KANSAS TRIAL LAWYERS ASSOCIATION

To:	Senator Kellie Warren, Chair Members of the Senate Judiciary Committee
From:	Rex A. Sharp, Sharp Law LLP, Prairie Village
Date:	February 2, 2023
RE:	**SB 74 Litigation Financing in civil actions (OPPOSED)**

I urge the committee to oppose SB 74 because litigation funding is not now a problem in Kansas, nor does it pose a future threat. Perhaps it is an East or West Coast problem, but it is irrelevant in Kansas. In my 35 years of practicing law in Kansas, I have never seen or heard of litigation funding being used by a Kansas law firm.

I know it happens in big cases, but not in the way most people think. Instead, the most prevalent use today is by Fortune 200 companies suing other Fortune 200 companies, often in intellectual property litigation that can cost millions of dollars. It is not their core business to litigate, so they have someone else fund it and keep their own capital for their own business operations.

For instance, Sanofi hired Weil Gotshal (offices all over the world) to litigate an antitrust case against Mylan over pushing Sanofi's generic EpiPen out of the market via kickbacks to pharmacy benefit managers (PBMs). Complex and complicated, damages were over $1 Billion, done in Federal Court in the District of Kansas. Sanofi lost in both district court and on appeal to the 10th Circuit and is now headed to the United States Supreme Court. But SB 74 would not have affected the Sanofi case or federal court practice at all. Smaller cases handled in state court simply don't warrant litigation funding.

Now, the problems with the proposed SB 74.

1. **No definition of third-party funder**, so everything in New Section 1 gets swept in, including family members helping fund a case, a bank loan sourced from recovery on a case, a revolving line of credit with a lien on a case filed, or even health care companies (including hospitals) with liens on the case proceeds if there is a recovery. All these people, and more, or then jointly responsible for costs and monetary sanctions in the case. Again, frankly, sanctions are so rare in Kansas state court, that this seems to be a solution in search of a problem, but nonetheless is not carefully written.

2. **Automatic disclosure.** No other type of agreement must be disclosed without a request for production and the right to object, and with good reason. First, it may be irrelevant. Why does it matter if a rich uncle, a bank, or a litigation funder is financing one side? Second, automatic disclosure may reveal work product privilege material. For instance, most litigation funders are old attorneys who vet cases carefully before investing in them—pointing out the good and bad in liability and damages -- after a detailed showing from the plaintiff or defense attorney. No party has the right to the other side's analysis of the case.

3. **Non-party subpoenas.** Treating subpoena costs differently based on who or what funds a particular party is not an equal application of the law. A subpoena is a search for the truth-bearing on the litigation and should not be made more expensive just because one party has third-party funding any more than a big company should have to pay more because it is a big company.

The bottom line is that this is not a problem in Kansas and trying to fix something that does not exist will complicate litigation and run up costs. SB 74 has not been well thought out, at least not for Kansas. I urge the committee to reject SB 74.