

Texas Legislature Passes Law Providing Heightened Protection for Parties Affected by Pandemic

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During the 2021 legislative session, in response to Covid-19, the Texas Legislature passed Senate Bill 6. SB 6 is designed to provide greater protection for health care providers, first responders, certain product manufacturers and suppliers, educational institutions, and other persons whose conduct or product was affected by, or provided in connection with, a pandemic. However, the retroactive application of this new law raises a viable question as to its constitutionality.

Except in a case of “reckless conduct or intentional, wilful or wanton misconduct,” a physician, other health care provider, or first responder is not liable for injury arising from care or treatment “relating to or impacted by a pandemic disease or a disaster declaration related to a pandemic,” provided the defendant proves the pandemic was a producing cause of the care or treatment that caused the injury or proves that the injured person was diagnosed or reasonably suspected to be infected with a pandemic disease at the time of the care or treatment. The legislation provides similar protection to any person who may have caused injury to another by exposing the injured party to a pandemic disease during a pandemic emergency.

With respect to product manufacturers and supplies, those who design, manufacture, sell or donate certain products, such as clothing, equipment, medical devices, drugs, diagnostic tests, or cleaning/sanitizing products, during a pandemic emergency are not liable for injury caused by the product unless (i) they had actual knowledge of a product defect or acted with malice, and (ii) the product presented an unreasonable risk of substantial harm. The law also protects product distributors, protects persons for failure to warn, and protects anyone who injures another by their use of the product.

Under the new law, educational institutions are not liable for damages arising from a cancellation or modification of a course or 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 law became effective June 14, 2021, but applies 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.” Notwithstanding the inclusion of extensive language that seeks to justify its passage and retroactive application, this law will unquestionably face challenges as to its constitutionality under Article I, Section 16 of the Texas Constitution, which provides that “[n]o bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.” The enrolled version of SB 6 can be accessed [here](#).