KANSAS SENATE JUDICIARY COMMITTEE
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SHOOK, HARDY & BACON L.L.P.
ON BEHALF OF THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM
SENATE BILL 152 PROPONENT TESTIMONY

Thank you for the opportunity to testify in support of S.B. 252, asbestos lawsuit disclosure legislation, on behalf of the U.S. Chamber Institute for Legal Reform ("ILR"), a division of the U.S. Chamber of Commerce. The U.S. Chamber is the world's largest business organization representing companies of all sizes across every sector of the economy. Many Kansas businesses are members of the U.S. Chamber.

As part of its core mission, ILR has been studying the effects of third-party litigation funding ("TPLF") TPLF for more than a decade. The ILR has sponsored a number of nonpartisan symposia and conferences, as well as the publication of articles on the effects of TPLF in the United States. ILR also has engaged in public advocacy with multiple state legislatures, the U.S. Congress and federal and state courts. In short: TPLF is very much on ILR's mind, and I welcome and am grateful for the opportunity to testify about TPLF, the dangers it poses to Kansas's civil justice system, and why S.B. 152 is necessary to mitigate those problems.

TPLF

Investor groups are pouring unprecedented sums of money into financing litigation in the United States. In recent years, well-heeled investors such as pension funds and university endowments have collectively pumped billions of dollars into the sector.

Third-party litigation funders front money to plaintiffs' law firms in exchange for an agreed-upon cut of any settlement or money judgment. Investors are attracted by the prospect of hefty returns that are not tied to economic or market conditions.

Commercial litigation funding began in Australia, made its way to the UK and Europe, and arrived in the U.S. about a decade ago. The practice has taken off in recent years with the loosening of longstanding common law doctrines on maintenance, champerty and barratry that prohibited the outside financing of litigation. This troubling trend is reflected in the record profits generated by leading funders in recent years.

Along with the growth of TPLF in general, there is a trend for larger investment firms to move away from financing individual cases in favor of investments in pools of cases.

Litigation funders view lawsuits as assets, just like any other receivables. One of TPLF industry's largest companies, Burford Capital LLC, explained in an Annual Report: "It may seem strange to think of litigation in that way, but if one strips away the drama and the collateral dynamics associated with the litigation process, a litigation claim is nothing more than an effort to get money to change hands." Burford is a publicly traded global finance firm focused on litigation funding.

Proponents of TPLF claim that the practice evens the playing field between large, well-financed litigants who are quite used to fighting in court, and individuals or small to mid-sized companies, who are often inexperienced at fighting legal battles and may find themselves easily outgunned.

On the other hand, the ILR and other business and civil justice organizations believe that TPLF leads to the filing of speculative, potentially high-yield lawsuits, because litigation funders absorb some of the risk in litigation and can spread it across a portfolio of cases and among investors.

Additionally, a funder's presence can unreasonably prolong cases and frustrate settlements. The presence of a third-party litigation funder can change what is essentially a two-party negotiation into a multi-party settlement with a "behind the table" constituent.

TPLF practices also raise serious ethical issues, such as a threat to a lawyer's ability to exercise independent judgment in cases where the funder has authority to make litigation or settlement decisions.

Presently, in most states, TPLF arrangements generally do need not be disclosed during litigation—and therefore largely remain hidden from public scrutiny. Further, unlike other financial products, TPLF is largely unregulated. The practice operates with little to no transparency, making it difficult for judges and parties to know who has an interest in the outcome of the litigation.

The ILR believes that courts should know if their efforts to settle cases may be complicated by an entity that is not in the room.

Courts also might be more open to defendant requests for cost-shifting in cases involving burdensome discovery if they are aware that there is not a wide disparity in each side's ability to pay. A multi-million dollar hedge fund that is making a business decision to invest in a case for profit should not be entitled to the same producer-pays free ride as an impecunious citizen.

Where sanctions are appropriate for misconduct, courts need to know about the presence of a third-party in the litigation to determine how to impose sanctions or other costs.

Further, disclosure of funders can help courts police litigation that is filed or prolonged for improper purposes. A few high-profile cases have highlighted the potential for undisclosed third-party funders to sponsor litigation for ulterior purposes such as personal revenge or improper business tactics.

S.B. 152

S.B. 152 would shine much needed light on TPLF. The bill requires disclosure of a litigation financing agreement in which a third party not before the court fronts funds to a party in exchange for obtaining a contractual right to a portion of any litigation proceeds. To discourage frivolous claims, the bill will hold TPLF funders and plaintiffs jointly liable for costs and sanctions.

The bill promotes transparency in light of the proliferation of third-party litigation funding agreements that may conceal the true nature of the interests underlying a litigation and may enable a third party to exert influence on a party or that party's attorney. Because such an agreement carries a potential to significantly impact the just, speedy, and inexpensive determination of an action, disclosure should be required.

In 2018, Wisconsin became the first state to require a party's initial disclosure of any third party litigation financing agreement. *See* Wis. Code § 804.01(2)(bg). In 2019, West Virginia adopted a similar disclosure requirement for consumer lending lawsuits. *See* W. Va. Code Ann. § 46A-6N-6.

Adoption of S.B. 152 puts Kansas in the legal mainstream and is consistent with the clear trend toward transparency. *See* U.S. Chamber Inst. for Legal Reform, Selling More Lawsuits Buying More Trouble (2020); David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Ctr. for L. & Pub. Pol'y, Third Party Litigation Funding Working Group, at 31-32 (2018).

For these reasons, the ILR supports enactment of S.B. 152.