

STORAGE NAME: h1853.jo.doc
DATE: April 3, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 1853 (PCB JO 01-05)
RELATING TO: Claims by Foreign Governments
SPONSOR(S): Committee on Judicial Oversight and Representative Goodlette
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT YEAS 5 NAYS 2
 - (2)
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

HB 1853 requires that a foreign government that seeks to recover for the costs of benefits or services that the government has provided or is obligated to provide must proceed by subrogation. That means that the government must "stand in the shoes" of the persons who it has paid benefits or will pay benefits.

The bill requires that the foreign government must identify all individuals whose expenses it has paid and seeks to recover and to establish every element that such individuals would be required to establish in an action by the individual to recover medical expenses. The foreign government would be subject to the same defenses and discovery obligations that would apply in an individual action.

The bill provides that the provisions of the bill apply whether or not another provision of law would otherwise provide the prescribed rules of procedure.

The bill makes a foreign judgment awarded to a foreign government based on the payment for benefits or services invalid and not enforceable unless the foreign government's proceeding complied with the requirements of this bill.

The bill will take effect on July 1, 2001, and will apply to any action pending on or after July 1, 2001.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

At least eleven foreign governments have filed lawsuits in Florida courts against numerous tobacco companies seeking reimbursement for the cost of health care and other programs paid for by the governments for people in those countries who used tobacco products. In The Republic of Ecuador v. Philip Morris Companies, Inc. et. al., Case No. 00-1951 CA 27 (Fla. 11th Cir. Co.), Ecuador asked the court to order various tobacco companies to pay "the health care costs of tobacco-related disease and to incur the economic losses related to lost work, lost tax revenues and lost Gross National Product." See Complaint for Damages, filed January 21, 2000, at page 39-40. Essentially, Ecuador and other governments are alleging that the tobacco companies' products harmed their countries citizens and the governments are attempting to recover the monies that they paid to treat those citizens.

Similar cases have been filed in other parts of the country. In In re: Tobacco/Governmental Health Care Costs Litigation, 83 F.Supp.2d 125 (D.D.C. 1999), the district court dismissed the government of Guatemala's claim against various tobacco companies to recover health care costs paid to treat smokers in that country. The court found that Guatemala's claim was too remote to require that the companies pay the government. See Tobacco/Governmental Health Care Costs Litigation, 83 F.Supp. at 128-133. Appeal of that case is pending.

At common law, a plaintiff attempting to recover for payments to a third party would have to proceed via subrogation. Subrogation is the substitution of one person to the position of another with reference to a legal claim or right. Where one party pays money because of the wrongful acts of another, then the paying party is subrogated to the rights of the receiving party as against the wrongdoer. See Fla. Jur. 2d., Contribution, Indemnity, and Subrogation, § 3. A Florida court explained subrogation:

Subrogation is designed to afford relief when one is required to pay a legal obligation which ought to be met, either wholly or partially, by another... Subrogation rights place a party ... in the legal position of one who has been paid money because of the acts of a third party. Thus, the subrogee "stands in the shoes" of the subrogor and is entitled to all of the rights of its subrogor, ... but also suffers all of the liabilities to which the subrogor would be subject.

Allstate Ins. Co. v. Metropolitan Dade County, 436 So. 2d 976, 978 (Fla. 3rd DCA 1983) (citations and case-specific information omitted).

In 1994, the Legislature amended the Medicaid Third Party Liability Act to create a new cause of action and permit the state to recover Medicaid costs paid to third parties. These amendments abrogated the traditional requirement that actions to recover costs paid to third parties proceed by subrogation. See Agency for Health Care Admin. v. Associated Industries of Florida, Inc., 678 So. 2d 1239, 1248-1257 (Fla. 1996). The amendments added a specific cause of action to allow the state to proceed to recover Medicaid payments without subrogation. Those amendments were repealed in 1998 and the state is now required to proceed by subrogation. See Ch. 98-411, Laws of Florida, s. 1. The statutes do not define specifically how a foreign government can raise a similar claim.

C. EFFECT OF PROPOSED CHANGES:

Section 1 of the bill defines "foreign government" as the "government of any politically sovereign entity other than the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, the Virgin Islands, Guam, American Samoa, or any other territory or possession of the United States and includes any political subdivision of such agency."

Section 2 of the bill requires that a foreign government that seeks to recover for the costs of benefits or services that the government has provided or is obligated to provide must proceed by subrogation. That means that the government must "stand in the shoes" of the persons who it has paid benefits or will pay benefits.

The bill requires that the foreign government must identify all individuals whose expenses it has paid and seeks to recover and to establish every element that such individuals would be required to establish in an action by the individual to recover medical expenses. The foreign government would be subject to the same defenses and discovery obligations that would apply in an individual action. For example, a foreign government seeking to recover health care costs that it paid to treat an individual will have to name the individual and establish the same elements that the individual would have to establish (e.g. duty, causation, and damages in a negligence action). The defendant in such an action will have the same defenses and discovery rights that it would have if an individual was the plaintiff.

Section 3 of the bill provides that the provisions of the bill apply whether or not another provision of law would otherwise provide the prescribed rules of procedure.

Section 4 of the bill makes a foreign judgment awarded to a foreign government based on the payment for benefits or services invalid and not enforceable unless the foreign government's proceeding complied with the requirements of this bill.

Section 5 of the bill provides a severability clause so that if a portion of the bill is declared unconstitutional, other provisions can be given effect.

Section 6 of the bill provides that the bill will take effect on July 1, 2001, and will apply to any action pending on or after July 1, 2001.

D. SECTION-BY-SECTION ANALYSIS:

See Section II.C. Effect of Proposed Changes

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The fiscal impact on the private sector is indeterminate. The bill places specific requirements on foreign governments who sue companies in this state for reimbursement of medical benefits. Companies might have a reduction in the number of lawsuits filed by foreign governments seeking to recover costs of medical care. However, since the bill does not prohibit foreign governments from seeking recovery but instead only places requirements that must be met before an action can proceed, it is unclear whether the number of actions will actually decrease.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Due Process

It is possible a foreign government may argue that applying the bill to actions which are already pending may violate due process. However, it is unclear whether foreign governments can assert due process claims since it can be argued that a foreign government is not a person within the meaning of the due process clause. In South Carolina v. Katzenbach, 383 U.S. 301, 323-324 (1966), the court stated “[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court.” If a state is not a “person” under the due process clause, it is unlikely that a foreign government would be a “person” under the clause. In Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992), the court decided the issue before it without deciding whether Argentina was a “person” for purposes of the due process clause.

The bill's requirement that the foreign government identify each individual whose expenses it has paid appears to specifically comply with due process requirements. In Associated Industries, the court held a provision of the 1994 amendments to the Medicaid Third Party Liability Act unconstitutional because it permitted the state to proceed without identifying individual Medicaid recipients. The court explained that the statute clearly relieved the state of the obligation to reveal the identities of Medicaid recipients and said that such a requirement prevented the defendant from demonstrating the improprieties of individual payments. See Associated Industries, 678 So. 2d at 1254. The portion of the bill requiring that the foreign government identify the individual recipients would appear to protect the due process rights of potential defendants.

Separation of Powers

A foreign government may also argue that the bill violates the Supreme Court's authority to set rules for practice and procedure in the courts. See Art. V, s. 2, Fla. Const. The Legislature has the authority to define substantive rights and any procedural provisions contained in such laws that are intimately related to the definition of substantive rights do not violate separation of powers. See Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49, 54 (Fla. 2000). It can be argued that this bill only defines rights because it sets forth specifically what elements that the foreign government must show in order to prevail. It does not attempt to alter affirmative defenses or discovery requirements as set forth in the Florida Rules of Civil Procedure.

Treaties

Article II, section 2 of the United States Constitution gives the President, with the approval of two-thirds of the Senate, the right to make treaties. The provisions of the bill could be rendered unenforceable if they were found to violate the terms of either an existing treaty with a foreign government or a treaty that is later approved by the Senate.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

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