MURTHA CULLINA
ATTORNEYS AT LAW

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Written testimony of Attorney Heather O. Berchem of Murtha Cullina LLP concerning S.B. No. 1029 (Raised) AN ACT CONCERNING CAUSES OF ACTION AGAINST LICENSED NURSING HOME FACILITIES FOR FAILURE TO MEET STANDARDS OF CARE RELATED TO COVID-19.

Good morning. My name is Heather Berchem. I am a partner and chair of the Long-Term Care Practice Group at the law firm of Murtha Cullina LLP, which serves as counsel to the Connecticut Association of Health Care Facilities and the Connecticut Center for Assisted Living (CAHCF/CCAL). CAHCF/CCAL is a trade organization with a membership of 150 skilled nursing facilities and assisted living communities in Connecticut. Thank you for the opportunity to provide testimony in opposition to **S.B. No. 1029 (Raised) AN ACT CONCERNING CAUSES OF ACTION AGAINST LICENSED NURSING HOME FACILITIES FOR FAILURE TO MEET STANDARDS OF CARE RELATED TO COVID-19**.

The proposed bill would create a statutory right to bring a civil action in State court for any loss, damage, injury or death arising from exposure to or transmission of COVID-19 at a nursing home due to the failure of the nursing home to comply with, or negligence of such nursing home in complying with, any standard of care specified in guidance issued by the Connecticut Department of Public Health (DPH) or the National Centers for Disease Control and Prevention (CDC) applicable at the time.

The bill as written is vague and ambiguous. In addition, it inappropriately attempts to establish agency guidance as the applicable standard of care and give it the force and effect of law. Furthermore, a longstanding and well developed right of action to sue for negligence already exists under the common law, and therefore passage of this bill is unnecessary to protect the rights of individuals to bring claims arising from COVID-19.

The Bill is Ambiguous in Applicability and Scope

The bill is vague and ambiguous both in its applicability and scope. The bill is effective from the date of passage and presumably applies only to losses due to exposure or transmission occurring after the date of passage. However, some may attempt to interpret the bill more broadly as applying retroactively to acts or omissions occurring before the date of passage, as long as the lawsuit is brought after the effective date of

Murtha Cullina LLP
265 Church Street
New Haven, CT 06510
T 203.772.7700
F 203.772.7723

the bill. Any attempt to apply the bill retroactively would inappropriately conflict with Executive Order 7V, which granted health care providers limited immunity from claims relating to COVID-19 prior to March 1, 2021 and would cause unnecessary confusion. We believe any version of this bill must clearly specify that the right to bring an action exists only for losses due to exposure or transmission occurring on or after the date of passage.

Additionally, the bill provides a right to bring a civil action for the failure to comply, or negligence in complying with, "any standard of care specified in guidance" issued by DPH or the CDC. The language of the bill purports to apply only to guidance that the agencies specifically identified as a standard of care, however a plaintiff could attempt to argue that *any* guidance issued by these agencies constitutes a standard of care. For the reasons set forth more fully below, either application would be inappropriate, but this illustration of ambiguity highlights a significant concern with this bill.

Similarly, the language in the proposed bill granting the right to bring a cause of action "notwithstanding any provision of the general statutes" raises additional ambiguity, including the interplay between the proposed bill and existing statutory and procedural requirements for filing professional or ordinary negligence claims, such as the need for a certificate of good faith, and even the statute of limitations to be applied.

Agency Guidance Should Not be Used to Establish the Applicable Standard of Care or be Given the Force and Effect of Law

The right to sue for negligent acts, including those which result in exposure to or transmission of COVID-19, already exists in common law. This bill inappropriately attempts to shift that existing and longstanding right of action to what amounts to a negligence *per se* standard for violations of CDC or DPH guidance.

Negligence *per se* has historically been reserved for violations of clearly defined statutory or regulatory provisions. It is inappropriate and unfair to extend this right of action to agency guidance, which lacks the full force of a clearly defined law enacted after a rigorous statutory or regulatory process. Implicit in the negligence *per se* concept is an assumption that the statute or regulation establishes a clear, minimum standard of care. An ambiguous or contradictory regulatory or statutory standard defeats the certainty on which the rule of *per se* liability rests.

The guidance issued by DPH and the CDC during this pandemic lacks the clarity and certainty that negligence *per se* requires. Indeed, these agencies themselves often referred to their efforts to create and implement guidance during the pandemic as "trying to build the plane while they were flying." The agency guidance was being developed under unprecedented circumstances for application to providers across 50 states, at various stages of outbreak, with varying resident populations, access to PPE, testing supplies and availability of staff. New and revised guidance continues to be issued by

these agencies, changing past recommendations to better respond to COVID-19, about which much is still unknown. This will undoubtedly continue as our understanding of COVID-19, the efficacy and effect of vaccines, and possible variant strains continues to develop.

By its own calculation, the CDC alone published more than 180 guidance documents to advise health care providers regarding COVID-19 in the past year. In total, the CDC issued 5,584 documents providing information and guidance on COVID-19.[1] The DPH similarly issued numerous guidance documents. By definition, and at its best, the agency guidance was frequently presented as recommendations, rather than requirements, often loosely or flexibly worded to address varying circumstances. At worst, the guidance was conflicting or was simply unable to be applied to the real life, and constantly changing, situations occurring in nursing homes across the State and country on a daily, and even hourly, basis.[2] Frequent clarifications and revisions were required to address these issues, which often had to be sought by individual providers directly with the agency or through industry calls with relevant agencies.

The CDC itself has acknowledged issues with COVID-19 guidance issued by the agency. Toward the end of 2020, the CDC director ordered the Principal Deputy Director to conduct a comprehensive review of all existing CDC guidance related to COVID-19. A summary of the results of this review was released on March 10, 2021. In the summary, the CDC identified a number of issues with respect to the agency's COVID-19 guidance, including guidance that was not primarily authored by CDC staff and reliance on language lacking the force of a directive, such as 'consider' or 'if feasible'. The report noted that the CDC did not even have a search function on its website for COVID-19 guidance documents until July 2020. The CDC Principal Deputy Director herself stated in the summary, "[a]s I conducted my review, I found it difficult to a) tell whether a new document represented a major or very minor update to an existing guidance and b) decipher the core recommendations in long documents."[3]

To attribute to such guidance the same degree of clarity, certainty and foresight as a statute or regulation that has undergone multiple levels of scrutiny, revisions, and input from relevant stakeholders or the force and certainty of a standard of care is simply incorrect and improper and likely unconstitutional.

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[1] https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/by-the-numbers.html

[2] As one example, CDC guidance instructed nursing homes to place hand sanitizer in every resident room, a task that was not able to be safely implemented with certain residents with dementia or other diagnoses who would be at risk for ingesting the hand sanitizer.

[3] CDC Summary of Guidance Review, March 10, 2021. https://www.cdc.gov/coronavirus/2019-ncov/downloads/communication/Guidance-Review.pdf

While a plaintiff may, and no doubt will, argue before a court that the failure of a nursing home to comply with particular agency guidance serves as evidence of negligence, this determination should only be made by a judge or jury after full consideration of the facts and circumstances under existing common law principles. For these reasons, we oppose this bill as drafted.

Thank you for your time. I would be happy to answer any questions you may have.

For additional information, you may contact Heather Berchem at hberchem@murthalaw.com or (203) 772-7728.