



KANSAS BAR  
ASSOCIATION

**TO:**           **The Honorable Kellie Warren**  
                  And Members of the Senate Judiciary Committee

**FROM:**       **Joseph Molina**  
                  On Behalf of the Kansas Bar Association

**RE:**           **SB 74 - Providing joint liability for costs and sanctions in third-party funded litigation, requiring certain discovery disclosures and requiring payment of certain costs for nonparty subpoenas.**

**DATE:**       **February 2, 2023**

Madam Chair and Members of the Senate Judiciary Committee:

The KBA appreciates the opportunity to provide this written testimony in **OPPOSITION** to **SB 74-** providing for joint liability for costs and sanctions in third-party funded litigation, requiring certain discovery disclosures and requiring payment of certain costs for nonparty subpoenas.

First, the Kansas Bar Association has a long-standing policy of supporting access to justice and access to the courts. Access to justice commonly refers to an injury consisting of, or resulting from, denial of access to courts, denial of procedural fairness and due process in relation to court proceedings. Requiring a party to disclose third-party agreements may lead to fewer opportunities for meritorious claims to be heard by the court due to a party's inability to fund the action. SB 74 may curtail that access by removing a tool the financially underfunded could use to litigate claims. Third-party agreements have the same incentives as contingency fees and insurance agreements. Just because contingency fees and insurance indemnification are older than third-party agreements and thus better understood within the confines of the legal systems, does not mean that third-party agreements should be singled out for additional legal scrutiny.

Second, SB 74 treats insurance agreements and third-party agreements differently when it comes to disclosure and admissibility. As stated above, third-party agreements and insurance agreements share similar incentives for clients, they quantify risk. However, SB 74 treats these two similar business structures differently to the detriment of the third-party agreement. On page 2, lines 22-27, insurance agreements may be obtained through discovery but information concerning the insurance agreement is not by reason of disclosure admissible as evidence. However, in the very next paragraph, SB 74 **mandates** disclosure of any agreement (including third-party agreements) under which any person has a right to receive compensation. SB 74 makes disclosures of third-party agreements mandatory while allowing insurance agreements the benefit of the civil discovery process.

Further, these agreements are also treated differently as they relate to admissibility in court with insurance agreements being protected while not protecting third party agreements. The bill states, in section 3(A), that "Information concerning the insurance agreement is not by reason of disclosure

admissible in evidence at trial". This language is absent from the new language in section 3(B) which could infer that third party agreements are intended to be admissible into evidence at trial and not protected like insurance agreements. This could have a prejudicial effect on the court or jury when evaluating the case.

SB 74 is overly broad because it does not define what types of agreements are subject to mandatory disclosure, nor does it define which types of entities have a right to receive compensation from the civil action. Again, on page 2, lines 32-35 it states that:

*"... provide to the other parties **any agreement under which any person**, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment or otherwise".*

This specific section would require amendment so that a person would know they are required to disclose their agreement. Further, is the intent of SB 74 to require disclosure of all Medicaid, Medicare and ERISA agreements that impact a civil case.

It is for these reasons the KBA opposes **SB 74** - providing for joint liability for costs and sanctions in third-party funded litigation, requiring certain discovery disclosures and requiring payment of certain costs for nonparty subpoenas.

Thank you for your time and attention. I am happy to stand for questions when appropriate.

***About the Kansas Bar Association:***

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals. Its more than 5,500 members include lawyers, judges, law students, paralegal students and paralegals. [www.ksbar.org](http://www.ksbar.org)