

## **BILL ANALYSIS**

C.S.H.B. 1869

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Judiciary & Civil Jurisprudence  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Interested parties report that health insurance carriers nationwide have become aggressive about collecting under subrogation agreements when such a practice is legal. With respect to health insurance carriers, interested parties report that subrogation agreements most commonly become an issue when the health insurance carrier pays an injured claimant's medical bills and then assumes the right to any remedies the claimant has against the injuring party as a means of recovering for itself the amount of the claim paid to the insured for the loss. The parties contend that inequities arise when the party responsible for an injury does not have adequate assets or insurance to make the injured party whole. The interested parties also report that there are circumstances where subrogation carriers recover the amount of benefits they paid without contributing to the injured party's legal fees or expenses. C.S.H.B. 1869 seeks to take a balanced approach to the issue of subrogation that addresses all parties to a health insurance transaction.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.H.B. 1869 amends the Civil Practice and Remedies Code to authorize an issuer of a plan that provides specified types of coverages and related insurance policies, under which the plan issuer may make payments to or on behalf of a covered individual as a result of a personal injury to the individual caused by the tortious conduct of a third party, to contract to be subrogated to or have a right of reimbursement, lien, assignment, credit, or offset or other right of recovery from the individual's third-party recovery for that injury. The bill entitles a payor of benefits to recover a share of the recovery of a covered individual whose third-party recovery is subject to a payor's right of subrogation or recovery if the individual is unable to realize a complete and adequate recovery for an injury sustained as a result of the actionable tortious conduct of a third party. The bill specifies that the payor's share is an amount equal to the lesser of one-third of the covered individual's total recovery or of the total cost of benefits paid by the payor as a direct result of the tortious conduct of the third party.

C.S.H.B. 1869 authorizes a covered individual to bring a declaratory judgment action limiting the amount of a payor's recovery to an amount that is less than the amount otherwise payable and prohibits the court from awarding costs or attorney's fees to any party in the action. The bill limits the payor's total recovery to an amount that is not less than 15 percent of and not more than one-third of the covered individual's total recovery if, in such an action, the covered individual proves by a preponderance of the evidence that the covered individual's total recovery is less than 50 percent of the value of the covered person's underlying claim for damages. The bill limits the payor's total recovery to an amount that is less than 15 percent of and equal to or greater than five percent of the covered individual's total recovery if, in such an action, the covered individual shows by clear and convincing evidence that the payor's recovery of an amount otherwise payable under the bill's provisions would result in a recognized injustice. The

bill exempts the recovery of a payor from a common law doctrine requiring an injured party to be made whole before a subrogee makes a recovery.

C.S.H.B. 1869 requires a payor of benefits whose interest is not actively represented by an attorney in a third-party action for recovery of a personal injury to a covered individual to pay the attorney representing a covered individual a fee in an amount determined under an agreement entered into between the attorney and the payor, plus a pro rata share of expenses incurred in connection with the recovery. The bill requires the court, in the absence of such an agreement, to award to the attorney a reasonable fee for recovery of the payor's share, not to exceed one-third of the payor's recovery, payable out of the payor's share of the total recovery. The bill prohibits a payor from being assessed any attorney's fees under any theory or rule of law, including the common fund doctrine, out of a recovery limited by a covered individual's declaratory judgment. The bill prohibits a payor of benefits from pursuing a recovery against a covered individual's first party recovery.

C.S.H.B. 1869 establishes that, except to the extent that a covered individual can bring a declaratory judgment to limit the amount of a payor's recovery, its provisions do not create a cause of action and that its provisions control to the extent of any conflict between those provisions and another law, including a rule of procedure or evidence. The bill's provisions do not apply with respect to a workers' compensation insurance policy or any other source of medical benefits under Labor Code provisions relating to workers' compensation.

### **EFFECTIVE DATE**

September 1, 2013.

### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

While C.S.H.B. 1869 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and highlighted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

#### **INTRODUCED**

SECTION 1. Title 6, Civil Practice and Remedies Code, is amended by adding Chapter 140 to read as follows:

#### **CHAPTER 140. CONTRACTUAL SUBROGATION RIGHTS OF PAYORS OF CERTAIN BENEFITS**

Sec. 140.001. DEFINITIONS. In this chapter:

(1) "Covered individual" means an individual entitled to benefits described by Section 140.002.

(2) "Payor of benefits" or "payor" means an issuer of a plan providing benefits described by Section 140.002 who:

(A) pays benefits to or on behalf of a covered individual as a result of personal injuries to the covered individual caused by the tortious conduct of a third party; and

(B) has a contractual right of subrogation described by Section 140.004.

#### **HOUSE COMMITTEE SUBSTITUTE**

SECTION 1. Title 6, Civil Practice and Remedies Code, is amended by adding Chapter 140 to read as follows:

#### **CHAPTER 140. CONTRACTUAL SUBROGATION AND OTHER RECOVERY RIGHTS OF PAYORS OF CERTAIN BENEFITS**

Sec. 140.001. DEFINITIONS. In this chapter:

(1) "Covered individual" means an individual entitled to benefits described by Section 140.002.

(2) "Payor of benefits" or "payor" means an issuer of a plan providing benefits described by Section 140.002 who:

(A) pays benefits to or on behalf of a covered individual as a result of personal injuries to the covered individual caused by the tortious conduct of a third party; and

(B) has a contractual right of subrogation, reimbursement, lien, assignment, credit, or

Sec. 140.002. APPLICABILITY OF CHAPTER. (a) This chapter applies to an issuer of a health benefit plan that provides benefits for medical or surgical expenses incurred as a result of a health condition, accident, or sickness, a disability benefit plan, or an employee welfare benefit plan, including an individual, group, blanket, or franchise insurance policy or insurance agreement, a group hospital service contract, or an individual or group evidence of coverage or similar coverage document, including:

- (1) an insurance company;
- (2) a group hospital service corporation operating under Chapter 842, Insurance Code;
- (3) a fraternal benefit society operating under Chapter 885, Insurance Code;
- (4) a stipulated premium insurance company operating under Chapter 884, Insurance Code;
- (5) a reciprocal exchange operating under Chapter 942, Insurance Code;
- (6) a health maintenance organization operating under Chapter 843, Insurance Code;
- (7) a multiple employer welfare arrangement that holds a certificate of authority under Chapter 846, Insurance Code; or
- (8) an approved nonprofit health corporation that holds a certificate of authority under Chapter 844, Insurance Code.

(b) Notwithstanding Section 172.014, Local Government Code, or any other law, this chapter applies to a risk pool providing health and accident coverage under Chapter 172, Local Government Code.

(c) Notwithstanding any provision in Chapter 1551, 1575, 1579, or 1601, Insurance Code, or any other law, this chapter applies to an issuer of:

- (1) a basic coverage plan under Chapter 1551, Insurance Code;
- (2) a basic plan under Chapter 1575, Insurance Code;
- (3) a primary care coverage plan under Chapter 1579, Insurance Code; and
- (4) basic coverage under Chapter 1601,

offset or other contractual right of recovery described by Section 140.004.

Sec. 140.002. APPLICABILITY OF CHAPTER; EXCEPTION. (a) This chapter applies to an issuer of a health benefit plan that provides benefits for medical or surgical expenses incurred as a result of a health condition, accident, or sickness, a disability benefit plan, or an employee welfare benefit plan, including an individual, group, blanket, or franchise insurance policy or insurance agreement, a group hospital service contract, or an individual or group evidence of coverage or similar coverage document, including:

- (1) an insurance company;
- (2) a group hospital service corporation operating under Chapter 842, Insurance Code;
- (3) a fraternal benefit society operating under Chapter 885, Insurance Code;
- (4) a stipulated premium insurance company operating under Chapter 884, Insurance Code;
- (5) a reciprocal exchange operating under Chapter 942, Insurance Code;
- (6) a health maintenance organization operating under Chapter 843, Insurance Code;
- (7) a multiple employer welfare arrangement that holds a certificate of authority under Chapter 846, Insurance Code; or
- (8) an approved nonprofit health corporation that holds a certificate of authority under Chapter 844, Insurance Code.

(b) Notwithstanding Section 172.014, Local Government Code, or any other law, this chapter applies to a risk pool providing health and accident coverage under Chapter 172, Local Government Code, and to any other payor of benefits described by Section 172.015, Local Government Code.

(c) Notwithstanding any other law, this chapter applies to an issuer of a plan or coverage under Chapter 1551, 1575, 1579, or 1601, Insurance Code.

Insurance Code.

(d) Notwithstanding any other law, this chapter applies to any self-funded issuer of a plan that provides a benefit described by Subsection (a).

(e) This chapter applies to any policy, evidence of coverage, or contract under which a benefit described by Subsection (a) is provided and:

(1) that is delivered, issued for delivery, or entered into in this state; or

(2) under which an individual or group in this state is entitled to benefits.

Sec. 140.003. CONFLICTS WITH OTHER LAW.

Sec. 140.004. CONTRACTUAL SUBROGATION RIGHTS AUTHORIZED. An issuer of a plan that provides benefits described by Section 140.002 under which the policy or plan issuer may make payments to or on behalf of a covered individual as a result of a personal injury to the individual caused by the tortious conduct of a third party may contract to be subrogated to and have a right of reimbursement from the individual's recovery for that injury, subject to this chapter.

Sec. 140.005. PAYOR'S RECOVERY LIMITED. (a) If an injured covered individual to whose rights a payor of benefits is subrogated is not able to realize a complete and adequate recovery for an injury sustained as a result of the actionable tortious conduct of a third party, the payor is entitled to recover as provided by Subsection (b).

(b) Subject to Subsections (c), (d), and (e), a payor's share under Subsection (a) of a covered individual's recovery is an amount that is equal to the lesser of:

(1) one-third of the covered individual's total recovery; or

(2) the total cost of benefits paid by the payor as a direct result of the tortious conduct of the third party.

(d) Notwithstanding any other law, this chapter applies to any issuer of a self-funded plan that provides a benefit described by Subsection (a).

(e) Except as provided by Subsection (f), this chapter applies to any policy, evidence of coverage, or contract under which a benefit described by Subsection (a) is provided and:

(1) that is delivered, issued for delivery, or entered into in this state; or

(2) under which an individual or group in this state is entitled to benefits.

(f) This chapter does not apply with respect to a workers' compensation insurance policy or any other source of medical benefits under Title 5, Labor Code.

Sec. 140.003. CONFLICTS WITH OTHER LAW.

Sec. 140.004. CONTRACTUAL RECOVERY RIGHTS AUTHORIZED. An issuer of a plan that provides benefits described by Section 140.002 under which the plan issuer may make payments to or on behalf of a covered individual as a result of a personal injury to the individual caused by the tortious conduct of a third party may contract to be subrogated to or have a right of reimbursement, lien, assignment, credit, or offset or other right of recovery from the individual's third-party recovery for that injury, subject to this chapter.

Sec. 140.005. PAYOR'S RECOVERY LIMITED. (a) If an injured covered individual whose third-party recovery is subject to a payor's right of subrogation or recovery described by Section 140.004 is not able to realize a complete and adequate recovery for an injury sustained as a result of the actionable tortious conduct of a third party, the payor is entitled to recover as provided by Subsection (b).

(b) Subject to Subsections (c), (d), and (e), a payor's share under Subsection (a) of a covered individual's recovery is an amount that is equal to the lesser of:

(1) one-third of the covered individual's total recovery; or

(2) the total cost of benefits paid by the payor as a direct result of the tortious conduct of the third party.

(c) A covered individual may bring a declaratory judgment action to limit the amount of a payor's recovery under this section to an amount that is less than the amount otherwise payable under Subsection (b), as provided by Subsections (d) and (e).  
(d) If, in an action under Subsection (c), the covered individual proves by a preponderance of the evidence that the covered individual's total recovery is less than 50 percent of the value of the covered person's underlying claim for damages, the payor's total recovery under this section is limited to an amount that is not less than 15 percent of and not more than one-third of the covered individual's total recovery.  
(e) If, in an action under Subsection (c), the covered individual shows by clear and convincing evidence that the payor's recovery of an amount otherwise payable under this section would result in a recognized injustice, the payor's total recovery under this section is limited to an amount that is less than 15 percent of and equal to or greater than five percent of the covered individual's total recovery.  
(f) A common law doctrine that requires an injured party to be made whole before a subrogee makes a recovery does not apply to the recovery of a payor under this section.

Sec. 140.006. ATTORNEY'S FEES IN ACTION TO LIMIT SUBROGEE'S RECOVERY.

Sec. 140.007. ATTORNEY'S FEES IN THIRD-PARTY ACTION.

Sec. 140.008. FIRST PARTY RECOVERY.

Sec. 140.009. CONSTRUCTION OF CHAPTER.

SECTION 2. The change in law made by this Act applies only to a contractual right of subrogation in:

- (1) an insurance policy or evidence of coverage delivered, issued for delivery, or renewed on or after the effective date of this Act; or
- (2) a contract entered into or renewed on or after the effective date of this Act.

(c) A covered individual may bring a declaratory judgment action to limit the amount of a payor's recovery under this section to an amount that is less than the amount otherwise payable under Subsection (b), as provided by Subsections (d) and (e).  
(d) If, in an action under Subsection (c), the covered individual proves by a preponderance of the evidence that the covered individual's total recovery is less than 50 percent of the value of the covered person's underlying claim for damages, the payor's total recovery under this section is limited to an amount that is not less than 15 percent of and not more than one-third of the covered individual's total recovery.  
(e) If, in an action under Subsection (c), the covered individual shows by clear and convincing evidence that the payor's recovery of an amount otherwise payable under this section would result in a recognized injustice, the payor's total recovery under this section is limited to an amount that is less than 15 percent of and equal to or greater than five percent of the covered individual's total recovery.  
(f) A common law doctrine that requires an injured party to be made whole before a subrogee makes a recovery does not apply to the recovery of a payor under this section.

Sec. 140.006. Substantially the same as introduced version.

Sec. 140.007. ATTORNEY'S FEES IN THIRD-PARTY ACTION.

Sec. 140.008. FIRST PARTY RECOVERY.

Sec. 140.009. CONSTRUCTION OF CHAPTER.

No equivalent provision.

No equivalent provision.

SECTION 2. Chapter 140, Civil Practice and Remedies Code, as added by this Act, applies only to an action commenced on or after the effective date of this Act to assert a contractual right of subrogation or recovery described by Section 140.004, Civil Practice and Remedies Code, as added by this Act.

SECTION 3. This Act takes effect January 1, 2014.

SECTION 3. This Act takes effect September 1, 2013.