

Testimony to the House Judiciary Committee in Opposition to HB2510
January 31, 2024

Chair Humphries and Committee Members, 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 regarding our opposition to this bill.

ILFA represents the commercial legal finance industry, which is entirely separate and distinct from consumer litigation funding. Unlike consumer funding, the commercial legal finance industry focuses on providing non-recourse capital to businesses and law firms related to high-value business-related disputes, such as breach of contract, antitrust, intellectual property and international arbitration. These transactions are typically in the tens of millions of dollars.

Furthermore, these are passive outside investments, meaning that funders do not control the matters in which they invest, including questions of strategy and settlement.

In many instances, commercial legal finance gives smaller companies the resources to pursue meritorious claims. Many funded commercial matters are “David vs. Goliath” in nature, in which a smaller company is engaged in litigation against a larger well-resourced company. Without access to this financing, many meritorious claims would not go forward. One need only look to Underwood Ranches and Colibri Heart Valve to see this in practice.

Craig Underwood runs a family-owned farm that grew jalapenos. His farm was the sole supplier for one of largest Sriracha manufacturers, Huy Fong Foods. When Huy Fong terminated their contract with Underwood Farms, causing him to lose 80 percent of his revenue, lay off 50 percent of his workforce, and suffer millions of dollars in damages, it was the legal finance industry that stepped in to help. It provided him with the vital resources he needed to win the contract dispute and keep their farm in business. Craig Underwood has specifically said, “the funding was a lifesaver for my family’s business.”

Colibri Heart Valve, a small medical device company with less than a dozen employees, was founded by the inventors of an artificial heart valve that fits within a thin, flexible tube which is inserted in a small incision and released in a controlled method into the artery – a far less invasive procedure than open heart surgery. Colibri brought, and won, a lawsuit against Medtronic CoreValve, a large medical device company, for violating one of their patents. According to Calibri, without the help of legal finance, it was going to be a question of asserting their patent or continuing to bring their lifesaving product to market. Legal finance allowed them to do both.

This is the right and just result, which would not have been possible without access to legal finance. Commercial legal finance is beneficial to businesses. From startups to Fortune 100 companies. It allows them to keep capital in their businesses, allowing them to grow and innovate.

We appreciate the changes made by the bill sponsor to the previous version of this legislation. The new version attempts to treat insurance agreements and legal finance agreements in the same way. However, there are fundamental differences between insurance agreements and legal finance agreements. Commercial finance contracts are highly case-specific, heavily negotiated, and involve an in-depth due diligence process. The result is an agreement that often includes sensitive and privileged information as well as a budgetary roadmap for the litigation.

It's important to note that this is the client's information – the sensitive and privileged information of Craig Underwood and Colibri Heart Valve. Increasing the risk that this information will be turned over to the opposing party in litigation significantly disincentivizes future Craig Underwoods and Colibri Heart Valves from using legal finance. Courts consistently hold that the details of legal finance agreements are protected by work-product, as well as other legal protections, and should not be turned over to opposing parties in litigation.

In addition, unlike insurance agreements, in the vast majority of cases, the funding agreement is not relevant to the underlying merits. Here as well, courts consistently find that legal finance agreements are not relevant to pending cases. And when they are relevant, courts already have the ability to disclose some, or all, of the agreement, depending on the facts of a particular case.

All we are requesting is to ensure the proposed provision related to legal finance agreements in HB2510 doesn't prevent parties who have decided it necessary or in their best interest to use of legal finance from being able to assert privilege, when applicable, or relevancy, when appropriate. The language we have asked to be included is simply clarifying that the protections already in the Kansas code still apply to this provision. Specifically, adding “**Subject to the limitations of [sections] (b)(1), (b)(2), and (b)(4).**” We do not believe this bill should advance. However, should it advance at all, we respectfully ask this amendment be adopted by the committee.

Commercial legal finance enables parties with meritorious claims to access our justice system, which in turn ensures courts will hear the best legal arguments and arrive at the right legal conclusions. The result is a fairer and more just legal system.

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.