

## **BILL ANALYSIS**

C.S.H.B. 1435  
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Judiciary & Civil Jurisprudence  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Interested parties assert the dangers of selling certain synthetic substances without proper explanation of a particular substance's effects and contend that additional enforcement is needed to protect the public from deceptive trade practices relating to the production, sale, distribution, and promotion of such substances. C.S.H.B. 1435 seeks to provide this additional enforcement by authorizing district and county attorneys to act under the Deceptive Trade Practices-Consumer Protection Act with respect to these substances.

### **CRIMINAL JUSTICE IMPACT**

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

### **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. 1435 amends the Business & Commerce Code to subject the making of a deceptive representation or designation about a synthetic substance, and the causing of confusion or misunderstanding as to the effects a synthetic substance causes when consumed or ingested, in the production, sale, distribution, or promotion of a synthetic substance that produces and is intended to produce an effect when consumed or ingested similar to or in excess of the effect of a controlled substance or controlled substance analogue to action by a district or county attorney under the Deceptive Trade Practices-Consumer Protection Act to the same extent as such making or causing is subject to action by the consumer protection division of the attorney general's office under the act with certain exceptions.

C.S.H.B. 1435 requires a district or county attorney who accepts assurance of voluntary compliance under the act to file the assurance in the district court in the county in which the alleged violator resides or does business. The bill requires a district or county attorney who executes and serves a civil investigative demand and files a petition to extend the return date for, modify, or set aside the demand for good cause to file the petition in the district court in the county where the parties reside. The bill authorizes a district or county attorney to act under the bill's provisions so long as the consumer protection division does not intend to act with respect to that matter. The bill requires all settlements or penalties collected by a district or county attorney in an action brought by the attorney under the bill's provisions to be divided between the state and the county in which the attorney brought suit, with 50 percent of the amount collected paid to the comptroller of public accounts for deposit to the credit of the basic civil legal services account in the judicial fund administered by the Supreme Court of Texas and with 50 percent of the amount collected paid to the county.

**EFFECTIVE DATE**

September 1, 2017.

**COMPARISON OF ORIGINAL AND SUBSTITUTE**

While C.S.H.B. 1435 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and formatted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

**INTRODUCED**

**HOUSE COMMITTEE SUBSTITUTE**

SECTION 1. Section 17.42(e), Business & Commerce Code, is amended to read as follows:

No equivalent provision.

(e) The fact that a consumer has signed a waiver under this section is not a defense to an action brought by a prosecuting ~~[the]~~ attorney ~~[general]~~ under Section 17.47.

SECTION 2. Section 17.45, Business & Commerce Code, is amended by adding Subdivision (14) to read as follows:

No equivalent provision.

(14) "Prosecuting attorney" means:  
(A) the consumer protection division of the attorney general's office;  
(B) a district attorney; or  
(C) a county attorney.

SECTION 3. Section 17.46(a), Business & Commerce Code, is amended to read as follows:

No equivalent provision.

(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division or other prosecuting attorney, as applicable, under Sections 17.47, 17.58, 17.60, and 17.61 of this code.

SECTION 4. Sections 17.47(a), (c), (d), (e), and (h), Business & Commerce Code, are amended to read as follows:

No equivalent provision.

(a) Subject to Section 17.48, whenever a prosecuting attorney ~~[Whenever the consumer protection division]~~ has reason to believe that any person is engaging in, has engaged in, or is about to engage in any act or practice declared to be unlawful by this subchapter, and that proceedings would be in the public interest, the prosecuting

attorney [~~division~~] may bring an action in the name of the state against the person to restrain by temporary restraining order, temporary injunction, or permanent injunction the use of such method, act, or practice.

Nothing herein shall require the prosecuting attorney [~~consumer protection division~~] to notify such person that court action is or may be under consideration. Provided, however, the prosecuting attorney [~~consumer protection division~~] shall, at least seven days prior to instituting such court action, contact such person to inform him in general of the alleged unlawful conduct. Cessation of unlawful conduct after such prior contact shall not render such court action moot under any circumstances, and such injunctive relief shall lie even if such person has ceased such unlawful conduct after such prior contact. Such prior contact shall not be required if, in the opinion of the prosecuting attorney [~~consumer protection division~~], there is good cause to believe that such person would evade service of process if prior contact were made or that such person would destroy relevant records if prior contact were made, or that such an emergency exists that immediate and irreparable injury, loss, or damage would occur as a result of such delay in obtaining a temporary restraining order.

(c) In addition to the request for a temporary restraining order, or permanent injunction in a proceeding brought under Subsection (a) of this section, a prosecuting attorney [~~the consumer protection division~~] may request, and the trier of fact may award, a civil penalty to be paid to the state or county, as appropriate, in an amount of:

(1) not more than \$20,000 per violation; and  
(2) if the act or practice that is the subject of the proceeding was calculated to acquire or deprive money or other property from a consumer who was 65 years of age or older when the act or practice occurred, an additional amount of not more than \$250,000.

(d) The court may make such additional orders or judgments as are necessary to compensate identifiable persons for actual damages or to restore money or property, real or personal, which may have been acquired by means of any unlawful act or practice. Damages may not include any

damages incurred beyond a point two years prior to the institution of the action by a prosecuting attorney [~~the consumer protection division~~]. Orders of the court may also include the appointment of a receiver or a sequestration of assets if a person who has been ordered by a court to make restitution under this section has failed to do so within three months after the order to make restitution has become final and nonappealable.

(e) Any person who violates the terms of an injunction under this section shall forfeit and pay to the state or county, as appropriate, a civil penalty of not more than \$10,000 per violation, not to exceed \$50,000. In determining whether or not an injunction has been violated the court shall take into consideration the maintenance of procedures reasonably adapted to insure compliance with the injunction. For the purposes of this section, the district court issuing the injunction shall retain jurisdiction, and the cause shall be continued, and in these cases, the prosecuting [~~consumer protection division, or the district or county~~] attorney [~~with prior notice to the consumer protection division, acting in the name of the state,~~] may petition for recovery of civil penalties under this section.

(h) In bringing or participating in an action under this subchapter, the prosecuting attorney [~~consumer protection division~~] acts in the name of the state and does not establish an attorney-client relationship with another person, including a person to whom the prosecuting attorney [~~consumer protection division~~] requests that the court award relief.

SECTION 5. Sections 17.48(b) and (d), Business & Commerce Code, are amended to read as follows:

(b) A district or county attorney [~~with prior written notice to the consumer protection division,~~] may institute and prosecute actions seeking injunctive relief and civil penalties under this subchapter, after complying with the prior contact provisions of Subsection (a) of Section 17.47 of this subchapter. On request, the consumer protection division shall assist the district or county attorney in any action taken under this subchapter. If an action is prosecuted

No equivalent provision.

by a district or county attorney alone, he shall make a full report to the consumer protection division including the final disposition of the matter. No district or county attorney may bring an action under this section against any licensed insurer or licensed insurance agent transacting business under the authority and jurisdiction of the State Board of Insurance unless first requested in writing to do so by the State Board of Insurance, the commissioner of insurance, or the consumer protection division pursuant to a request by the State Board of Insurance or commissioner of insurance.

(d) A district or county attorney is not required to obtain the permission of the consumer protection division to prosecute an action under this subchapter [~~for a violation of Section 17.46(b)(28), if the district or county attorney provides prior written notice to the division as required by Subsection (b)~~].

SECTION 6. The heading to Section 304.252, Business & Commerce Code, is amended to read as follows:

Sec. 304.252. ENFORCEMENT BY CERTAIN PROSECUTING ATTORNEYS [~~ATTORNEY GENERAL~~].

No equivalent provision.

SECTION 7. Section 304.252(c), Business & Commerce Code, is amended to read as follows:

(c) A violation of Subchapter B, C, or D is subject to enforcement action [~~by the attorney general's consumer protection division~~] under Sections 17.47, 17.58, 17.60, and 17.61.

No equivalent provision.

SECTION 8. Section 306.053, Business & Commerce Code, is amended to read as follows:

Sec. 306.053. DECEPTIVE TRADE PRACTICE; ENFORCEMENT. A violation of this chapter is a false, misleading, or deceptive act or practice under Section 17.46 and is subject to action [~~only by the consumer protection division of the attorney general's office~~] as provided by Section 17.46(a).

No equivalent provision.

SECTION 9. Section 17.48(c), Business & Commerce Code, is repealed.

No equivalent provision.

SECTION 10. The changes in law made by this Act apply only to a cause of action that accrues on or after the effective date of this Act. A cause of action that accrued before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

No equivalent provision.

No equivalent provision.

SECTION 1. Subchapter E, Chapter 17, Business & Commerce Code, is amended by adding Section 17.463 to read as follows:

Sec. 17.463. PRODUCTION, SALE, DISTRIBUTION, OR PROMOTION OF CERTAIN SYNTHETIC SUBSTANCES.

(a) This section applies only to an act described by Section 17.46(b)(31).

(b) Subject to Subsection (e) and except as otherwise provided by this section, an act to which this section applies is subject to action by a district or county attorney under Sections 17.47, 17.58, 17.60, and 17.61 to the same extent as the act is subject to action by the consumer protection division under those sections.

(c) If a district or county attorney, under the authority of this section, accepts assurance of voluntary compliance under Section 17.58, the district or county attorney must file the assurance of voluntary compliance in the district court in the county in which the alleged violator resides or does business.

(d) If a district or county attorney, under the authority of this section, executes and serves a civil investigative demand and files a petition described by Section 17.61(g), the petition must be filed in the district court in the county where the parties reside.

(e) A district or county attorney may act under this section so long as the consumer protection division does not intend to act with respect to that matter.

(f) Notwithstanding any other law, in an action brought by a district or county attorney under this section, all settlements or penalties collected by the district or county attorney shall be divided between the state and the county in which the

attorney brought suit, with:

(1) 50 percent of the amount collected paid to the comptroller for deposit to the credit of the basic civil legal services account established by Section 51.943, Government Code; and

(2) 50 percent of the amount collected paid to the county.

No equivalent provision.

SECTION 2. Subchapter E, Chapter 17, Business & Commerce Code, is amended by adding Section 17.463 to read as follows:

Sec. 17.463. PRODUCTION, SALE, DISTRIBUTION, OR PROMOTION OF CERTAIN SYNTHETIC SUBSTANCES.

(a) This section applies only to an act described by Section 17.46(b)(30).

(b) Subject to Subsection (e) and except as otherwise provided by this section, an act to which this section applies is subject to action by a district or county attorney under Sections 17.47, 17.58, 17.60, and 17.61 to the same extent as the act is subject to action by the consumer protection division under those sections.

(c) If a district or county attorney, under the authority of this section, accepts assurance of voluntary compliance under Section 17.58, the district or county attorney must file the assurance of voluntary compliance in the district court in the county in which the alleged violator resides or does business.

(d) If a district or county attorney, under the authority of this section, executes and serves a civil investigative demand and files a petition described by Section 17.61(g), the petition must be filed in the district court in the county where the parties reside.

(e) A district or county attorney may act under this section so long as the consumer protection division does not intend to act with respect to that matter.

(f) Notwithstanding any other law, in an action brought by a district or county attorney under this section, all settlements or penalties collected by the district or county attorney shall be divided between the state and the county in which the attorney brought suit, with:

(1) 50 percent of the amount collected paid to the comptroller for deposit to the credit of the basic civil legal services account

established by Section 51.943, Government Code; and  
(2) 50 percent of the amount collected paid to the county.

No equivalent provision.

SECTION 3. This Act applies only to conduct that occurs on or after the effective date of this Act.

No equivalent provision.

SECTION 4. (a) Section 1 of this Act takes effect only if the Act of the 85th Legislature, Regular Session, 2017, relating to nonsubstantive additions to and corrections in enacted codes becomes law.  
(b) Section 2 of this Act takes effect only if the Act of the 85th Legislature, Regular Session, 2017, relating to nonsubstantive additions to and corrections in enacted codes does not become law.

SECTION 11. This Act takes effect September 1, 2017.

SECTION 5. Same as introduced version.