87R21292 BRG-F

By:  Hancock, et al. S.B. No. 6

(Leach, et al.)

Substitute the following for S.B. No. 6:

By:  Krause C.S.S.B. No. 6

A BILL TO BE ENTITLED

AN ACT

relating to liability for certain claims arising during a pandemic or disaster related to a pandemic.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1.  Section 51.014(a), Civil Practice and Remedies Code, is amended to read as follows:

(a)  A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that:

(1)  appoints a receiver or trustee;

(2)  overrules a motion to vacate an order that appoints a receiver or trustee;

(3)  certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4)  grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;

(5)  denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state;

(6)  denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73;

(7)  grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code;

(8)  grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001;

(9)  denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351;

(10)  grants relief sought by a motion under Section 74.351(l);

(11)  denies a motion to dismiss filed under Section 90.007;

(12)  denies a motion to dismiss filed under Section 27.003;

(13)  denies a motion for summary judgment filed by an electric utility regarding liability in a suit subject to Section 75.0022; [~~or~~]

(14)  denies a motion filed by a municipality with a population of 500,000 or more in an action filed under Section 54.012(6) or 214.0012, Local Government Code; or

(15)  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).

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

Sec. 74.155.  LIABILITY OF PHYSICIANS, HEALTH CARE PROVIDERS, AND FIRST RESPONDERS DURING PANDEMIC. (a)  In this section:

(1)  "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 Chapter 418, Government Code, for the entire state, and any amendment, modification, or extension of the declaration.

(2)  "First responder" has the meaning assigned by Section 421.095, Government Code.

(3)  "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.

(b)  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) A physician, health care provider, or first responder may not use 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)  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)  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)  A defense under this section is in addition to any other defense, immunity, or limitation of liability provided by law. This section does not constitute a waiver of sovereign immunity of this state or governmental immunity of a political subdivision.

(g)  A physician, health care provider, or first responder who intends to raise a defense under Subsection (b) must 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; or

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

(h)  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.

SECTION 3.  Title 6, Civil Practice and Remedies Code, is amended by adding Chapter 148 to read as follows:

CHAPTER 148. LIABILITY DURING PANDEMIC EMERGENCY

Sec. 148.001.  DEFINITIONS. In this chapter:

(1)  "Pandemic disease" has the meaning assigned by Section 74.155.

(2)  "Pandemic emergency" means a state of disaster declared by the governor under Chapter 418, Government Code, in response to a pandemic disease.

Sec. 148.002.  PRODUCTS LIABILITY ACTIONS RELATED TO PANDEMIC EMERGENCY. (a) 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)  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:

(A)  had actual knowledge of a defect in the product when the product left the person's control; or

(B)  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)  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)  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:

(A)  had actual knowledge of a defect in the product when the person selected, distributed, or used the product; or

(B)  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) 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;

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

(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)  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, the claimant shall serve on the defendant:

(1)  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

(2)  a curriculum vitae for each expert whose opinion is included in the report.

(c)  The deadline for serving the report and curriculum vitae required by Subsection (b) may be extended by written agreement of the affected parties.

(d)  A defendant must 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:

(1)  the date the report is served on the defendant; or

(2)  the date the defendant's answer to the claim is filed.

(e)  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, the court may grant the claimant, on one occasion, a 30-day period to cure any deficiency in the report.

(f)  If a sufficient report is not timely served under this section, the court, on the defendant's motion, shall enter an order:

(1)  dismissing the claim with respect to the defendant, with prejudice; and

(2)  awarding to the defendant reasonable attorney's fees and costs of court incurred by the defendant in the action.

(g)  Nothing in this section shall be construed to mean that a single expert must address all causation issues with respect to all defendants.

(h)  A report served under this section:

(1)  is not admissible in evidence by any party;

(2)  may not be used in a deposition, trial, or other proceeding; and

(3)  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.

(i)  After a claim to which Subsection (a) applies is filed, all claimants, collectively, may take not more than two depositions before the expert report is served as required by Subsection (b).

(j)  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, a 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.

Sec. 148.004.  LIABILITY OF EDUCATIONAL INSTITUTIONS FOR CERTAIN ACTIONS DURING PANDEMIC EMERGENCY. (a)  In this section, "educational institution" means an institution or program that facilitates learning or the acquisition of knowledge, skills, values, beliefs, or habits. The term includes:

(1)  a public or private preschool, child-care facility, primary or secondary school, college, or university;

(2)  an institution of higher education, as that term is defined by Section 61.003, Education Code; and

(3)  a private or independent institution of higher education, as that term is defined by Section 61.003, Education Code.

(b)  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.

SECTION 4.  (a) For purposes of Section 74.155, Civil Practice and Remedies Code, as added by this Act, the legislature finds that:

(1)  the widespread effect of Coronavirus Disease 2019 ("COVID-19") in this state has resulted in a state of disaster as declared by the governor under Section 418.014, Government Code;

(2)  the frequency and severity of such cases in this state have severely taxed the physicians and health care providers, including health care institutions, stressed the state's health care system, and created shortages of medical staff, therapeutics, hospital beds, testing equipment, and safety supplies;

(3)  physicians and health care providers often have inadequate facilities to respond to the disaster;

(4)  physicians and health care providers often have inadequate test kits and monitoring devices to properly assess all those presenting themselves for care or treatment;

(5)  because of the number and severity of cases, many physicians and health care providers in this state have been forced to prioritize care and treatment;

(6)  many physicians and health care providers have placed themselves, their loved ones, and their livelihoods at risk by trying to respond to the disaster;

(7)  at the current time, there is no certainty as far as how long this crisis will last;

(8)  a pandemic, including the COVID-19 pandemic, requires an enormous response from governments working in coordination with physicians and health care providers in the community;

(9)  protecting physicians and health care providers from unnecessary liability supports their efforts during a pandemic, including the COVID-19 pandemic; and

(10)  there is a strong public interest to be served by this Act.

(b)  Because of the conditions stated in Subsection (a) of this section, the purpose of Section 74.155, Civil Practice and Remedies Code, as added by this Act, is to improve and modify the system by which health care liability claims are determined in order to:

(1)  promote the public health, safety, and welfare of all citizens and ensure access to care and treatment during a pandemic by broadly protecting physicians and health care providers, including health care institutions, in this state from liability that may relate to the care or treatment of individuals associated with a pandemic, including COVID-19;

(2)  provide for prompt and swift medical and health care responses to the citizens of this state suffering from COVID-19;

(3)  recognize that many physicians and health care providers responding to these situations may not have the full benefits of the medical devices and facilities they would in non-disaster situations;

(4)  encourage physicians and health care providers from other states to respond, if necessary, to the COVID-19 disaster in this state as declared by the president of the United States and by the governor; and

(5)  ensure that the focus and resources of physicians and health care providers in responding to the COVID-19 disaster are being addressed.

(c)  For purposes of Section 74.155 and Chapter 148, Civil Practice and Remedies Code, as added by this Act, the legislature finds that while some settled expectations regarding claims to which this Act applies may be impaired by this Act, the Act 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.

SECTION 5.  (a) 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. An action commenced before March 13, 2020, or an action for which a judgment has become final before the effective date of this Act is governed by the law applicable to the action immediately before the effective date of this Act, and that law is continued in effect for that purpose.

(b)  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, a physician, health care provider, or first responder who intends to raise a defense under Subsection (b) of that section must 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.  This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2021.