CONFERENCE COMMITTEE REPORT

MR. SPEAKER and MR. PRESIDENT: Your committee on conference on Senate amendments to **HB 2070** submits the following report:

The House accedes to all Senate amendments to the bill, and your committee on conference further agrees to amend the bill as printed as Senate Substitute for House Bill No. 2070, as follows:

On page 1, by striking all in lines 15 through 36;

By striking all on pages 2 through 22;

On page 23, by striking all in lines 1 through 36; following line 36, by inserting:

"Section 1. K.S.A. 2023 Supp. 60-226 is hereby amended to read as follows: 60-226. (a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions on oral examination or written questions; written interrogatories; production of documents or things or permission to enter onto land or other property under K.S.A. 60-234, ~~K.S.A.~~ 60-245(a)(1)(A)(iii) or ~~K.S.A.~~ 60-245a, and amendments thereto; physical and mental examinations; and requests for admission.

(b) *Discovery scope and limits.* (1) *Scope in general.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on frequency and extent.* (A) On motion, or on its own, the court may

limit the frequency or extent of discovery methods otherwise allowed by the rules of civil procedure and must do so if it determines that:

(i) The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by subsection (b)(1).

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of subsection (b)(2)(A). The court may specify conditions for the discovery.

(3) *Agreements.* (A) *Insurance agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which an insurance business may be liable to satisfy part or all of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance is not a part of an insurance agreement.

(B) (i) *Third-party agreements.* A party may obtain discovery of the existence and content of any third-party agreement.

(ii) *Limitations on discovery of third-party agreements.* (a) On motion, a court shall prohibit any inquiry into the existence or nonexistence of a third-party agreement on finding, by

a preponderance of the evidence, that such inquiry may cause undue prejudice to the party objecting to such inquiry. When making such finding, the court shall consider the political, ideological or social nature of the case, the likely balance of litigation resources between the parties, whether such inquiry would be proportional to the needs of the case and any other relevant information presented by the parties.

(b) Information concerning the third-party agreement is not by reason of disclosure admissible in evidence at trial.

(c) Subsection (b)(3)(B) shall not be construed to require a nonprofit corporation or association to disclose its members or donors or to require disclosure of otherwise privileged information.

(d) Unless the court finds that a third-party agreement would be admissible under the rules of evidence and necessary to prove an element of a claim in the case, disclosure of the existence or content of such agreement shall not be required in any action brought:

(1) By or on behalf of the state or any political subdivison of the state enforcing a law or seeking to protect against an imminent threat to health or public safety; or

(2) solely in the public interest or on behalf of the general public if:

(A) The plaintiff does not seek any relief that is different from the relief sought for the general public or a class of which the plaintiff is a member unless such relief is a claim for attorney fees, costs or penalties;

(B) the action, if successful, would enforce an important right affecting the public interest and would confer a significant pecuniary or nonpecuniary benefit on the general public or a large class of persons; and

(C) private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

(e) When requested by the disclosing party, the court shall issue an order to protect discovery of a third-party agreement from disclosure other than to the parties, the parties' counsel, experts and others necessary to the legal claim.

(iii) The provisions of this subparagraph shall expire on July 1, 2029.

(C) *Reporting of third-party agreements.* (i) On and after July 1, 2024, any third-party agreement under which a person has a contractual right to receive, directly or indirectly, compensation that is contingent in any respect on the outcome of the claim shall be reported to the judicial council within 45 days after the commencement of an action in any Kansas court in which such a third-party agreement exists or within 45 days after such third-party agreement is entered into, whichever is later. The judicial council shall provide the person who reported such agreement documentation showing that such report was made. Any third-party agreement that is not reported pursuant to this subparagraph is void and unenforceable unless such agreement relates to an action described in subsection (b)(3)(B)(ii)(d).

(ii) The clerk of the supreme court shall prescribe a form for use under this subparagraph. Such form shall include a method of reporting whether the third-party agreement is a third-party agreement with a foreign person and any other information the clerk determines is necessary for the judicial council to complete the study required by subsection (b)(3)(D).

(iii) Reports received pursuant to this subparagraph shall be confidential and shall not be subject to the provisions of the open records act, K.S.A. 45-215 et seq., and amendments thereto. The provisions of this clause shall expire on July 1, 2029, unless the legislature reviews and reenacts this provision pursuant to K.S.A. 45-229, and amendments thereto.

(iv) The provisions of this subparagraph shall expire on July 1, 2029.

(D) (i) On or before July 1, 2027, the judicial council shall establish a committee to study the issue of third-party agreements. Such committee shall review all reports submitted

pursuant to subsection (b)(3)(C) and any other information related to such agreements the committee deems necessary. Between September 1, 2028, and December 1, 2028, the judicial council shall report to the chief justice of the supreme court, attorney general, house standing committee on judiciary and senate standing committee on judiciary on the topic of third-party agreements in Kansas and in other states and make recommendations on the use of such third-party agreements in Kansas.

(ii) The provisions of this subparagraph shall expire on July 1, 2029.

(4) *Trial preparation; materials.* (A) *Documents and tangible things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, including the other party's attorney, consultant, surety, indemnitor, insurer or agent. But, subject to subsection (b)(5), those materials may be discovered if:

(i) They are otherwise discoverable under ~~paragraph (1)~~ subsection (b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection against disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and K.S.A. 60-237, and amendments thereto, applies to the award of expenses. A previous statement is either:

(i) A written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical or other recording, or a

transcription of it, that recites substantially verbatim the person's oral statement.

(5) *Trial preparation; experts.* (A) *Deposition of an expert who may testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a disclosure is required under subsection (b)(6), the deposition may be conducted only after the disclosure is provided.

(B) *Trial-preparation protection for draft disclosures.* Subsections (b)(4)(A) and (b)(4)(B) protect drafts of any disclosure required under subsection (b)(6), and drafts of a disclosure by an expert witness provided in lieu of the disclosure required by subsection (b)(6), regardless of the form in which the draft is recorded.

(C) *Trial-preparation protection for communications between a party's attorney and expert witnesses.* Subsections (b)(4)(A) and (b)(4)(B) protect communications between the party's attorney and any witness about whom disclosure is required under subsection (b)(6), regardless of the form of the communications, except to the extent that the communications:

(i) Relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert employed only for trial preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) As provided in K.S.A. 60-235(b), and amendments thereto; or

(ii) on showing exceptional circumstances under which it is impracticable for the party

to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) Pay the expert a reasonable fee for time spent in responding to discovery under subsection (b)(5)(A) or (b)(5)(D); and

(ii) for discovery under subsection (b)(5)(D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(6) *Disclosure of expert testimony.* (A) *Required disclosures.* A party must disclose to other parties the identity of any witness it may use at trial to present expert testimony. The disclosure must state:

(i) The subject matter on which the expert is expected to testify; and

(ii) the substance of the facts and opinions to which the expert is expected to testify.

(B) *Witness who is retained or specially employed.* Unless otherwise stipulated or ordered by the court, if the witness is retained or specially employed to provide expert testimony in the case, or is one whose duties as the party's employee regularly involve giving expert testimony, the disclosure under subsection (b)(6)(A) must also state a summary of the grounds for each opinion.

(C) *Time to disclose expert testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or court order, the disclosures must be made:

(i) At least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under subsection (b)(6)(B), within 30 days after the other party's disclosure.

(D) *Supplementing the disclosure.* The parties must supplement these disclosures when required under subsection (e).

(E) *Form of disclosures.* Unless otherwise ordered by the court, all disclosures under this subsection must be:

(i) In writing, signed and served; and

(ii) filed with the court in accordance with K.S.A. 60-205(d), and amendments thereto.

(7) *Claiming privilege or protecting trial preparation materials.* (A) *Information withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must:

(i) Expressly make the claim; and

(ii) describe the nature of the documents, communications or things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) *Protective orders.* (1) *In general.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending, as an alternative on matters relating to a deposition, in the district court where the deposition will be taken. The

motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action and must describe the steps taken by all attorneys or unrepresented parties to resolve the issues in dispute. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:

(A) Forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court orders.

(2) *Ordering discovery.* If a motion for a protective order is wholly or partly denied the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding expenses.* The provisions of K.S.A. 60-237, and amendments thereto, apply to the award of expenses.

(d) *Sequence of discovery.* Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(1) Methods of discovery may be used in any sequence; and

(2) discovery by one party does not require any other party to delay its discovery.

(e) *Supplementing disclosures and responses.* (1) *In general.* A party who has made a disclosure under subsection (b)(6), or who has responded to an interrogatory, request for production or request for admission, must supplement or correct its disclosure or response:

(A) In a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert witness.* For an expert to whom the disclosure requirement in subsection (b)(6) applies, the party's duty to supplement extends both to information included in the disclosure and to information given during the expert's deposition. Any additions or changes to this information must be disclosed at least 30 days before trial, unless the court orders otherwise.

(f) *Signing disclosures and discovery requests, responses and objections.* (1) *Signature required; effect of signature.* Every disclosure under subsection (b)(6) and every discovery request, response or objection must be signed by at least one attorney of record in the attorney's own name, or by the party personally, if unrepresented, and must state the signor's address, e-mail address and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information and belief formed after a reasonable inquiry:

(A) With respect to a disclosure, it is complete and correct as of the time it is made;

(B) with respect to a discovery request, response or objection, it is:

(i) Consistent with the rules of civil procedure and warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive considering the needs of the case, prior discovery in the case, the amount in controversy and the importance of the issues at stake in the action.

(2) *Failure to sign.* Other parties have no duty to act on an unsigned disclosure, request, response or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for improper certification.* If a certification violates this section without substantial justification, the court, on motion, or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including ~~attorney's~~ attorney fees, caused by the violation.

(g) As used in this section:

(1) "Foreign person" means:

(A) An individual that is not a citizen of the United States or an alien lawfully admitted for permanent residence in the United States;

(B) an unincorporated association when a majority of the members are not citizens of the United States or aliens lawfully admitted for permanent residence in the United States;

(C) a corporation that is not incorporated in the United States;

(D) a government, political subdivision or political party of a country other than the United States;

(E) an entity that is organized under the laws of a country other than the United States;

(F) an entity that has a principal place of business in a country other than the United

States and that has shares or other ownership interest held by the government or a government official of a country other than the United States; or

(G) an organization in which any person or entity described in subsections (g)(1)(A) through (g)(1)(F) holds a controlling or majority interest or in which the holdings of any such persons or entities, considered together, would constitute a controlling or majority interest.

(2) "Reasonable interest" means a total interest not greater than 11.1% of the principal.

(3) "Third-party agreement" means any agreement under which any person, other than a party, an attorney representing the party, such attorney's firm or a member of the family or household of a party has agreed to pay expenses directly related to prosecuting the legal claim and has a contractual right to receive compensation that is contingent in any respect on the outcome of the claim. "Third-party agreement" does not include an agreement that does not afford the nonparty agreeing to pay legal expenses any profit from the legal claim beyond repayment of the amount such nonparty has contractually agreed to provide plus reasonable interest.

(h) The provisions of subsections (b)(3)(B), (b)(3)(C) and (b)(3)(D) are severable. If any portion of such subsections is held by a court to be unconstitutional or invalid, or the application of any portion of such subsections to any person or circumstance is held by a court to be unconstitutional or invalid, the invalidity shall not affect the other portions of such subsections that can be given effect without the invalid portion or application, and the applicability of such other portions of such subsections to any person or circumstance remains valid and enforceable.";

Also on page 23, in line 37, by striking "38-2270 and 38-2273 are" and inserting "2023 Supp. 60-226 is"; by striking all in lines 38 through 40; in line 42, by striking "Kansas register" and inserting "statute book";

And by renumbering sections accordingly;

On page 1, in the title, in line 1, by striking all after "concerning"; by striking all in lines 2 through 9; in line 10, by striking "retroactivity" and inserting "the code of civil procedure; relating to litigation funding by third parties; limiting discovery and disclosure of third-party agreements in certain circumstances; requiring reporting of such agreements to the judicial council and a judicial council committee to study third-party agreements; requiring the clerk of the supreme court to develop a form for reports; exempting such reports from the open records act"; also in line 10, by striking all after "K.S.A."; in line 11, by striking all before the fourth "and" and inserting "2023 Supp. 60-226"; in line 12, by striking "sections" and inserting "section";

And your committee on conference recommends the adoption of this report.

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Conferees on part of Senate

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Conferees on part of House