

SENATE CHAMBER

STATE OF OKLAHOMA

DISPOSITION

FLOOR AMENDMENT

No. 1

COMMITTEE AMENDMENT

(Date)

I move to amend House Bill No. 2391 by substituting the attached floor substitute (Request # 2169) for the title, enacting clause and entire body of the measure.

Submitted by:

Brent Howard
Senator Howard

I hereby grant permission for the floor substitute to be adopted.

Brent Howard
Senator Howard, Chair (required)

B. Gollihare
Senator Gollihare

Mary B Boren
Senator Boren

Senator Brooks

Senator Bullard

Senator Daniels

Senator Treat, President Pro Tempore

Senator Floyd
Chad Hall
Senator Hall

Senator Jech

Senator Standridge
Senator Standridge

Jack Stewart
Senator Stewart

R. Danell Weaver
Senator Weaver

Senator McCortney, Majority Floor Leader

Note: Judiciary Committee majority requires seven (7) members' signatures.

Howard-TEK-FS-HB2391
4/26/2023 1:33 PM

(Floor Amendments Only)

Date and Time Filed: 4.26.23 3:23 pm jd

Untimely

Amendment Cycle Extended

Secondary Amendment

1 STATE OF OKLAHOMA

2 1st Session of the 59th Legislature (2023)

3 FLOOR SUBSTITUTE
4 FOR ENGROSSED

5 HOUSE BILL NO. 2391

By: Culver of the House

and

Howard of the Senate

7
8
9 FLOOR SUBSTITUTE

10 [civil procedure - discovery - consumer litigation
11 funding agreements - codification - effective date]

12
13 ~~BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:~~

14 SECTION 1. AMENDATORY 12 O.S. 2021, Section 3226, is
15 amended to read as follows:

16 Section 3226. A. DISCOVERY METHODS; INITIAL DISCLOSURES.

17 1. DISCOVERY METHODS. Parties may obtain discovery regarding
18 any matter that is relevant to any party's claim or defense by one
19 or more of the following methods: Depositions upon oral examination
20 or written questions; written interrogatories; production of
21 documents or things or permission to enter upon land or other
22 property, for inspection and other purposes; physical and mental
23 examinations; requests for admission; authorizations for release of
24 records; and otherwise by court order upon showing of good cause.

1 Except as provided in this section or unless the court orders
2 otherwise under this section, the frequency of use of these methods
3 is not limited.

4 2. INITIAL DISCLOSURES.

5 a. Except in categories of proceedings specified in
6 subparagraph b of this paragraph, or to the extent
7 otherwise stipulated or directed by order, a party,
8 without awaiting a discovery request, shall provide to
9 other parties a computation of any category of damages
10 claimed by the disclosing party, making available for
11 inspection and copying the documents or other
12 evidentiary material, not privileged or protected from
13 disclosure, on which such computation is based,
14 including materials bearing on the nature and extent
15 of injuries suffered. Subject to subsection B of this
16 section, in any action in which physical or mental
17 injury is claimed, the party making the claim shall
18 provide to the other parties a release or
19 authorization allowing the parties to obtain relevant
20 medical records and bills, and, when relevant, a
21 release or authorization for employment and scholastic
22 records.

1 b. The following categories of proceedings are exempt
2 from initial disclosure under subparagraph a of this
3 paragraph:

- 4 (1) an action for review of an administrative record,
- 5 (2) a petition for habeas corpus or other proceeding
6 to challenge a criminal conviction or sentence,
- 7 (3) an action brought without counsel by a person in
8 custody of the United States, a state, or a state
9 subdivision,
- 10 (4) an action to enforce or quash an administrative
11 summons or subpoena,
- 12 (5) an action by the United States to recover benefit
13 payments,
- 14 (6) an action by the United States to collect on a
15 student loan guaranteed by the United States,
- 16 (7) a proceeding ancillary to proceedings in other
17 courts, and
- 18 (8) an action to enforce an arbitration award.

19 c. Disclosures required under this paragraph shall be
20 made at or within sixty (60) days after service unless
21 a different time is set by stipulation or court order,
22 or unless a party objects that initial disclosures are
23 not appropriate in the circumstances of the action and
24 states the objection in a motion filed with the court.

1 In ruling on the objection, the court shall determine
2 what disclosures, if any, are to be made and set the
3 time for disclosure. A party shall make its initial
4 disclosures based on the information then readily
5 available to it and is not excused from making its
6 disclosures because it has not fully completed its
7 investigation of the case or because it challenges the
8 sufficiency of another party's disclosures or because
9 another party has not made its disclosures.

10 B. DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by
11 order of the court in accordance with the Oklahoma Discovery Code,
12 the scope of discovery is as follows:

13 1. IN GENERAL.

14 a. Parties may obtain discovery regarding any matter, not
15 privileged, which is relevant to any party's claim or
16 defense, reasonably calculated to lead to the
17 discovery of admissible evidence and proportional to
18 the needs of the case, considering the importance of
19 the issues at stake in the action, the amount in
20 controversy, the parties' relative access to relevant
21 information, the parties' resources, the importance of
22 the discovery in resolving the issues, and whether the
23 burden or expense of the proposed discovery outweighs
24 its likely benefit. Information within this scope of

1 discovery need not be admissible in evidence to be
2 discoverable.

3 b. A party shall produce upon request pursuant to Section
4 3234 of this title, any insurance agreement under
5 which any person carrying on an insurance business may
6 be liable to satisfy part or all of a judgment which
7 may be entered in the action or to indemnify or
8 reimburse for payments made to satisfy the judgment.
9 Information concerning the insurance agreement is not
10 by reason of disclosure admissible in evidence at
11 trial. For purposes of this section, an application
12 for insurance shall not be treated as a part of an
13 insurance agreement.

14 c. A party shall produce upon request pursuant to Section
15 3234 of this title, any commercial litigation funding
16 agreement as defined in Section 2 of this act.
17 Information related to the commercial litigation
18 funding agreement is not by reason of disclosure
19 admissible as evidence at trial. Production of a
20 commercial litigation funding agreement shall include
21 a certification by sworn affidavit by the producing
22 party as to whether any funds encumbered by the terms
23 of the agreement have been or will be sourced from a
24 foreign state or agency or instrumentality of a

1 foreign state as defined in 28 U.S.C. Section 1603 or
2 22 U.S.C. Section 611, as amended. Certification that
3 discloses that a foreign state or agency or
4 instrumentality of a foreign state is such a source
5 shall include the identity of the foreign state,
6 agency, or instrumentality that is the source of the
7 funds. Such certification shall be supplemented or
8 corrected by the producing party within thirty (30)
9 days in the event the certification becomes incomplete
10 or inaccurate in a material respect. A consumer
11 litigation funding agreement as defined in Section 3-
12 801 of Title 14A of the Oklahoma Statutes shall be
13 exempt from the provisions of this subparagraph.

14 2. LIMITATIONS ON FREQUENCY AND EXTENT.

- 15 a. By order, the court may alter the limits on the length
16 of depositions under Section 3230 of this title, on
17 the number of interrogatories under Section 3233 of
18 this title, on the number of requests to produce under
19 Section 3234 of this title, or on the number of
20 requests for admission under Section 3236 of this
21 title.
- 22 b. A party is not required to provide discovery of
23 electronically stored information from sources that
24 the party identifies as not reasonably accessible

1 because of undue burden or cost. On motion to compel
2 discovery or for a protective order, the party from
3 whom discovery is sought must show that the
4 information is not reasonably accessible because of
5 undue burden or cost. If that showing is made, the
6 court may order discovery from such sources if the
7 requesting party shows good cause, considering the
8 limitations of subparagraph c of this paragraph. The
9 court may specify conditions for the discovery.

10 c. On motion or on its own, the court shall limit the
11 frequency or extent of discovery otherwise allowed if
12 it determines that:

13 (1) the discovery sought is unreasonably cumulative
14 or duplicative, or can be obtained from some
15 other source that is more convenient, less
16 burdensome, or less expensive,

17 (2) the party seeking discovery has had ample
18 opportunity to obtain the information by
19 discovery in the action, or

20 (3) the proposed discovery is outside the scope
21 permitted by subparagraph a of paragraph 1 of
22 this subsection.

23 d. If an officer, director or managing agent of a
24 corporation or a government official is served with

1 notice of a deposition or subpoena regarding a matter
2 about which he or she has no knowledge, he or she may
3 submit at a reasonable time prior to the date of the
4 deposition an affidavit to the noticing party so
5 stating and identifying a person within the
6 corporation or government entity who has knowledge of
7 the subject matter involved in the pending action.
8 Notwithstanding such affidavit, the noticing party may
9 proceed with the deposition, subject to the noticed
10 witness's right to seek a protective order.

11 3. TRIAL PREPARATION: MATERIALS.

12 a. Unless as provided by paragraph 4 of this subsection,
13 a party may not discover documents and tangible things
14 that are prepared in anticipation of litigation or for
15 trial by or for another party or its representative,
16 including the other party's attorney, consultant,
17 surety, indemnitor, insurer or agent. Subject to
18 paragraph 4 of this subsection, such materials may be
19 discovered if:

- 20 (1) they are otherwise discoverable under paragraph 1
21 of this subsection, and
22 (2) the party shows that it has substantial need for
23 the materials to prepare its case and cannot,
24

1 without undue hardship, obtain their substantial
2 equivalent by other means.

3 b. If the court orders discovery of such materials, the
4 court shall protect against disclosure of the mental
5 impressions, conclusions, opinions or legal theories
6 of a party's attorney or other representative
7 concerning the litigation.

8 c. A party or other person may, upon request and without
9 the required showing, obtain the person's own previous
10 statement about the action or its subject matter. If
11 the request is refused, the person may move for a
12 court order, and the provisions of paragraph 4 of
13 subsection A of Section 3237 of this title apply to
14 the award of expenses. A previous statement is
15 either:

16 (1) a written statement that the person has signed or
17 otherwise adopted or approved, or

18 (2) a contemporaneous stenographic, mechanical,
19 electrical, or other recording, or a
20 transcription thereof, which recites
21 substantially verbatim the person's oral
22 statement.

23 4. TRIAL PREPARATION: EXPERTS.
24

1 a. Discovery of facts known and opinions held by experts,
2 otherwise discoverable under the provisions of
3 paragraph 1 of this subsection and acquired or
4 developed in anticipation of litigation or for trial,
5 may be obtained only as follows:

6 (1) a party may, through interrogatories, require any
7 other party to identify each person whom that
8 other party expects to call as an expert witness
9 at trial and give the address at which that
10 expert witness may be located,

11 (2) after disclosure of the names and addresses of
12 the expert witnesses, the other party expects to
13 call as witnesses, the party, who has requested
14 disclosure, may depose any such expert witnesses
15 subject to scope of this section. Prior to
16 taking the deposition the party must give notice
17 as required in subsections A and C of Section
18 3230 of this title, and

19 (3) in addition to taking the depositions of expert
20 witnesses the party may, through interrogatories,
21 require the party who expects to call the expert
22 witnesses to state the subject matter on which
23 each expert witness is expected to testify; the
24 substance of the facts and opinions to which the

1 expert is expected to testify and a summary of
2 the grounds for each opinion; the qualifications
3 of each expert witness, including a list of all
4 publications authored by the expert witness
5 within the preceding ten (10) years; the
6 compensation to be paid to the expert witness for
7 the testimony and preparation for the testimony;
8 and a listing of any other cases in which the
9 expert witness has testified as an expert at
10 trial or by deposition within the preceding four
11 (4) years. An interrogatory seeking the
12 information specified above shall be treated as a
13 single interrogatory for purposes of the
14 limitation on the number of interrogatories in
15 Section 3233 of this title.

- 16 b. The protection provided by paragraph 3 of this
17 subsection extends to communications between the
18 party's attorney and any expert witness retained or
19 specially employed to provide expert testimony in the
20 case or whose duties as the party's employee regularly
21 involve giving expert testimony, except to the extent
22 that the communications:
- 23 (1) relate to compensation for the expert's study or
24 testimony,

- 1 (2) identify facts or data that the party's attorney
2 provided and that the expert considered in
3 forming the opinions to be expressed, or
4 (3) identify assumptions that the party's attorney
5 provided and that the expert relied upon in
6 forming the opinions to be expressed.

7 c. A party may not, by interrogatories or deposition,
8 discover facts known or opinions held by an expert who
9 has been retained or specially employed by another
10 party in anticipation of litigation or to prepare for
11 trial and who is not expected to be called as a
12 witness at trial, except as provided in Section 3235
13 of this title or upon a showing of exceptional
14 circumstances under which it is impracticable for the
15 party to obtain facts or opinions on the same subject
16 by other means.

17 d. Unless manifest injustice would result:

- 18 (1) the court shall require that the party seeking
19 discovery pay the expert a reasonable fee for
20 time spent in responding to discovery under
21 division (2) of subparagraph a of this paragraph
22 and subparagraph c of this paragraph, and
23 (2) the court shall require that the party seeking
24 discovery with respect to discovery obtained

1 under subparagraph c of this paragraph, pay the
2 other party a fair portion of the fees and
3 expenses reasonably incurred by the latter party
4 in obtaining facts and opinions from the expert.

5 5. CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL PREPARATION
6 MATERIALS.

- 7 a. When a party withholds information otherwise
8 discoverable under the Oklahoma Discovery Code by
9 claiming that it is privileged or subject to
10 protection as trial preparation material, the party
11 shall make the claim expressly and shall describe the
12 nature of the documents, communications, or things not
13 produced or disclosed in a manner that, without
14 revealing information itself privileged or protected,
15 will enable other parties to assess the applicability
16 of the privilege or protection.
- 17 b. If information produced in discovery is subject to a
18 claim of privilege or of protection as trial
19 preparation material, the party making the claim may
20 notify any party that received the information of the
21 claim and the basis for it. After being notified, a
22 party shall promptly return, sequester, or destroy the
23 specified information and any copies the party has;
24 shall not use or disclose the information until the

1 claim is resolved; shall take reasonable steps to
2 retrieve the information if the party has disclosed it
3 before being notified; and may promptly present the
4 information to the court under seal for a
5 determination of the claim. The producing party shall
6 preserve the information until the claim is resolved.
7 This mechanism is procedural only and does not alter
8 the standards governing whether the information is
9 privileged or subject to protection as trial
10 preparation material or whether such privilege or
11 protection has been waived.

12 C. PROTECTIVE ORDERS.

13 1. Upon motion by a party or by the person from whom discovery
14 is sought, accompanied by a certification that the movant has in
15 good faith conferred or attempted to confer, either in person or by
16 telephone, with other affected parties in an effort to resolve the
17 dispute without court action, and for good cause shown, the court in
18 which the action is pending or on matters relating to a deposition,
19 the district court in the county where the deposition is to be taken
20 may enter any order which justice requires to protect a party or
21 person from annoyance, harassment, embarrassment, oppression or
22 undue delay, burden or expense, including one or more of the
23 following:

24 a. that the discovery not be had,

- 1 b. that the discovery may be had only on specified terms
2 and conditions, including a designation of the time,
3 place or the allocation of expenses,
4 c. that the discovery may be had only by a method of
5 discovery other than that selected by the party
6 seeking discovery,
7 d. that certain matters not be inquired into, or that the
8 scope of the disclosure or discovery be limited to
9 certain matters,
10 e. that discovery be conducted with no one present except
11 persons designated by the court,
12 f. that a deposition after being sealed be opened only by
13 order of the court,
14 g. that a trade secret or other confidential research,
15 development or commercial information not be disclosed
16 or be disclosed only in a designated way, and
17 h. that the parties simultaneously file specified
18 documents or information enclosed in sealed envelopes
19 to be opened as directed by the court.

20 2. If the motion for a protective order is denied in whole or
21 in part, the court may, on such terms and conditions as are just,
22 order that any party or person provide or permit discovery. The
23 provisions of paragraph 4 of subsection A of Section 3237 of this
24 title apply to the award of expenses incurred in relation to the

1 motion. Any protective order of the court which has the effect of
2 removing any material obtained by discovery from the public record
3 shall contain the following:

4 a. a statement that the court has determined it is
5 necessary in the interests of justice to remove the
6 material from the public record,

7 b. specific identification of the material which is to be
8 removed or withdrawn from the public record, or which
9 is to be filed but not placed in the public record,
10 and

11 c. a requirement that any party obtaining a protective
12 order place the protected material in a sealed manila
13 envelope clearly marked with the caption and case
14 number and is clearly marked with the word
15 "CONFIDENTIAL", and stating the date the order was
16 entered and the name of the judge entering the order.
17 This requirement may also be satisfied by requiring
18 the party to file the documents pursuant to the
19 procedure for electronically filing sealed or
20 confidential documents approved for electronic filing
21 in the courts of this state.

22 3. No protective order entered after the filing and
23 microfilming of documents of any kind shall be construed to require
24 the microfilm record of such filing to be amended in any fashion.

1 4. The party or counsel which has received the protective order
2 shall be responsible for promptly presenting the order to
3 appropriate court clerk personnel for appropriate action.

4 5. All documents produced or testimony given under a protective
5 order shall be retained in the office of counsel until required by
6 the court to be filed in the case.

7 6. Counsel for the respective parties shall be responsible for
8 informing witnesses, as necessary, of the contents of the protective
9 order.

10 7. When a case is filed in which a party intends to seek a
11 protective order removing material from the public record, the
12 plaintiff(s) and defendant(s) shall be initially designated on the
13 petition under pseudonym such as "John or Jane Doe", or "Roe", and
14 the petition shall clearly indicate that the party designations are
15 fictitious. The party seeking confidentiality or other order
16 removing the case, in whole or in part, from the public record,
17 shall immediately present application to the court, seeking
18 instructions for the conduct of the case, including confidentiality
19 of the records.

20 D. SEQUENCE AND TIMING OF DISCOVERY. Unless the parties
21 stipulate or the court orders otherwise for the convenience of
22 parties and witnesses and in the interests of justice, methods of
23 discovery may be used in any sequence. The fact that a party is
24

1 conducting discovery, whether by deposition or otherwise, shall not
2 operate to delay discovery by any other party.

3 E. SUPPLEMENTATION OF RESPONSES. A party who has responded to
4 a request for discovery with a response that was complete when it
5 was made is under no duty to supplement the response to include
6 information thereafter acquired, except as follows:

7 1. A party is under a duty seasonably to supplement the
8 response with respect to any question directly addressed to:

9 a. the identity and location of persons having knowledge
10 of discoverable matters, and

11 b. the identity of each person expected to be called as
12 an expert witness at trial, the subject matter on
13 which the person is expected to testify, and the
14 substance of the testimony of the person;

15 2. A party is under a duty seasonably to amend a prior response
16 to an interrogatory, request for production, or request for
17 admission if the party obtains information upon the basis of which:

18 a. (1) the party knows that the response was incorrect
19 in some material respect when made, or

20 (2) the party knows that the response, which was
21 correct when made, is no longer true in some
22 material respect, and

23

24

1 b. the additional or corrective information has not
2 otherwise been made known to the other parties during
3 the discovery process or in writing; and

4 3. A duty to supplement responses may be imposed by order of
5 the court, agreement of the parties, or at any time prior to trial
6 through new requests for supplementation of prior responses.

7 F. DISCOVERY CONFERENCE. At any time after commencement of an
8 action, the court may direct the attorneys for the parties to appear
9 for a conference on the subject of discovery. The court shall do so
10 upon motion by the attorney for any party if the motion includes:

- 11 1. A statement of the issues as they then appear;
- 12 2. A proposed plan and schedule of discovery;
- 13 3. Any limitations proposed to be placed on discovery;
- 14 4. Any other proposed orders with respect to discovery; and
- 15 5. A statement showing that the attorney making the motion has
16 made a reasonable effort to reach agreement with opposing attorneys
17 on the matters set forth in the motion.

18 Each party and his attorney are under a duty to participate in
19 good faith in the framing of a discovery plan if a plan is proposed
20 by the attorney for any party. Notice of the motion shall be served
21 on all parties. Objections or additions to matters set forth in the
22 motion shall be served not later than ten (10) days after service of
23 the motion.

1 Following the discovery conference, the court shall enter an
2 order tentatively identifying the issues for discovery purposes,
3 establishing a plan and schedule for discovery, setting limitations
4 on discovery, if any; and determining such other matters, including
5 the allocation of expenses, as are necessary for the proper
6 management of discovery in the action. In preparing the plan for
7 discovery the court shall protect the parties from excessive or
8 abusive use of discovery. An order shall be altered or amended
9 whenever justice so requires.

10 Subject to the right of a party who properly moves for a
11 discovery conference to prompt convening of the conference, the
12 court may combine the discovery conference with a pretrial
13 conference.

14 G. SIGNING OF DISCOVERY REQUESTS, RESPONSES AND OBJECTIONS.

15 Every request for discovery, response or objection thereto made by a
16 party represented by an attorney shall be signed by at least one of
17 the party's attorneys of record in the party's individual name whose
18 address shall be stated. A party who is not represented by an
19 attorney shall sign the request, response or objection and state the
20 party's address. The signature of the attorney or party constitutes
21 a certification that the party has read the request, response or
22 objection, and that it is:

23 1. To the best of the party's knowledge, information and belief
24 formed after a reasonable inquiry consistent with the Oklahoma

1 Discovery Code and warranted by existing law or a good faith
2 argument for the extension, modification or reversal of existing
3 law;

4 2. Interposed in good faith and not primarily to cause delay or
5 for any other improper purpose; and

6 3. Not unreasonable or unduly burdensome or expensive, given
7 the nature and complexity of the case, the discovery already had in
8 the case, the amount in controversy, and other values at stake in
9 the litigation. If a request, response or objection is not signed,
10 it shall be deemed ineffective.

11 If a certification is made in violation of the provisions of
12 this subsection, the court, upon motion or upon its own initiative,
13 shall impose upon the person who made the certification, the party
14 on whose behalf the request, response or objection is made, or both,
15 an appropriate sanction, which may include an order to pay to the
16 amount of the reasonable expenses occasioned thereby, including a
17 reasonable attorney fee.

18 SECTION 2. NEW LAW A new section of law to be codified
19 in the Oklahoma Statutes as Section 3226.2 of Title 12, unless there
20 is created a duplication in numbering, reads as follows:

21 A. As used in the Oklahoma Discovery Code:

22 1. "Commercial litigation funder" means any person or entity,
23 other than an attorney permitted to charge a contingent fee
24 representing a party, that enters into a contract establishing a

1 right to receive compensation that is contingent on and sourced from
2 any proceeds of the civil action by settlement, judgment, or
3 otherwise. Commercial litigation funder shall not include a
4 consumer litigation funder as defined in Section 3-801 of Title 14A
5 of the Oklahoma Statutes; and

6 2. "Commercial litigation funding agreement" means an agreement
7 under which the commercial litigation funder is granted a right to
8 receive compensation contingent on and sourced from any proceeds of
9 a civil action by settlement, judgment, or otherwise. A commercial
10 litigation funding agreement shall not include:

11 a. legal representation services provided on a
12 contingency fee basis or legal costs advanced by a
13 legal representative where such services or costs are
14 provided to or on behalf of a client by an attorney
15 representing the party in the dispute and in
16 accordance with the Oklahoma Rules of Professional
17 Conduct,

18 b. an agreement entered into between an attorney or law
19 firm and a commercial litigation funder or any other
20 entity. Sharing of fees by an attorney or law firm
21 shall be in accordance with the Oklahoma Rules of
22 Professional Conduct including but not limited to
23 Rules 1.5 and 5.4 of Appendix 3-A of Title 5 of the
24 Oklahoma Statutes, or

1 c. a consumer litigation funding agreement as defined in
2 Section 3-801 of Title 14A of the Oklahoma Statutes.

3 SECTION 3. This act shall become effective November 1, 2023.
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5 59-1-2169 TEK 4/26/2023 4:23:47 PM
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