Fighting for the Rights of Dependent and Vulnerable Kansas Long-Term Care Residents

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The impact of COVID-19 on nursing home and assisted living residents in Kansas and across the country is devastating. Tragically, fatal outbreaks have been reported at several facilities in Kansas such as Brighton Gardens of Prairie Village, Riverbend Post-Acute Rehabilitation, Life Care Center of Burlington, Diversicare of Haysville, and Clearwater Nursing and Rehabilitation Center.

The storyline for the families is startling. At one Kansas facility, state regulators found that staff were permitted to interact with residents, even though the staff had reported showing hallmark signs and symptoms of COVID-19; that inadequate infection control and prevention measures were in place; and that personal protective equipment was not being used appropriately. Residents and their families understandably insist that these findings epitomize reasonable precautions that should be implemented to avert an outbreak.

The owners and operators of these long-term care facilities offer a different narrative, maintaining that their staff are doing everything possible to prevent the spread of COVID-19 and that their staff are adequately treating the sick residents. The owners and operators argue COVID-19 is a pandemic, a novel virus and that sickness and death are inevitable. The owners and operators accordingly want immunity and do not believe that they should be held accountable in Kansas courts for failing to do their job.

The positions are well defined, the arguments are straight forward, but the remedy until recently has remained curiously unsettled. On June 9, however, Gov. Laura Kelly signed House Bill 2016 into law, putting the obscurity to rest. Her gubernatorial action came after weeks of highly contested debate, numerous draft bills, a veto of House Bill 2054 and a mandated special legislative session. KTLA's committed advocacy for elderly Kansans and their families to spoil the industry charge for immunity included KTLA's immediate past-President David Morantz testifying in front of the Kansas House Judiciary Committee and a devoted effort by KTLA Executive Director, Callie Denton, and the rest of the KTLA leadership and staff.

Markedly, HB 2016 excludes a nursing home and an assisted living facility from the definition of a "healthcare provider." Instead, a nursing home and an assisted living facility, in HB 2016, are incorporated into the definition of an "adult care facility."

> New Sec. 9. (a) "Adult care facility" means a "nursing facility," "assisted living facility" or "residential healthcare facility" as those terms are defined in K.S.A. 39-923, and

amendments thereto. (f) "Healthcare provider" means a person or entity that is licensed, registered, certified, or otherwise authorized by the state of Kansas to provide healthcare services in this state, including a hospice certified to participate in the medicare program under 42 C.F.R. § 418 et seq. "Healthcare provider" does not include any entity licensed under chapter 39 of the Kansas Statutes Annotated, and amendments thereto.

Additionally, HB 2016 defines a "COVID-19 claim" as follows,

> New Sec. 9. (c) "COVID-19 claim" means any claim for damages, losses, indemnification, contribution, or other relief arising out of or based on exposure or potential exposure to COVID-19. "COVID-19 claim" includes a claim made by or on behalf of any person who has been exposed or potentially exposed to COVID-19,or any representative, spouse, parent, child or other relative of such person, for injury, including mental or emotional injury, death or loss to person, risk of disease or other injury, costs of medical monitoring or surveillance, or other losses allegedly caused by the person's exposure or potential exposure to COVID-19.

HB 2016, by not including nursing homes and assisted living facilities in the definition of "healthcare provider," treats nursing homes and assisted living facilities different than it treats doctors and hospitals, as it relates to a "COVID-19 claim."

In so doing, HB 2016 provides Kansas nursing homes and assisted living facilities a statutory affirmative defense to a "COVID-19 claim."

> 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 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.

Meaningfully, HB 2016 does not award immunity to nursing homes and assisted living facilities. Residents that contract COVID-19 in a nursing home or an assisted living facility and family members who lost a loved one from COVID-19 in a nursing home or an assisted living facility continue to have the right to sue the facility in a Kansas court for negligent care and treatment. Consequently, the right to trial by jury, which is the bedrock of American jurisprudence and a fundamental civil liberty, rightly continues to serve as the process by which "COVID-19 claims" are to be decided. To this end, the standard of care, as the evaluative framework within the American civil jury system, is well positioned to address the specific characteristics of a "COVID-19 claim" against a nursing home or an assisted living facility. The standard of care is flexible, adaptable, and accommodating and to its credit, it is entirely dependent on the facts and circumstances of any given case. The standard of care is perfectly structured to capture the particularities of COVID-19, before establishing the minimum level of care that needs to be followed by the nursing home or the assisted living facility, and jurors are equally as able to decide the merits of such a case. Fortunately, and after tireless advocacy by KTLA, HB 2016 attains these tenants and allows frail, dependent, and injured elderly Kansans and their families to maintain their day in court.

HB 2016, while falling short of imparting immunity on a long-term care facility, does offer a long-term care defendant with a different antidote, an affirmative defense for a "COVID-19 claim" that if satisfied bars a plaintiff from recovery, and for this reason HB 2016 does unfortunately impede on the right of elderly Kansans and their families to be heard in court. For a "COVID-19 claim," a defendant that is acting pursuant to and in substantial compliance with the "public health directives" will have a complete defense. Admittedly, the definition of "public health directives" is broad and because of that it is not clear what specific statute, regulation, or rule will fall within the definition. Notwithstanding, the defendant will have the burden of proof to establish this affirmative defense. Additionally, the jury will be charged with considering the weight of the evidence as it pertains to the merits of this affirmative defense. Also, as "substantial compliance" is not defined in HB 2016, it will be the jury that is charged with determining the litmus test for "substantial compliance." It very well may be that survey findings from state and federal regulators are now indisputably admissible to help prove or disprove this affirmative defense. There are questions that remain with this affirmative defense that will be tested and discovered as "COVID-19 claims" are filed and litigated in Kansas courts.

Notably, the affirmative defense is created by HB 2016 does not impact claims against nursing homes and assisted living facilities that cover care and injuries unrelated to COVID-19 or, said differently, are not a "COVID-19 claim." Consequently, a resident or a surviving family member who brings a lawsuit against a nursing home or an assisted living facility for a pressure sore, a fall and fracture, or a medication

error will not be impacted by HB 2016, nor its affirmative defense. Causes of action that do not involve a "COVID-19 claim" will move forward, as always, under the guidance of the established common law standard of care and the traditional defenses.

In addition, HB 2016 declares that the affirmative defense it affords to nursing homes and assisted living facilities for a "COVID-19 claim" shall apply only to causes of action that accrue during a limited time-period.

> New Sec. 15. (b) The provisions of sections 10 and 13, and amendments thereto, shall apply retroactively to any cause of action accruing on or after March 12, 2020, and prior to termination of the state of disaster emergency related to the covid-19 public health emergency declared pursuant to K.S.A. 48-924, and amendments thereto.

Older, vulnerable, and dependent residents in nursing homes and assisted living facilities are far too often forgotten. Unfortunately, it is too easy to look the other way and thereby excuse sub-standard care, supervision, and oversight. Elderly Kansans, however, are deserving of quality care, along with adequate supervision and oversight, and they have earned the right to be kept safe, secure, and protected. The bottom line is nursing homes and assisted living facilities, regardless of COVID-19, still need to do their job. In fact, in light of COVID-19 and the dangers it presents to the older generation, nursing homes and assisted living facilities now more than ever need to have an adequate infection control and prevention program in place to prevent an outbreak. Regrettably, sufficient infection control and prevention is a practice that historically many long-term care institutions have failed to provide to their residents and for that reason it is likely not a coincidence that COVID-19 outbreaks are now occurring at some Kansas long-term care facilities.

HB 2016, while it will likely face appropriate legal and constitutional challenges, and despite the restrictions and uncertainties of its newly crafted affirmative defense, thankfully preserves the time-tested right of elderly Kansans and their families to continue to hold long-term care facilities, many of whom are out-of-state companies, accountable in Kansas courts. It is this accountability that is so important, as it will inevitably cause nursing homes and assisted living facilities to re-think their approach and to do the right thing. It will cause nursing homes and assisted living facilities to fully realize the harmful significance of allowing their vulnerable residents to be exposed to COVID-19 by their infected workers. And it will cause nursing homes and assisted living facilities to have an appropriate infection control and prevention program in place to protect their frail residents from COVID-19. KTLA strongly believes Kansans who reside at nursing homes and assisted living facilities, along with their families, merit a voice and they deserve, without restriction, to maintain their constitutional right to be heard by a jury of their peers.