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Seeking to Squelch 'Litigation Maker,' Texas Tort Reformers Eye COVID-19 Liability Bill

A bill to protect health care providers, manufacturers, educational institutions and other businesses from lawsuits over COVID-19 exposure will be coming to the Texas Legislature this session.

By Angela Morris | January 20, 2021



(Photo: Shutterstock.com)

When it comes to laws making it harder to sue over COVID-19 exposure, Texas lawmakers during this year's legislative session will get the chance to join other states and the federal government.

Behind the scenes of the legislative session, a coalition of tort reform lobbyists and business associations are putting the final touches on a bill that would protect health care providers, many types of businesses, manufacturers and educational institutions from getting sued because of the ongoing pandemic.

The measure is likely to face pushback from plaintiffs attorneys who say there's no flood of COVID-19 litigation. Also, the chances of passage are less than in other years, because Texas lawmakers are facing a rash of emergencies stemming from the pandemic that will take priority while also coping with infection control measures that could slow down bills as they wind through the legislative process.

"We don't want a major public health and economic crisis to become a litigation maker," said George Christian, senior counsel with the Texas Civil Justice League, which is leading a coalition of business, trade, professional and health care associations that see this bill as a top item. "We've got a lot of interest from leadership on it, and I feel like we're going to get a pretty good run at it."

Christian said the league is finalizing a draft bill now and has already found a sponsor—Sen. Kelly Hancock, R-North Richland Hills—to file it when it's ready. No one from Hancock's office responded to an email seeking comment before deadline.

He noted that the bill has four major components: health care liability protections, premises liability protections for many business types, protections for manufacturers who create COVID-19 related products, and protections for educational institutions that close to in-person learning.

What's in the bill?

George Christian, senior counsel with the Texas Civil Justice League, said the league is finalizing a draft of the bill for filing by Sen. Kelly Hancock, R-North Richland Hills. Christian explained the contents of the bill to Texas Lawyer.

On the health care front, the bill would extend Texas law's standard-of-care for emergency rooms to providers who treat COVID-19 patients. The bill lays out the same standard in cases where a patient's non-coronavirus treatment or procedure got delayed because of disruptions in the pandemic, Christian said.

Under the premises liability section of the bill, a business would get protection if an employee or a customer alleged a COVID-19 injury coming from the premises. A company would have to engage in pretty egregious behavior to be liable, and would get protection as long as it tried following safety precautions, he said.

Texans for Lawsuit Reform is backing the soon-to-be-filed legislation. The group's general counsel, Lee Parsley, didn't respond to a message seeking comment before deadline.

"Texas law should provide that a business that makes a good faith effort to comply with state and federal safety protocols should not be liable for a customer or employee contracting COVID-19," said an email by Lucy Nashed, spokeswoman for Texans for Lawsuit Reform. "Liability should arise only if the business was grossly negligent or acted intentionally in exposing the employee or customer to COVID-19, and the employee or customer has a significant illness."

She added that in the beginning of a COVID-19 lawsuit, a plaintiff should have to show valid scientific evidence that the defendant caused the illness, or the case should be dismissed.

Texas Association of Defense Counsel president Slater Elza wrote in an email that Christian is serving as the association's lobbyist. He declined further comment about the COVID-19 liability bill.



George Christian. Courtesy photo

Manufacturers who make items like ventilators, personal protective equipment, vaccines or treatments for the coronavirus would get covered in the bill, "unless you knew something was wrong with it, and put it out anyway," said Christian.

The part of the bill that applies to educational institutions would stop them from facing lawsuits from students who wanted tuition refunds because the school closed to in-person learning, he added.

The bill has a couple of other provisions that would ensure that contracts disrupted in the pandemic qualify for a force majeure situation, and would require the Texas Supreme Court's emergency orders to apply equally to all case types, including eviction cases—which Christian said that some county justice of the peace are not allowing to be filed at all.

The legislation is likely to face pushback from plaintiffs lawyers who may argue there is no need for the bill.

Texas Trial Lawyers Association President Jim Perdue Jr. said in a statement that the bill hasn't been filed and he needs to review specific proposals.

"COVID-related case filings against businesses have been limited and narrow in scope. In fact, our members report many more inquiries related to insurance companies denying claims from business owners for pandemic-related losses seemingly out of hand," Perdue said.

Dallas attorney Quentin Brogdon said there would not be a flood of COVID-19 exposure litigation. His firm, Crain Brogdon Rogers, isn't getting many calls from potential plaintiffs. Among the dozen or so calls he has fielded, Brogdon only accepted two—from families of nursing home workers who contracted the coronavirus at work and died.

"There is no incentive for lawyers to bring unwinnable cases. Jurors are ultimately going to have to weigh in on the conduct and it

will not be an easy task in any COVID exposure case to prove causation," Brogdon explained. "We are screening for evidence of clear exposure and a clear disregard of basic protective measures to prevent the contraction of COVID."

Christian, the civil justice league's lobbyist for the bill, said he agreed that it's unlikely plaintiffs would file a flood of COVID exposure lawsuits. But Christian added he sees a potential and has concerns that some business types—like long-term care providers, nursing homes and meat-packing plants—could get targeted with COVID-19 exposure litigation.

"There are certain places where this could get loose," he said. "The attitude from the people on our side and those in the legislature who want to do it is, 'We will just close the door before anything happens.'"

But Brogdon said the bill could cause some harm—and not just from plaintiffs who could no longer file lawsuits, even those with merit. The bill could hurt any ordinary Texan, he said.

"The reason blanket immunity in any arena, including in COVID, is a bad idea is that it incentivizes corporations not to take reasonable steps to protect patients, nursing home residents, workers and the public," Brogdon said. "Blanket immunity potentially impacts us all by incentivizing unsafe businesses to continue to stay open, and it indiscriminately cuts off the rights of even those who have meritorious claims."



Quentin Brogdon. (Courtesy Photo)

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