

BILL ANALYSIS

Senate Research Center

S.B. 6
By: Hancock et al.
Business & Commerce
6/1/2021
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 6 provides retroactive civil liability protections for large and small businesses, religious institutions, non-profit entities, healthcare providers, first responders, and educational institutions.

The bill also extends current immunity that healthcare volunteers have during a man-made or natural disaster to include a health care provider that is getting paid during a man-made disaster, natural disaster, or a health care emergency.

Lastly, S.B. 6 provides civil liability protections to a person who designs, manufactures, sells, labels, or donates certain products that have a defect or inadequate instructions unless the person had knowledge of the issue and acted with actual malice.

(Original Author's/Sponsor's Statement of Intent)

S.B. 6 amends current law relating to liability for certain claims arising during a pandemic or disaster related to a pandemic.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 51.014(a), Civil Practice and Remedies Code, to include an interlocutory order of a district court, county court at law, statutory probate court, or county court that overrules an objection filed under Section 148.003(d) or denies all or part of the relief sought by a motion under Section 148.003(f) among the orders a person is authorized to appeal. Makes nonsubstantive changes.

SECTION 2. Amends Subchapter D, Chapter 74, Civil Practice and Remedies Code, by adding Section 74.155, as follows:

Sec. 74.155. LIABILITY OF PHYSICIANS, HEALTH CARE PROVIDERS, AND FIRST RESPONDERS DURING PANDEMIC. (a) Defines "disaster declaration," "first responder," and "pandemic disease."

(b) Provides that, except in a case of reckless conduct or intentional, wilful, or wanton misconduct, a physician, health care provider, or first responder is not liable for an injury, including economic and noneconomic damages, or death arising from care, treatment, or failure to provide care or treatment relating to or impacted by a pandemic disease or a disaster declaration related to a pandemic disease if the physician, health care provider, or first responder proves by a preponderance of the evidence that:

(1) a pandemic disease or disaster declaration related to a pandemic disease was a producing cause of the care, treatment, or failure to provide care or treatment that allegedly caused the injury or death; or

(2) the individual who suffered injury or death was diagnosed or reasonably suspected to be infected with a pandemic disease at the time of the care, treatment, or failure to provide care or treatment.

(c) Prohibits a physician, health care provider, or first responder from using the showing under Subsection (b)(2) as a defense to liability under Subsection (b) for negligent care, treatment, or failure to provide care or treatment if a claimant proves by a preponderance of the evidence that the respective diagnosis, treatment, or reasonable suspicion of infection with a pandemic disease at the time of the care, treatment, or failure to provide care or treatment was not a producing cause of the individual's injury or death.

(d) Provides that care, treatment, or failure to provide care or treatment relating to or impacted by a pandemic disease or a disaster declaration related to a pandemic disease under Subsection (b) includes:

(1) screening, assessing, diagnosing, or treating an individual who is infected or suspected of being infected with a pandemic disease;

(2) prescribing, administering, or dispensing a drug or medicine for off-label or investigational use to treat an individual who is infected or suspected of being infected with a pandemic disease;

(3) diagnosing or treating an individual who is infected or suspected of being infected with a pandemic disease outside the normal area of the physician's or provider's specialty, if any;

(4) delaying or canceling nonurgent or elective medical, surgical, or dental procedures;

(5) delaying, canceling, or not accepting in-person appointments for office or clinical visits, diagnostic tests, scheduled treatment, physical or occupational therapy, or any other diagnosis or treatment of an illness or condition not related to a pandemic disease;

(6) using medical devices, equipment, or supplies outside of their normal use, including using or modifying such devices, equipment, or supplies for an unapproved use, to treat an individual who is infected or suspected of being infected with a pandemic disease;

(7) conducting tests on or providing treatment to an individual who is infected or suspected of being infected with a pandemic disease outside the premises of a health care facility;

(8) acts or omissions caused by a lack of personnel or staffing, facilities, medical devices, supplies, or other resources attributable to a pandemic disease that renders a physician, health care provider, or first responder unable to provide the same level or manner of care to any individual that otherwise would have been acquired in the absence of the disease; and

(9) acts or omissions arising from the use or nonuse of personal protective equipment.

(e) Provides that this section does not alter the scope of practice of a physician, health care provider, or first responder under the laws of this state.

(f) Provides that a defense under this section is in addition to any other defense, immunity, or limitation of liability provided by law. Provides that this section does not constitute a waiver of sovereign immunity of this state or governmental immunity of a political subdivision.

(g) Requires a physician, health care provider, or first responder who intends to raise a defense under Subsection (b) to provide to a claimant specific facts that support an assertion under Subsection (b)(1) or (2) not later than the later of:

(1) the 60th day after the date the claimant serves an expert report on the physician, health care provider, or first responder under Section 74.351 (Expert Report); or

(2) the 120th day after the date the physician, health care provider, or first responder files an original answer in the suit.

(h) Provides that this section applies only to a claim arising from care, treatment, or failure to provide care or treatment that occurred during a period beginning on the date that the president of the United States or the governor makes a disaster declaration related to a pandemic disease and ending on the date the declaration terminates.

(i) Provides that this section does not create a civil cause of action.

SECTION 3. Amends Title 6, Civil Practice and Remedies Code, by adding Chapter 148, as follows:

CHAPTER 148. LIABILITY DURING PANDEMIC EMERGENCY

Sec. 148.001. DEFINITIONS. Defines "pandemic disease" and "pandemic emergency."

Sec. 148.002. PRODUCTS LIABILITY ACTIONS RELATED TO PANDEMIC EMERGENCY. (a) Provides that this section applies only to the following products:

(1) clothing or equipment worn to minimize exposure to hazards of a pandemic disease that cause injury or illness;

(2) medical devices, equipment, and supplies used during a pandemic emergency or to treat individuals infected or suspected to be infected with a pandemic disease, including devices, equipment, and supplies used or modified for an unapproved use to treat or prevent the spread of the disease or used outside of their normal use to treat or prevent the spread of the disease;

(3) drugs, medicines, or vaccines used to treat or prevent the spread of a pandemic disease, including drugs, medicines, or vaccines prescribed, dispensed, or administered for an unapproved use in an attempt to treat or prevent the spread of the disease or used outside of their normal use in an attempt to treat or prevent the spread of the disease;

(4) tests to diagnose or determine immunity to a pandemic disease;

(5) commercial cleaning, sanitizing, or disinfecting supplies used to prevent the spread of a pandemic disease; or

(6) any component of a product described by this subsection.

(b) Provides that a person who designs, manufactures, sells, or donates a product described by Subsection (a) during a pandemic emergency is not liable for personal injury, death, or property damage caused by the product unless:

(1) the person had actual knowledge of a defect in the product when the product left the person's control or the person acted with actual malice in designing, manufacturing, selling, or donating the product; and

(2) the product presents an unreasonable risk of substantial harm to an individual using or exposed to the product.

(c) Provides that a person who designs, manufactures, labels, sells, or donates a product described by Subsection (a) during a pandemic emergency is not liable for personal injury, death, or property damage caused by a failure to warn or provide adequate instructions regarding the use of a product unless:

(1) the person acted with actual malice in failing to warn or provide adequate instructions regarding the use of the product; and

(2) the failure to warn or provide adequate instructions regarding the use of the product presents an unreasonable risk of substantial harm to an individual using or exposed to the product.

(d) Provides that a person is not liable for personal injury, death, or property damage caused by or resulting from the person's selection, distribution, or use of a product described by Subsection (a) during a pandemic emergency unless:

(1) the person had actual knowledge of a defect in the product when the person selected, distributed, or used the product or the person acted with actual malice in selecting, distributing, or using the product; and

(2) the product presents an unreasonable risk of substantial harm to an individual using or exposed to the product.

Sec. 148.003. LIABILITY FOR CAUSING EXPOSURE TO PANDEMIC DISEASE.

(a) Provides that a person is not liable for injury or death caused by exposing an individual to a pandemic disease during a pandemic emergency unless the claimant establishes that:

(1) the person who exposed the individual:

(A) knowingly failed to warn the individual of or remediate a condition that the person knew was likely to result in the exposure of an individual to the disease, provided that the person:

(i) had control over the condition;

(ii) knew that the individual was more likely than not to come into contact with the condition; and

(iii) had a reasonable opportunity and ability to remediate the condition or warn the individual of the condition before the individual came into contact with the condition; or

(B) knowingly failed to implement or comply with government-promulgated standards, guidance, or protocols intended to lower the likelihood of exposure to the disease that were applicable to the person or the person's business, provided that:

(i) the person had a reasonable opportunity and ability to implement or comply with the standards, guidance, or protocols; and

(ii) the person refused to implement or comply with or acted with flagrant disregard of the standards, guidance, or protocols;

(iii) the government-promulgated standards, guidance, or protocols that the person failed to implement or comply with did not, on the date that the individual was exposed to the disease, conflict with government-promulgated standards, guidance, or protocols that the person implemented or complied with; and

(2) reliable scientific evidence shows that the failure to warn the individual of the condition, remediate the condition, or implement or comply with the government-promulgated standards, guidance, or protocols was the cause in fact of the individual contracting the disease.

(b) Requires the claimant, except as provided by Subsection (c), not later than the 120th day after the date a defendant files an answer to a claim to which Subsection (a) applies, to serve on the defendant a report authored by at least one qualified expert that provides a factual and scientific basis for the assertion that the defendant's failure to act caused the individual to contract a pandemic disease and a curriculum vitae for each expert whose opinion is included in the report.

(c) Authorizes extension of the deadline for serving the report and curriculum vitae required by Subsection (b) by written agreement of the affected parties.

(d) Requires a defendant to file an objection to the sufficiency of the report and serve the objection on the claimant not later than 21 days after the later of the date the report is served on the defendant or the date the defendant's answer to the claim is filed.

(e) Authorizes the court, if a court determines that a report served under Subsection (b) does not represent an objective, good faith effort to provide a factual and scientific basis for the assertion that the defendant's failure to act caused the injured individual to contract a pandemic disease, to grant the claimant, on one occasion, a 30-day period to cure any deficiency in the report.

(f) Requires the court, if a sufficient report is not timely served under this section, on the defendant's motion, to enter an order dismissing the claim with respect to the defendant, with prejudice, and awarding to the defendant reasonable attorney's fees and costs of court incurred by the defendant in the action.

(g) Requires that nothing in this section be construed to mean that a single expert is required to address all causation issues with respect to all defendants.

(h) Provides that a report served under this section is not admissible in evidence by any party, is prohibited from being used in a deposition, trial, or other proceeding, and is prohibited from being referred to by any party during the course of the action, except in a proceeding to determine if a report is sufficient or timely.

(i) Prohibits all claimants, collectively, after a claim to which Subsection (a) applies is filed, from taking more than two depositions before the expert report is served as required by Subsection (b).

(j) Prohibits a person, for purposes of Subsection (a)(1)(B), if an order, rule, or authoritative declaration promulgated by the governor, the legislature, a state agency, or a local governmental entity with jurisdiction over the person conflicts with a different government-promulgated standard, guideline, or protocol, from being considered to fail to implement or comply with the government-

promulgated standard, guideline, or protocol if, at the time of the injured individual's exposure to the pandemic disease during a pandemic emergency, the person is making a good faith effort to substantially comply with at least one conflicting order, rule, or declaration.

Sec. 148.004. **LIABILITY OF EDUCATIONAL INSTITUTIONS FOR CERTAIN ACTIONS DURING PANDEMIC EMERGENCY.** (a) Defines "educational institution." Provides that the term includes a public or private preschool, child-care facility, primary or secondary school, college, or university, institution of higher education as defined by Section 61.003 (Definitions), and a private or independent institution of higher education as defined by Section 61.003.

(b) Provides that an educational institution is not liable for damages or equitable monetary relief arising from a cancellation or modification of a course, program, or activity of the institution if the cancellation or modification arose during a pandemic emergency and was caused, in whole or in part, by the emergency.

Sec. 148.005. **NO CIVIL CAUSE OF ACTION.** Provides that this chapter does not create a civil cause of action.

SECTION 4. (a) Sets forth legislative findings relative to the Coronavirus Disease 2019 pandemic, for purposes of Section 74.155, Civil Practice and Remedies Code, as added by this Act.

(b) Sets forth the purpose of Section 74.155, Civil Practice and Remedies Code, as added by this Act, because of the conditions stated in Subsection (a) of this section.

(c) Sets forth legislative findings relative to the compelling public interest in establishing certain procedures and standards for addressing potential claims against individuals and entities faced with an unprecedented public health emergency, for purposes of Section 74.155 and Chapter 148, Civil Practice and Remedies Code, as added by this Act.

SECTION 5. (a) Provides that Section 74.155 and Chapter 148, Civil Practice and Remedies Code, as added by this Act, apply only to an action commenced on or after March 13, 2020, for which a judgment has not become final before the effective date of this Act.

(b) Requires a physician, health care provider, or first responder who intends to raise a defense under Subsection (b) of Section 74.155, in an action commenced before the effective date of this Act and to which Section 74.155, Civil Practice and Remedies Code, as added by this Act, applies, to provide to the claimant specific facts required under Subsection (g) of that section not later than the later of:

(1) the 60th day after the effective date of this Act;

(2) the 120th day after the date the physician, health care provider, or first responder files an original answer in the suit; or

(3) the 60th day after the date the claimant serves an expert report on the physician, health care provider, or first responder under Section 74.351, Civil Practice and Remedies Code.

SECTION 6. Effective date: upon passage or September 1, 2021.