

Testimony to the Senate Judiciary Committee Regarding SB74  
February 2, 2023

Chair Warren and Committee Members:

Good morning, my name is Gary Barnett and I am the Executive Director and General Counsel of the International Legal Finance Association (“ILFA”). I would like to thank the members of this committee for allowing me to provide remarks on this bill.

ILFA represents the commercial legal finance industry, which is entirely separate and distinct from consumer litigation funding. Commercial legal finance refers to the provision of capital to law firms and businesses represented by sophisticated counsel, typically in the form of multimillion dollar nonrecourse investments. ILFA’s members are commercial legal finance providers who provide such capital to law firms and businesses of all sizes, helping them mitigate risk and allowing them to maintain the necessary capital to invest in their growth—driving economic development and job creation in their local communities. Many of the other concerns we have heard from pro-regulation interests in support of this proposal not only do not apply to commercial legal finance but seem to be nothing more than a parade of hypothetical horrors.

We believe that the legislation under consideration is unprecedented and would establish overbroad regulation that will adversely affect Kansas businesses and law firms by restricting their access to this type of capital, which is a market-based solution to a business need of companies engaged in litigation domestically and abroad. If this bill is passed, Kansas would become the first state in the nation to enact a law that includes both a cost-shifting mechanism in matters involving financing as well as forced disclosure of all legal finance agreements.

The vast majority of courts and legislatures have rejected similar proposals to force disclosure of financing in commercial matters, declining to add unnecessary rules or regulation and implicitly recognizing the potential adverse effect of such regulation on business and the legal industry. Such effects include slowing and increasing the cost of litigation and exposing privileged and proprietary business information. Anyone who has witnessed high-stakes commercial litigation knows that demands for disclosure of irrelevant information are a common mechanism of delay. There is no doubt that forced disclosure would make the problem worse.

Regardless, in a free market economy, parties are at liberty to contract and should be free to do so without being forced to disclose their confidential financial arrangements—particularly to an adversary in litigation. There is no basis for one litigant to have disclosure about the confidential financial arrangements of another; courts do not inquire into all the various business relationships that litigants have because they are rightly considered irrelevant. Commercial legal finance is another such private financial transaction. No one is calling for banks to disclose their security interests over fee receivables in law firms. But those arrangements are just as much

“litigation finance” as what specialist finance firms do, and they happen in significantly greater volume.

It is also important to note that ILFA’s members are passive outside investors, meaning, they have no control over the matters in which they invest and do not constrain or interfere with a counterparty’s ability to resolve an underlying matter. Just as a leasing company does not tell you how to drive your car, a commercial legal finance provider does not influence the matter for which they provide capital. Furthermore, the investments are nonrecourse, meaning that the provider’s return is dependent on a successful outcome. There is no debt obligation and therefore clients who use legal finance do not have ongoing principal or interest payments.

In closing, ILFA does not have a blanket objection to tort reform—we are not in the tort business. However, the proposal under consideration today is *not* tort reform. It is an overbroad regulation on business that will prevent Kansas businesses and law firms from obtaining a mainstream financing tool if, and when, they determine it is advantageous to them from a business perspective.

Thank you again for the time and for allowing me to participate today. Please consider me, and ILFA, as a resource, if you have any further questions as you continue to discuss this legislation.