

# KANSAS TRIAL LAWYERS ASSOCIATION



To: Senator Rick Wilborn, Chairman  
Members of the Senate Judiciary Committee

From: David Morantz, Shambert, Johnson & Bergman, Chtd., Kansas City  
President, Kansas Trial Lawyers Association

Date: May 18, 2020

**Re: Health care immunity, business immunity proposals**

Thank you for the opportunity to provide testimony on behalf of the Kansas Trial Lawyers Association regarding immunity from liability for businesses and health care providers. KTLA has a long-standing position supporting accountability in the law and opposing special rules that apply to certain groups or circumstances that relieve them of responsibility. Immunity laws don't hold people accountable for their actions; they shift the burden to injured persons, taxpayers, and charitable organizations. Immunity laws conflict with KTLA's core principles.

KTLA members recognize that the COVID-19 pandemic and the current State of Disaster Emergency is an extraordinary situation that requires considerations for the protection and safety of the public. We admire and appreciate the health care providers who have been on the front lines caring for those who are ill with the virus. We also appreciate the many other essential workers and businesses that have stayed open so that basic necessities remain available during shelter-in-place restrictions.

KTLA believes the civil justice system works, even during times of crisis. The legislature does not need to pass special laws and grant special exceptions and immunities from negligence to assure that justice prevails.

First and foremost, the standard of care for establishing negligence is a flexible standard. It takes into account the conditions, such as the current health emergency, and requires only that a person act reasonably under those conditions. An individual is not held to the same standards in a pandemic as they are in normal times.

Immunity for negligent actions provides protection from litigation, but it also *removes protections*, including a Kansan's right to their day in court and to seek resolution of a dispute. Immunity laws will prevent any Kansan who has sustained life-changing injuries due to negligence from bringing a claim.

Imposing immunity in this setting potentially raises troubling constitutional issues that are not easily addressed without major changes to the proposal. The committee must consider whether legislation it advances is constitutional in Kansas.

First, under well-settled Kansas law, Section 18 of the Bill of Rights to the Kansas Constitution requires that the legislature provide an adequate substitute remedy when it takes away a cause of action available at common law, as the proposals before this committee would do. This is part of what is commonly referred to as “the quid pro quo test.” See *Miller v. Johnson*, 295 Kan. 636, 289 P.3d 1098 (2012). Second, proposals that apply retroactively are suspect. The legislature is restricted in retroactively limiting causes of action, because those causes of action are vested property rights under Kansas law. See *Resolution Trust Corp. v. Fleischer*, 257 Kan. 360, 892 P.2d 497.

More pragmatically, plaintiffs’ attorneys operate on a contingent fee basis, which means they pay all costs of litigation and receive no compensation unless they win the case for their client. The contingent fee system has the effect of weeding out meritless claims and protecting defendants. It is not economically sound for attorneys to invest time and money in cases that do not involve a violation of the standard of care and thus lack merit.

### **Business immunity**

Kansans feel the economic pressures caused by COVID-19 but are naturally concerned with the risks of re-opening the state too quickly. The business community has urged a much speedier re-opening of Kansas. Yet they propose that the Legislature pass blanket immunity legislation to almost completely eliminate their liability related to COVID-19. What assurances do Kansans have that it is safe for the state to re-open, and at the pace demanded by the business community, when the business community is seeking such broad immunity protections.

Employers have a duty to employees to provide a safe workplace, and we see no benefit to working Kansans from weakening employers’ legal obligations. The stories from across the nation, and from the packing houses of southwest Kansas, in particular, are troubling: employers that who fail to provide basic protective equipment, fail to follow social distancing or fail to send home sick and exposed workers seem to show that in some cases businesses exacerbated the spread of COVID-19.

Immunizing businesses creates a race to the bottom because those who act reasonably cannot benefit from their precautions if their competitors are free to act unreasonably. To assure safety for the public and for working Kansans, every business must be held accountable.

Immunizing businesses would also serve to delay our economic recovery. Shoppers and diners won’t return to stores and restaurants unless they feel safe to do so; shielding businesses from accountability is a signal to consumers the protections we expect, and the enforcement, won’t be there. Businesses claiming a need for special treatment and immunity undermine the public’s confidence in returning to stores and restaurants, slowing the re-opening of our economy. Immunizing businesses also disincentives adherence to public safety measures and regulations. In the midst of a deadly pandemic, the legislature must take steps to protect the public, then encourage return to post-COVID-19 practices, not remove incentives for them to do so.

We have reviewed the Kansas Chamber's proposal, which was circulated to the House Judiciary Committee. It includes broad immunity provisions found nowhere else in Kansas law, including:

- limitations on who may file a claim to those who die from COVID-19 or who are hospitalized;
- no liability for claims related to exposure unless there was a willful and malicious failure to guard or warn against a substantial risk of COVID-19;
- immunity for manufacture of alleged defective PPE or cleaning equipment used by health care providers, medical care facilities or first responders unless there was actual knowledge of the defect and willful disregard for the substantial risk for the substantial and unnecessary risk that it would cause serious injury.

The Kansas Chamber's proposal provides almost complete immunity. By limiting plaintiffs and applying immunity across the board except in the most egregious circumstances, the proposal is a short-sighted attempt to pre-adjudicate disputes and rule in favor of business while shutting the courthouse doors on Kansans.

The Kansas Chamber's proposal protects the negligent actions of out of state corporations causing injury to Kansas citizens, leaving Kansans holding the bag. In the case of product liability claims, Kansas businesses who in good faith buy PPE to protect their employees, only to find it defective, will likely have no recourse against the company who manufactured it.

KTLA urges the committee's strong opposition to business immunity and any limitations on accountability, duty to provide a safe workplace or to manufacture safe and effective products.

### **Health care provider immunity**

KTLA remains opposed to legislation providing for health care provider immunity because the civil justice system assures that justice is rendered, even under pandemic conditions, and does not need adjustment to protect certain groups or individuals.

Although treatment of COVID-19 is rapidly evolving, CMS<sup>1</sup> and the CDC<sup>2</sup> have been issuing guidance for health care providers regarding COVID-19 since early March. The guidance has had the effect of lowering and adjusting the professional standard of care, and it reflects current pandemic conditions. If there were allegations of professional negligence, the CMS and CDC would be the relevant authorities to establish the appropriate standard of care.

Realistically, litigation against a health care provider for care related to COVID-19 is not likely, and ill-advised. Citizen juries will view COVID-19 suits through a lens of gratitude for the selflessness of health care providers who have put themselves in harms' way during the crisis. Potential litigants and their potential attorneys understand the power of juries to apply and enforce the standards of their communities. For claims arising during the current pandemic, those standards will deter all but the most meritorious cases.

KTLA and the Kansas Medical Society have very different perspectives on the issue of health care provider immunity under the COVID-19 pandemic, and we acknowledge our different perspectives. Our differences did not keep us from discussing the issue, and we appreciated the opportunity to hear their objectives with the proposal, provide input and voice our concerns.

KTLA has not changed its position on legal immunity. However, we thoughtfully considered the medical community's concerns and the Governor and some lawmakers' desire to address those concerns with very narrow, limited, and tailored immunity provisions. We provided language to KMS based on the experience of our members, which is narrow, limited, and tailored and reduces the possibility of unintended interpretations by litigants or in court.

The most recent draft of the proposal does not completely capture what we hoped it would. We are willing to continue to talk with KMS and assume dialog remains open to continue to improve the immunity provisions, if it is the committee's desire to advance a narrow, limited, and tailored bill.

### **Nursing homes, assisted living, and long-term care facilities**

KTLA respectfully requests that if the committee decides to advance a bill, that nursing homes, assisted living, and long-term care facilities not be included in its provisions. We draw a distinction between front line medical providers and the care provided in long-term care facilities, and we feel strongly that these facilities must be excluded.

The frail elderly residents of Kansas nursing homes and long-term care facilities are particularly vulnerable. During times of non-emergency, nursing homes are required to take reasonable precautions to stop the spread of infectious diseases. Many have routinely failed to do so. Such facilities should not receive immunity for conduct that was harmful and negligent prior to and separate from the COVID-19 crisis, and which might have facilitated the spread of the pandemic. Kaiser Health News<sup>3</sup> reviewed federal records on nursing homes and found that nationwide, 63 percent of nursing homes were cited for one or more infection control deficiencies for the past two regular inspection periods (for some facilities, going back to 2016). Of the 293 Kansas facilities included in the review, 58 percent had deficiencies indicating "potential for harm." Two indicated "immediate jeopardy." Protecting negligent facilities instead of protecting the most vulnerable Kansans is not justified under any circumstance.

In at least 15 states, more than half of the people who died of COVID-19 lived in long-term care facilities. As of May 11, Johnson County has reported over 30 nursing home deaths due to COVID-19.

KTLA members believe that Kansas laws, Kansas courts, and Kansas juries do an excellent job of ensuring justice, even during a State of Disaster Emergency. On behalf of KTLA members, I respectfully request that you carefully consider the necessity of immunity legislation, the potential for excluding meritorious claims, and reduced accountability.

Thank you for the opportunity to provide information to the committee. If you have any additional questions about the information in this testimony or the issue of immunity, please feel free to contact me at [dmorantz@sjblaw.com](mailto:dmorantz@sjblaw.com) or KTLA's executive director Callie Jill Denton at [cdenton@ktla.org](mailto:cdenton@ktla.org).

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<sup>1</sup> <https://www.cms.gov/files/document/4220-covid-19-long-term-care-facility-guidance.pdf>

<sup>2</sup> <https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html>

<sup>3</sup> Kaiser Health News, March 4, 2020, <https://khn.org/news/coronavirus-preparedness-infection-control-lapses-attoprated-nursing-homes/>