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House Judiciary  
Proponent Testimony HB 2126  
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Mr. Chairman and members of the committee, I am Mark Maloney with Hinkle Law Firm here representing the Progressive Healthcare Alliance on House Bill 2126. I have practiced law in Kansas for more than 30 years, with a significant portion of my current practicing being the representation of Kansas health care providers, including long-term care providers, in defense of medical malpractice claims and lawsuits. This bill is critically important because HB 2016, passed during the special session, placed an unusually difficult and costly burden on long-term care providers at a time of great difficulty for the long term care industry.

I want to spend a few moments to describe the difference between immunity and an affirmative defense. I contend HB 2016, New Section 13 actually placed the adult care facilities in a more detrimental position than if no language was passed at all.

Statutory immunity operates as a shield to protect against not just liability but in some instances “immunity from suit.” Statutory immunity often places the burden to overcome the protection on the plaintiff. The plaintiff would have to then show how the defendant violated a clearly established right. Immunity is the clearest manner a legislature can provide to assist in avoiding protracted and costly litigation. This was recognized by the legislature and governor in May 2020 when immunity was provided to all health care providers, but for long term care home, and other businesses operating during the Covid-19 pandemic.

Conversely, an affirmative defense places the burden on the defendant to establish the defense. Moreover, by creating an affirmative defense based on compliance with public health directives, the statute creates legal implications that would otherwise not exist. Specifically, if the facility did not comply, are they automatically liability? I fully expect that will be the argument of many personal injury lawyers to juries.

*“New Sec. 13. (a) Notwithstanding any other provision of law, an adult care facility shall have an affirmative defense to liability in a civil action for damages, administrative fines or penalties for a COVID-19 claim if such facility: (1) (A) Was caused, by the facility's compliance with a statute or rule and regulation, to reaccept a resident who had been removed from the facility for treatment of COVID-19; or (B) treats a resident who has tested positive for COVID-19 in such facility in compliance with a statute or rule and*

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*regulation; and (2) is acting pursuant to and in substantial compliance with public health directives. (b) As used in this section, "public health directives" means any of the following that is required by law to be followed related to public health and COVID-19: (1) State statutes, rules and regulations or executive orders issued by the governor pursuant to K.S.A. 48-925, and amendments thereto; or (2) federal statutes or regulations from federal agencies, including the United States centers for disease control and prevention and the occupational safety and health administration of the United States department of labor."*

HB 2126 simply adds the more certain claim "of immunity from liability in a civil action for damages, administrative fines or penalties for a COVID-19 claim". The bill then strikes the additional hurdles created by special session HB 2016 and creates a standard that facilities are restricted from asserting an immunity claim if "the act, omission, or decision constituted gross negligence or willful, wanton, or reckless conduct." This is the same safeguard in the healthcare immunity language for other medical providers.

As you know, the COVID-19 pandemic has been a community wide disease and has impacted the lives of our members and our industry in many significant ways. Managing end of life issues has become more difficult on a personal level as we have followed CDC guidelines and limited external contact. Passing this legislation will not unwind the pain the pandemic has left many in communities but it just may help a few more facilities remain open and prevent them from entering state receivership.

Thank you for the opportunity to present these comments, I will stand for any questions at the appropriate time.