

KANSAS TRIAL LAWYERS ASSOCIATION



To: Rep. Fred Patton, Chairman
Members of the House Judiciary Committee

From: Callie Jill Denton, Executive Director

Date: March 18, 2021

Re: SB 283 As Amended Concerning the governmental response to the COVID-19 pandemic in Kansas - Opposed

Thank you for the opportunity to provide testimony on behalf of the Kansas Trial Lawyers Association on SB 283 As Amended.

KTLA's opposition to SB 283 is based on our organization's long-standing policy position that special immunity exceptions do not serve to protect the interests of Kansans. More specifically, legal immunity:

- permits some to be held accountable for negligent conduct while others are not;
- denies injured persons and their families their constitutional right to trial by jury and the right to a remedy;
- conflicts with fundamental notions of right and wrong and the democratic principle that no one is above the law.

KTLA members recognize the COVID-19 pandemic is unprecedented. Despite our position and belief in the courts and juries, in 2020 we worked with stakeholders and policymakers to craft COVID-19 immunity legislation that is (1) narrowly tailored and limited to the COVID-19 emergency; and (2) fair to all parties to a dispute under the circumstances.

A year later, stakeholders and policymakers have more information than they did when the law was enacted during the 2020 Special Session. The flood of claims that was predicted has not happened.¹ In light of new information and with the benefit of a year's experience, it is appropriate for the Legislature to reconsider the necessity of the COVID-19 immunity provisions and to allow our system of courts and juries to function as intended.

¹ The Health Care Stabilization Fund reported that as of October 1, 2020, three (3) Kansas adult care facilities had been named in 25 COVID-19-related lawsuits or claims, including one (1) Wyandotte County facility that had 19 alone. Allegations relate to protective equipment not being used; permitting employees with symptoms of COVID-19 to work without being tested; and not using appropriate techniques to stop the spread of the virus. *Report of the Health Care Stabilization Fund Oversight Committee to the 2021 Kansas Legislature*, 2020 Health Care Stabilization Fund Oversight Committee, Kansas Legislative Research Department, page 0-9.

First, if the Legislature decides not to sunset certain immunity provisions, the provisions must continue to be as narrowly tailored as possible. At a minimum, immunity must be tied to the expiration or termination of the state of disaster emergency and not extend beyond. There is no reason to protect defendants or to limit plaintiffs' rights when the state of disaster emergency ends. COVID-19 immunity should be applied only to those claims that accrue prior to the expiration or termination of the disaster emergency.

Second, SB 283 as introduced makes no changes to the current law's retroactivity provisions. The Senate amended SB 283 to remove retroactivity. We believe the Senate amendment is an important correction to the bill and to current law because 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.

Finally, the Senate added amendments clarifying the Board of Healing Arts' authority relating to telemedicine; out-of-state physicians and other health care professionals; and temporary licenses and emergency licenses. KTLA believes these amendments help clarify BOHA's authority to regulate out-of-state physicians and other providers who may treat Kansans during the COVID-19 emergency and the clarifications will help assure Kansas patients' safety during the emergency.

On behalf of the Kansas Trial Lawyers Association, I respectfully request that the committee continue to work towards a COVID-19 immunity provisions that are as narrowly tailored as possible and balance the economic health of businesses and their employees, Kansas communities, and the state, with the constitutional rights, safety, and protection of all Kansans.

We appreciate the many difficult decisions the Kansas Legislature faces in responding to the COVID-19 emergency. KTLA thanks House Judiciary Committee members for their thoughtful consideration of our testimony on SB 283 As Amended.