

## **BILL ANALYSIS**

C.S.S.B. 6  
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Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

The onslaught of COVID-19 on Texas has strained the state's health care system, business infrastructure, and educational institutions, and there are widespread concerns regarding the long-term effects of the pandemic on these sectors, including the effects of the lawsuits that have already been filed in Texas and across the nation. More of these types of suits are likely to come. These suits involve doctors, hospitals, nursing homes, and businesses struggling to comply with various government guidelines while treating patients or trying to stay open.

Most of these individuals and businesses have been making good faith efforts to comply with appropriate guidelines applicable to the pandemic. With respect to certain claims arising during a pandemic or disaster related to a pandemic, C.S.S.B. 6 seeks to provide liability protection for certain individuals, organizations, and institutions that attempt to follow applicable governmental standards, guidelines, or protocols with the purpose of minimizing the spread of a pandemic disease. The bill also establishes standards that allow such lawsuits to proceed.

### **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.S.B. 6 amends the Civil Practice and Remedies Code to set out procedures for claims relating to a pandemic disease or a disaster declaration related to a pandemic disease and to establish exemptions from liability for such claims under certain conditions.

C.S.S.B. 6 sets out legislative findings relating to the following:

- the effect of COVID-19 resulting in a disaster declaration by the governor;
- the impact of cases of COVID-19 on physicians, healthcare providers, and the state's health care system and related shortages;
- the inadequacy of certain facilities, test kits, and monitoring devices with respect to the disaster response and assessing necessary care or treatment;
- the prioritization of care because of the number and severity of COVID-19 cases;
- the risk assumed by physicians and healthcare providers in responding to the disaster;
- the uncertainty with respect to how long the crisis will last;
- the response of governments working in coordination with physicians and health care providers required in a pandemic;

- the support for physicians and health care providers by protecting them from unnecessary liability during a pandemic; and
- the public interest served by the bill's provisions.

The bill also establishes the purposes of certain of its provisions to improve and modify the system by which health care liability claims are determined relating to the following:

- the promotion of the public health, safety, and welfare of all citizens;
- access to care and treatment during a pandemic by protecting physicians and health care providers from liability related to that care and treatment;
- prompt and swift medical and health care responses to Texas citizens suffering from COVID-19;
- recognition that physician and health care providers responding to these situations may not have the full benefits of medical devices and facilities as they would in non-disaster situations;
- encouraging physicians and health care providers from other states to respond to the declared COVID-19 disaster in Texas; and
- ensuring the focus and resources of physicians and health care providers in responding to the COVID-19 disaster are being addressed.

For purposes of Section 74.155 and Chapter 148, Civil Practice and Remedies Code, as added by the bill, the bill establishes a legislative finding relating to the possible impairment of some settled expectations regarding claims to which the bill applies and the compelling public interest of the bill in establishing certain procedures and standards for addressing potential claims against individuals and entities faced with an unprecedented public health emergency.

### **Liability of Physicians, Health Care Providers, and First Responders**

C.S.S.B. 6 exempts a physician, health care provider, or first responder, except in a case of reckless conduct or intentional, wilful, or wanton misconduct, from liability for 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:

- 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
- 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.

The bill requires a physician, health care provider, or first responder who intends to raise a defense to liability to provide to the claimant specific facts that support the relevant assertion in support of the defense by a specified deadline.

C.S.S.B. 6 prohibits a physician, health care provider, or first responder from using the fact that an 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 as a defense to liability for negligent care, treatment, or failure to provide care or treatment if the 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. The bill provides for the acts and omissions that are considered to be 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 the bill's provisions, including the following:

- screening, assessing, diagnosing, or treating an individual;
- prescribing, administering, or dispensing a drug or medicine for off-label or investigational use to treat an individual;
- diagnosing or treating an individual outside the normal area of the physician's or provider's specialty;

- delaying or canceling nonurgent or elective medical, surgical, or dental procedures;
- delaying, canceling, or not accepting in-person appointments for office or clinical visits, diagnostic tests, scheduled treatment, physical or occupational therapy, or another other diagnosis or treatment of an illness or condition not related to a pandemic disease;
- using medical devices, equipment, or supplies outside their normal use, including using or modifying such devices, equipment, or supplies for an unapproved use;
- conducting tests on or providing treatment to an individual outside the premises of a health care facility;
- acts or omissions caused by a lack of personnel or staffing, facilities, medical devices, supplies or other resources attributable to the pandemic disease; or
- acts or omissions arising from the use or nonuse of personal protective equipment.

C.S.S.B. 6 establishes that the defense to liability is in addition to any other defense, immunity, or limitation of liability provided by law and that the bill's provisions do not constitute a waiver of sovereign immunity of the state or governmental immunity of a political subdivision, do not alter the scope of practice of a physician, health care provider, or first responder under state law, and apply 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; and
- a cause of action that accrued on or after March 13, 2020, for which a judgment has not become final before the bill's effective date.

The bill requires a physician, health care provider, or first responder, with respect to an applicable action in which the physician, health care provider, or first responder intends to raise a defense under the bill's provisions, to provide the claimant specific facts not later than the later of:

- the 60th day after the bill's effective date;
- the 120th day after the date the physician, health care provider, or first responder files an original answer in the suit; or
- the 60th day after the date the claimant serves an expert report on the physician, health care provider, or first responder.

C.S.S.B. 6 sets out the following definitions for the purposes of these bill provisions regarding the liability of physicians, health care providers, and first responders during a pandemic:

- "disaster declaration" means a declaration of a state of disaster or emergency by the president of the United States applicable to the entire state, a declaration of a state of disaster by the governor under the Texas Disaster Act of 1975 for the entire state, and any amendment, modification, or extension of the declaration;
- "first responder" has the meaning assigned by reference to the Government Code; and
- "pandemic disease" means an infectious disease that spreads to a significant portion of the population of the United States and that poses a substantial risk of a significant number of human fatalities, illnesses, or permanent long-term disabilities.

### **Product Liability During Pandemic Emergency**

C.S.S.B. 6 exempts a person who designs, manufactures, sells, or donates certain protective clothing or equipment; medical devices, equipment, and supplies; drugs, medicine, or vaccines; diagnostic tests; commercial cleaning, sanitizing, or disinfecting supplies; or any component of such a product related to a pandemic emergency during a pandemic emergency from liability for personal injury, death, or property damage caused by the product unless:

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

- the product presents an unreasonable risk of substantial harm to an individual using or exposed to the product.

C.S.S.B. 6 exempts a person who designs, manufactures, labels, sells, or donates such a product during a pandemic emergency from liability for personal injury, death, or property damage caused by a failure to warn or provide adequate instructions regarding the use of the product unless:

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

C.S.S.B. 6 exempts a person from liability for personal injury, death, or property damage caused by or resulting from the person's selection, distribution, or use of such a product during a pandemic emergency unless:

- the person had actual knowledge of a defect in the product when the person selected, distributed, or used the product or acted with actual malice in selecting, distributing, or using the product; and
- the product presents an unreasonable risk of substantial harm to an individual using or exposed to the product.

C.S.S.B. 6 defines "pandemic emergency," for the purposes of these bill provisions regarding product liability during such an emergency, as a state of disaster declared by the governor under the Texas Disaster Act of 1975 in response to a pandemic disease.

### **Liability for Causing Exposure to Pandemic Disease**

C.S.S.B. 6 exempts a person from liability for injury or death caused by exposing an individual to a pandemic disease during a pandemic emergency unless the claimant establishes:

- the person who exposed the individual 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:
  - had control over the condition;
  - knew that the individual was more likely than not to come into contact with the condition; and
  - 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;
- the person who exposed the individual 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:
  - the person had a reasonable opportunity and ability to implement or comply with the standards, guidance, or protocols;
  - the person refused to implement or comply with or acted with flagrant disregard of the standards, guidance, or protocols; and
  - 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
- reliable scientific evidence shows that the person's 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.

The bill establishes that if an order, rule, or authoritative declaration promulgated by the governor, the legislature, a state agency, or a local governmental entity with jurisdiction over a person conflicts with a different government-promulgated standard, guideline, or protocol, the person may not be 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.

C.S.S.B. 6 requires a claimant to serve on the defendant by a specified deadline 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, with a curriculum vitae for each expert whose opinion is included in the report. The bill provides the following:

- the deadline may be extended by written agreement of the affected parties;
- the defendant must file an objection to the sufficiency of the report and serve the objection on the claimant by a specified deadline;
- if a court determines that the report does not represent an objective, good faith effort to provide a factual and scientific basis for the claimant's assertion, the court may grant the claimant, on one occasion, a 30-day period to cure any deficiency in the report; and
- if a sufficient report is not timely served, the court must, on the defendant's motion, enter an order dismissing the claim with respect to the defendant, with prejudice, and awarding to the defendant reasonable attorney's fees and court costs incurred by the defendant.

C.S.S.B. 6 establishes that the expert report requirement is not to be construed to mean that a single expert must address all causation issues with respect to all defendants. The claimant's report is not admissible in evidence by any party, may not be used in a deposition, trial, or other proceeding, and may not be referred to by any party during the course of the action, except in a proceeding to determine if a report is sufficient or timely. The bill limits to two the number of depositions a claimant may take before the report is served. The bill authorizes a person to appeal from an interlocutory order of an applicable court that overrules a defendant's objection to the claim or denies all or part of the relief sought by the defendant's motion to dismiss the claim.

### **Liability of Educational Institutions During Pandemic Emergency**

C.S.S.B. 6 exempts a public or private educational institution from liability for damages or equitable monetary relief arising from a cancellation or modification of a course, program, or activity if the cancellation or modification arose during a pandemic emergency and was caused, in whole or in part, by the emergency. The bill defines "educational institution" as an institution or program that facilitates learning or the acquisition of knowledge, skills, values, beliefs, or habits. The term includes the following:

- a public or private preschool, child-care facility, primary or secondary school, college, university; or
- an institution of higher education, including a private or independent institution of higher of education, as defined in the Education Code.

The bill's provisions apply only to an action commenced on or after March 13, 2020, for which a judgment has not become final before the bill's effective date. An action commenced before March 13, 2020, or an action for which a judgment has become final before the bill's effective date is governed by the law applicable to the action immediately before the bill's effective date, and that law is continued in effect for that purpose.

### **EFFECTIVE DATE**

On passage, or, if the bill does not receive the necessary vote, September 1, 2021.

### **COMPARISON OF SENATE ENGROSSED AND SUBSTITUTE**

While C.S.S.B. 6 may differ from the engrossed in minor or nonsubstantive ways, the following summarizes the substantial differences between the engrossed and committee substitute versions of the bill.

The substitute removes all changes and references to Chapter 79, Civil Practice and Remedies Code. The substitute also changes the caption to reflect that the substitute bill applies only to certain claims arising during a pandemic disease or a disaster declaration related to a pandemic disease and not other emergency declarations.

The substitute includes a clarification that did not appear in the engrossed regarding the deadline by which a physician, health care provider, or first responder who intends to raise a defense under the bill's provisions in an action commenced before the bill's effective date must provide specific facts to the claimant.

The substitute includes a provision establishing that a person is in compliance with a government-promulgated standard, guideline, or protocol, if the person makes a good faith effort to substantially comply with at least one order, rule, or declaration if there are conflicts. The substitute also adds the legislature to the list of those that may promulgate an order, rule, or authoritative declaration.

The substitute exempts an educational institution from liability for 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. The engrossed did not provide for this exemption.

The substitute does not include the legislative finding that appeared in the engrossed stating that, while some prior rights will be impaired by the bill, the impairment is not significant and the interest of protecting the public and ensuring adequate care vastly outweighs those rights. However, the substitute includes a legislative finding stating that, while some settled expectations regarding claims to which the bill applies may be impaired by the bill, the bill serves a compelling public interest in establishing certain procedures and standards for addressing potential claims against individuals and entities faced with an unprecedented public health emergency that has had severe and adverse impacts on both the health and safety of individuals and the ordinary functioning of governmental entities, the judicial system, the health care delivery system, educational and religious institutions, businesses, nonprofit entities, and others whose daily lives have been upended by the emergency.