

SUBJECT: Establishing liability exceptions for certain claims relating to pandemic

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 8 ayes — Leach, Davis, Julie Johnson, Krause, Middleton, Moody, Schofield, Smith

0 nays

1 absent — Dutton

SENATE VOTE: On final passage, April 8 — 29-1 (Hall)

WITNESSES: None

DIGEST: CSSB 6 would establish limits on certain kinds of liability relating to a pandemic disease or pandemic emergency. Liability exceptions would be established for certain actions by physicians, health care providers, and first responders and for certain actions by manufacturers and others involved with specified products. The bill also would establish liability protections for certain exposures of individuals to a pandemic disease and certain actions taken by educational institutions.

The bill would define "disaster declaration" as 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.

"Pandemic disease" would be defined as an infectious disease that spread to a significant portion of the population of the United States and that posed a substantial risk of a significant number of human fatalities, illnesses, or permanent long-term disabilities.

Liability of physicians, health care providers, first responders. CSSB 6 would, under certain circumstances, provide physicians, health care

providers, and first responders exceptions from liability for injuries 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. The exceptions would apply to economic and noneconomic damages.

The exception from liability would not apply in cases of reckless conduct or intentional, willful, or wanton misconduct that met certain conditions in the bill. The exception would apply if a physician, health care provider, or first responder proved 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.

A physician, health care provider, or first responder could not use the fact that the individual was diagnosed with or suspected of being infected with the pandemic disease as a defense to liability for negligent care, treatment, or failure to provide care or treatment if certain factors were proved by the claimant. The defense could not be used if the claimant proved by a preponderance of the evidence that the diagnosis, treatment, or reasonable suspicion of infection 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 would establish a list of actions and circumstances that would be considered care, treatment, or failure to provide care or treatment that could be excepted from liability under the bill.

The bill would establish timelines for physicians, health care providers, and first responders who intended to raise a defense established by the bill to provide to a claimant specific facts supporting an assertion that they

were not liable for the injury or death.

The bill's provisions would apply only to claims arising from care, treatment, or failure to provide care or treatment that occurred during the time from the date that the president of the United States or the governor made a disaster declaration related to a pandemic disease and ending on the date the declaration terminated.

Product liability actions. Under CSSB 6, during a pandemic emergency persons would not be liable for certain actions relating to product liability and injury, death, or property damage relating to specific products unless certain conditions in the bill were met, including that actual malice was involved.

"Pandemic emergency" would be defined as a state of disaster declared by the governor under the Texas Disaster Act of 1975 in response to a pandemic disease.

The potential exception from liability would apply only to certain products, including:

- clothing or equipment worn to minimize exposure to health hazards of a pandemic disease;
- medical devices, equipment, and supplies used to treat individuals infected with a pandemic disease, including those used or modified for an unapproved use;
- drugs, medicines, or vaccines used to treat or prevent the spread of a pandemic disease, including those used for an unapproved use;
- tests to diagnose or determine immunity to a pandemic disease;
- commercial cleaning, sanitizing, or disinfecting supplies; or
- any component of a product described above.

Design, manufacture, sale, or donation. CSSB 6 would, under certain circumstances, except from liability for personal injury, death, or property damage those who design, manufacture, sell, or donate certain products during a pandemic emergency. The exception from liability would not

apply if the product presented an unreasonable risk of substantial harm to an individual using or exposed to the product and the person who designed, manufactured, sold or donated the product:

- 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.

Failure to warn or instruct. A person who designed, manufactured, labeled, sold, or donated a product listed in the bill during a pandemic emergency would not be liable for personal injury, death, or property damage caused by a failure to warn or provide adequate instructions about the use of a product unless:

- the person acted with actual malice in failing to warn or provide adequate instructions; and
- the failure presented an unreasonable risk of substantial harm to an individual using or exposed to the product.

Selection, distribution, and use. A person would not be 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 the bill during a pandemic emergency unless the product presented an unreasonable risk of substantial harm to an individual using or exposed to it and 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.

Liability for causing exposure to pandemic disease. Under the bill, a person would not be liable, under certain circumstances, for injuries or death caused by exposing an individual to a pandemic disease during a pandemic emergency.

A person could be liable if a claimant could establish certain factors relating to failing to warn someone of certain conditions and failing to implement official standards, guidance, or protocols.

Failure to warn. A person would be not be liable unless a claimant established that 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 disease exposure and if 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.

Failure to implement standards, guidance, protocols. A person would not be liable unless the claimant established that the person who exposed the claimant knowingly failed to implement or comply with government-promulgated standards, guidance, or protocols intended to lower the likelihood of exposure to the disease, if:

- the person had a reasonable opportunity and ability to implement or comply with the standards, guidance, or protocols and refused or acted with flagrant disregard of them; and
- the standards, guidance, and protocols that the person failed to implement or comply with did not, on the date of exposure, conflict with standards, guidance, or protocols with which the person had implemented or complied.

The bill would establish a way to address situations in which an order, rule, or authoritative declaration by the governor, the Legislature, a state agency, or a local governmental conflicted with a different government-promulgated standard, guideline, or protocol. In this situation, a person could not be considered to have failed to implement or comply with the standard, guideline, or protocol if, at the time of an exposure, the person was making a good faith effort to substantially comply with at least one conflicting order, rule, or declaration.

Scientific evidence. In addition, under both a failure to implement and a

failure to warn described above, to hold someone liable a claimant would have to establish that reliable scientific evidence showed that the failure to warn the individual of the condition, remediate the condition, or implement standards, guidance, or protocols was the cause of the individual contracting the disease.

The bill would establish a timeline for claimants to serve on a defendant a report authored by at least one qualified expert that provided a factual and scientific basis for the assertion that the defendant's failure to act caused the person to contract a pandemic disease. The bill also would establish procedures and deadlines for objections to the sufficiency of the information in the report and ways to cure any deficiencies. If a sufficient report was not timely served as required by the bill, the court, on the defendant's motion, would be required to dismiss the claim and award the defendant reasonable attorney's fees and court costs. The bill would establish restrictions on the use of the report, including that it would not be admissible in evidence.

Liability of educational institutions. Educational institutions would not be liable for damages or equitable monetary relief from canceling or modifying 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. Under the bill, an educational institution would include:

- a public or private preschool, child-care facility, primary or secondary school, college, or university; and
- an institution of higher education or a private or independent institution of higher education.

Other provisions. The bill would make several legislative findings about conditions related to the COVID-19 pandemic and the purposes of certain provisions in the bill.

Provisions relating to the liability of physicians, health care providers, and first responders would apply only to actions that began on or after March

13, 2020, if a judgment had not become final by the bill's effective date. For actions that began before the bill's effective date, the bill would establish timelines for physicians, health care providers, and first responders who intended to raise a defense established by the bill to provide a claimant certain facts supporting an assertion that they were not liable.

The bill would establish that a person could appeal an order if a court overruled certain objections or denies certain relief relating to liability for exposure.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2021.

**SUPPORTERS
SAY:**

CSSB 6 would support the health care providers, businesses and others who helped Texas fight the COVID-19 pandemic by giving them limited liability protection for their good faith efforts during the pandemic. The bill also would provide needed protections to the businesses, religious institutions, schools, non-profits organizations, and others that tried to follow government standards, guidelines and protocols designed to fight the pandemic. With CSSB 6, Texas would join about three dozen states that have enacted limited liability protections relating to the COVID-19 pandemic for health care workers through laws or other actions.

The bill would not create immunity from lawsuits for any entity or shield bad actors who harmed people, but would impose common-sense limits on liability for some lawsuits related to the pandemic. Other lawsuits such as labor and employment suits related to COVID-19 would not be affected.

The protections that the bill would put in place are important for the state's recovery from the pandemic and the response to future ones. The protections are needed before more lawsuits hit Texas courts which are already struggling with a backlog of cases due to the pandemic. The bill would balance the needs of all parties by having a retroactive effective

date so that it would apply to actions taken during the pandemic.

Liability of physicians, health care providers, first responders. CSSB 6 would give protections to the state's frontline health care workers who stepped up to care for Texans during the pandemic, doing the best they could in a fluid situation. During this time, health care workers were faced with shifting protocols, incomplete information, limited supplies, and changing standards and so should be afforded reasonable protection from lawsuits under certain circumstances.

CSSB 6 would give health care providers working during the pandemic protection from inappropriate lawsuits by extending to them the standard of willful, wanton misconduct applied to health care providers giving emergency care. Care provided during the pandemic is analogous to emergency care and should be held to the same standard, rather than to the standard of negligence that would apply in many suits absent CSSB 6. The standard in the bill, also referred to as gross negligence, is well-defined in Texas case law, allowing both plaintiffs and defendants to understand how CSSB 6 would be applied to situations arising out of pandemic disease care.

The bill would balance protections for health care providers with those for individuals by extending liability protection only if the care was related to or impacted by a pandemic disease and other conditions were met. In addition, the liability protection afforded to health care providers would be unavailable in certain situations in which a claimant proved that the suspicion, diagnosis, or treatment for a pandemic disease was not the cause of a person's injury or death.

While the bill would provide some liability protection for health care workers, it would not protect them from all lawsuits. Health care providers, including nursing homes, could be held accountable for certain willful or wanton misconduct. Providers who asserted that care was related to a pandemic disease would have to prove that the pandemic disease or other criteria in the bill was the cause of the person's injury or death. Lawsuits that did not fall under the bill could proceed as under

current law.

Product liability. CSSB 6 would extend reasonable liability protections for designing, manufacturing, and marketing certain products so that businesses helping Texas deal with a pandemic disease could continue to operate during a pandemic emergency. The state has an interest in incentivizing such companies to continue producing and making new products, such as personal protective equipment. The bill would ensure that producing these products in good faith during a pandemic would not expose a business to lawsuits unless actual malice or knowledge of defects was involved.

Liability for causing exposure to pandemic disease. The bill would recognize that those acting in good faith by following official guidelines should have some protections from liability for exposure of others to a pandemic disease. Businesses, schools, churches and other places that made honest efforts to comply with government standards, guidance, or protocols during the pandemic should not be penalized for following rules that they were given. Enacting the limited liability protections in the bill would give businesses and other organizations an incentive to protect employees and customers by following official standards and would help them create conditions to safely bring back employees and open businesses. The bill would make provisions for conflicting guidance and require that a person make a good-faith effort to comply with at least one conflicting order. The bill would not penalize any entity for not following government protocols and deciding which of any conflicting orders to comply with would be up to each person.

The bill's provisions requiring those bringing a lawsuit to provide the defendant with a report by an expert would be modeled on similar requirements for lawsuits relating to emergency health care. The report would not present a barrier in legitimate cases as workers or others needing to file a report should have access to the necessary information, and the bill would allow for the report to be revised under certain circumstances.

Liability of educational institutions. The bill would narrowly tailor the protections given educational institutions and other institutions to lawsuits involving damages or equitable monetary relief for actions during a pandemic emergency.

CRITICS
SAY:

CSSB 6 would impose standards that were too high for Texans to pursue certain claims for injuries and deaths or property damage related to pandemics. Lawsuits for actions taken during the pandemic should be allowed to proceed as they do under current law, with courts considering the cases on their merits without unique provisions designed to shield certain parties from liability.

Liability of physicians, health care providers, first responders. CSSB 6 would provide a liability shield that was too broad for certain injuries, especially those that might occur in a nursing home, by limiting liability for injuries "relating to or impacted by a pandemic disease." A nursing home could use this provision to claim that almost any action or omission occurring in the past year was impacted by the pandemic, even if the provider should be subject to liability for the action or omission. For example, a nursing home could claim that a resident's prolonged time without being taken out of bed to be bathed was due to staffing shortages related to the pandemic.

Other types of abuse and neglect, including missed meals or treatments, also could be blamed on the pandemic, which would remove accountability for those responsible for the care of some of Texas' most vulnerable populations. The extra burden that the bill would impose in lawsuits if a nursing facility claimed pandemic-related protections would be too high for residents or families to reasonably be expected to meet.

Liability for causing exposure to pandemic disease. The bill would place too high of a legal hurdle for workers who were injured by exposure to a pandemic disease. The bill would require a pre-discovery report from the individual claiming injury, and it could be difficult for a worker to obtain the necessary information such as company policies and records to give to the expert producing the report. This is in contrast to cases related

to emergency medical care in which patients would have access to their medical records, and to lawsuits under current law in which the worker would have access to the information during the pre-trial discovery process.

The bill would establish another unreasonable barrier to a lawsuit by workers, especially low-wage workers, by requiring courts to award attorneys' fees and costs to be paid by the plaintiff to the defendant if a report was not sufficient. This would make it difficult for plaintiffs to find lawyers willing to take case related to pandemic disease exposure.

OTHER
CRITICS
SAY:

The bill would go too far in basing liability protections on adherence to overly restrictive government standards, guidance, or protocols by penalizing businesses or organizations that did not follow them, effectively writing those standards into law.

NOTES:

The House companion bill, HB 3659 by Leach, was considered by the House Judiciary and Jurisprudence Committee in a public hearing on April 14 and left pending.