

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: SB 1828

INTRODUCER: Senator Broxson

SUBJECT: Litigation Financing Consumer Protection

DATE: February 10, 2020

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	Pre-meeting
2.			JU	
3.			RC	

I. Summary:

SB 1828 creates the Litigation Financing Consumer Protection Act, which establishes oversight and consumer protections relating to such transactions within the Office of Financial Regulation (OFR). In such a transaction, a third party (financier) provides a nonrecourse cash advance to a consumer in exchange for an assignment of the consumer's contingent right to receive a portion of the potential proceeds of his or her civil action or claim. If the consumer loses the lawsuit, the financing firm generally does not receive a payment. For individuals involved in personal injury litigation, the cash advance may be used to pay medical expenses or mortgages, or other expenses.

The bill caps the interest rate on such litigation financing contracts (contracts) at 30 percent of the funded amount per year. A financier may impose a fee of up to \$500 with regard to a single civil claim, regardless of the number of financing contracts the consumer enters into with the litigation financier respecting the civil action or claim.

The bill requires such entities to register with OFR. Further, the bill requires the specified terms, conditions, and disclosures for a contract, which includes a right of rescission of the contract by the consumer within 5 business days after execution of the contract or receipt of the funds. This provision allows a consumer to cancel the contract without penalty, interest, charges, fees, or other obligation.

The bill prohibits a litigation financier from engaging in the following activities:

- Paying or offering to pay or accepting a commission, referral fee, or other consideration to any person for referring a consumer to a litigation financier.
- Advertising false or misleading information about its products or services.
- Referring a consumer to a specific attorney, law firm, or health care practitioner with exception.

- Failing to provide a copy of all complete litigation financing contracts to the consumer in a timely manner.
- Attempting to effect arbitration or waiver of a consumer's right to a jury trial.
- Offering or providing legal advice to the consumer regarding the contract or the subject civil action or claim.
- Reporting to a consumer credit reporting agency if insufficient funds remain from the net proceeds of the civil action or claim to repay the litigation financier.
- Entering into a contract with a consumer incorporating the consumer's obligations to the litigation financier under an existing contract.
- Knowingly entering into a litigation-financing contract with a consumer, who already has a contract with another litigation financier without first paying the entire funded amount and all charges owed under the existing contract, unless the consumer provides written consent for such an arrangement.

The provisions of the bill would not apply to commercial tort claims, workers' compensation claims, or lending or financing arrangements between an attorney or a law firm and lending institution.

The bill requires disclosure of such contracts in a civil action and protects communications between a consumer's attorney and a litigation financier about a litigation-financing contract.

The fiscal impact on the Office of Financial Regulation is indeterminate at this time.

II. Present Situation:

Third party litigation financing typically refers to financing provided by entities other than the plaintiffs, defendants, or their lawyers. Litigation financing involves a nonrecourse loan or cash advance made to an individual, who is represented by an attorney, in personal injury lawsuits.¹ The financing company (financier) contracts with the consumer, who agrees to repay the company the amount financed plus any financing fees or charges out of proceeds of the litigation at the conclusion of the action.

A funding is typically 5-10 percent of the expected value of a claim. The financier provides the financing agreement to the consumer and his or her attorney for review and approval. Both the consumer and the attorney must sign the agreement.² After providing the final approval, the financier disburses the funds to the consumer.

The typical amount of such agreements varies; one source noted that it is around \$2,000.³ Another source noted that the average size of these consumer transactions ranges from \$2,500 to \$7,500, with monthly financing fees that can be considerably higher than the monthly interest rates on credit card balances or consumer bank loans.⁴ Further, the study suggest that many

¹ Litigation financing can involve commercial or consumer financing. See https://www.namic.org/pdf/publicpolicy/190128_LitigationLendingUpdate.pdf.

² Schuller, Eric, *Consumer Legal Funding 101*, on file with Banking and Insurance Committee.

³ *Id.*

⁴ Zakara, Laura, Overview of Alternative Litigation Financing in the United States, Research Brief, RAND Institute of Civil Justice (2010) at www.rand.org (last viewed Jan. 2, 2020).

consumers who accept this type of funding have exhausted more common sources of financing and are attracted to it because they need to meet pressing financial obligations or because a non-recourse loan may guarantee them some recovery from their lawsuits.⁵

In some states, concerns have been raised that some cash advance arrangements may exploit consumers due to the complex nature of the transaction and potentially significant financing fees that may substantially reduce the proceeds from the litigation.⁶ According to one consumer advocate,

The designation as a nonrecourse loan should not alone allow the lender to evade the protections afforded borrowers of loans. Many loans that are collateralized are nonrecourse-certain car title and real property loans-but still are deemed loans providing the consumer protections such as usury limits. The nonrecourse nature of consumer litigation loans is the argument used to allow for a predatory rate of interest. Similar to payday loans, however, the data available on performance of these loans shows the default rate to be low. These loans are closely underwritten to protect the lender.⁷

Advocates of litigation financing contend that such financing levels the playing field and reduces the risks for firms and their clients to settle for less than what their cases are valued.⁸ Critics of litigation financing contend that the financing disrupts the legal process by involving outside parties that can potentially exert control, encourages the filing of frivolous claims, and gives plaintiff's attorney an unfair advantage in settlement negotiations.⁹

Discovery Issues Related to Consumer Finance Litigation

Prior to executing a litigation finance contract for a cash finance, the financing entity and the consumer seeking the funds must discuss the potential transactions, which involves due diligence and an analysis of the merits of the litigation to be funded. These communications may involve a litigant's attorney. Based on a review of a case, a financier determines the potential value of the claim with the consumer's attorney. A financier and a litigant may enter nondisclosure or confidentiality agreements, and the opposing party may not know about the role of the financier.¹⁰ There is concern that these communications and materials may be subject to discovery.

⁵ *Id.*

⁶ *Personal injury cash advance firms say yes to reforms*, (Feb. 28, 2005), Claims Journal, at <https://www.claimsjournal.com/news/east/2005/02/28/51995.htm> (last viewed Jan. 20, 2020).

⁷ Florida Alliance for Consumer Protection, *White Paper: Litigation Financing Consumer Protection*, on file with Banking and Insurance Committee.

⁸ Egan, Mary Ellen, *Other People's Money: Rise of litigation finance companies raises legal and ethical concerns* (Dec. 1, 2018) ABA Journal (Dec. 2018) at http://www.abajournal.com/magazine/article/litigation_finance_legal_ethical_concerns (last viewed Jan. 20, 2020).

⁹ *Id.*

¹⁰ Gersham, Jacob, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, The Wall Street Journal, Mar. 21, 2018.

Oversight of Litigation Financing in Florida

In Florida, interest rates and usury are governed under ch. 687, F.S., generally.¹¹ Any charges, including interest, in excess of the combined total of all charges of a consumer loan exceed the statutory limits under the Florida Consumer Finance Act, constitute a violation of ch. 687, F.S.¹² In a 2005 case, the Court noted that there are no laws regulating such agreements in Florida and this method of funding may warrant regulation in Florida.¹³ In another case, a Florida resident sought relief under Florida's Unfair Trade Practices Act,¹⁴ Florida's Consumer Finance Act,¹⁵ and Florida's Interest, Usury, and Lending Practices Act.¹⁶ The funding agreement in this complaint alleged that the financier charged him 51 percent interest, a \$600 processing fee, and a \$345 origination fee, which was charged every 6 months.¹⁷

In a 2002 opinion, the Florida Bar provided the following comments regarding litigation financing:

The Florida Bar discourages the use of nonrecourse advance funding companies. The terms of the funding agreements offered to clients may not serve the client's best interests in many instances. The Committee continues to have concerns...of the problems that can arise when a client obtains financial assistance from a party, such as the client's lack of incentive to cooperate.¹⁸

Oversight of Consumer Litigation Financing Transactions in Other States

Registration or Licensure; Interest Rate Caps

Committee staff conducted a limited survey relating to the state regulation of litigation financing. Eight states require registration or licensure of these entities.¹⁹ Some states, such as Ohio, do not require registration, and instead mandate terms and disclosures in the contract.²⁰

Five states have enacted laws relating to interest rates or fees.²¹ For example, Nevada licenses and regulates consumer litigation financing and requires that the funded amount plus charges and

¹¹In Florida, a usurious contract is a loan with an interest rate higher than 18 percent per year for a loan up to \$500,000 or a loan exceeding \$500,000 with an interest rate greater than 25 percent, with some exceptions, as provided in ss. 687.071 and 687.02, F.S.

¹² Section 516.031(1) and (3), F.S. The maximum interest rate is 30 percent per annum, computed on the first \$3,000 of the principal amount; 24 percent per annum on that part of the principal amount exceeding \$3,000 and up to \$4,000; and 18 percent per annum on that part of the principal amount exceeding \$4,000 and up to \$25,000.

¹³ *Fausone v. U.S. Claims, Inc.*, 915 So.2d 626 (2005).

¹⁴ Part II, ch. 501, F.S.

¹⁵ Ch. 516, F.S.

¹⁶ Ch. 687, F.S.

¹⁷ *Taylor v. Certified Legal Funding, Inc.* 2018 WL 3860243 (M.D. FL 2018). On October 30, 2018, a stipulated final judgment was entered in favor of Certified Legal Funding, Inc. against Ronald Taylor.

¹⁸ 00-3 Fla. Ethics Op. Fla. Bar (Mar. 15, 2002) at <https://www.floridabar.org/etopinions/etopinion-00-3/> (viewed Jan. 20, 2020).

¹⁹ Indiana (IC 24-12), Maine (ME Rev. Stat. Ann. 9-A, s. 12), Nebraska (Neb. Rev. St. s. 25-3301, et. seq.), Nevada (NRS 604C.320), Oklahoma (Okla. Stat. s. 14A-3-801(6)), Tennessee (Tenn. Code Ann. s. 47-16-101, et. seq.), Vermont (8 V.S.A. s. 2252), and West Virginia.

²⁰ Ohio Rev. Code s. 1349.55(A)(1).

²¹ Arkansas (A.C.A. s. 4-57-109), Indiana (Ind. Code 24-4.5-3-110), Nevada (NRS 604C.310), Tennessee, and West Virginia.

fees of each transaction must not exceed a rate of 40 percent of the funded amount annually.²² Tennessee authorizes two types of fees for such loans. A financier may impose a fee of up to 10 percent of the original amount provided to the consumer.²³ In addition, a financier may impose a maximum annual fee of \$360 per year for each \$1,000 of the unpaid principal of the funds advanced to the consumer for up to a maximum of 3 years.²⁴ West Virginia caps interest on such transactions at 18 percent.²⁵ Indiana authorizes a litigation financier to impose an annual fee of 36 percent of the funded amount and an annual servicing charge of up to 7 percent of the funded amount, as well as a onetime document charge.²⁶

In Colorado, the Supreme Court held that a litigation finance company that agrees to advance money to tort plaintiffs in exchange for future litigation proceeds is making a loan subject to regulation under Colorado's Uniform Consumer Credit Code even if the plaintiff does not have an obligation to repay any deficiency if the litigation proceeds are ultimately less than the amount due.²⁷ In this particular case, the Court noted that the amount of the loan is usually less than \$1,500, and the interest rates on some of these loans approached triple digits. One sample agreement provided \$1,234 to the consumer, with a payoff of \$1,851 after 6 months and \$4,010.50 after 2 years, for a 60 percent annual return.²⁸ In South Carolina, the Department of Consumer Affairs ruled that entities that fund litigation in exchange for a portion of the recovery are providing loans that must comply with state laws governing lending.²⁹

Communication Privileges

Vermont³⁰ and Indiana³¹ have enacted legislation that provides the communication between a consumer's attorney and the financing company may not be discoverable or limit the scope of any statutory or common-law privilege, including the work-product doctrine and the attorney-client privilege.

²² State of Nevada, Department of Business and Industry Financial Institutions Division, *FID Guidance S.B. 432, Consumer Litigation Funding* (Sep. 30, 2019) at [http://fid.nv.gov/uploadedFiles/fid.nv.gov/content/Licensing/Installment_Loan_Company\(1\)/SB432_Consumer%20Litigation%20Funding%20Guidance%2009.30.2019.pdf](http://fid.nv.gov/uploadedFiles/fid.nv.gov/content/Licensing/Installment_Loan_Company(1)/SB432_Consumer%20Litigation%20Funding%20Guidance%2009.30.2019.pdf) (viewed Jan. 20, 2020).

²³ T.C.A. s. 47-16-110(b).

²⁴ T.C.A. s. 47-16-110(c) (2014).

²⁵ W. Va. Code s. 46A-6N-9.

²⁶ IC 24-4.5-3-202 and IC 24-12.

²⁷ *Oasis Legal. Finance Group v. Coffman*, (Nov. 16, 2015), 2015 CO 63, at <https://www.scribd.com/document/289971303/Lawcash-Colo-Opinion> (last viewed Jan. 20, 2020).

²⁸ Fisher, Daniel, *Lawsuit Finance Contracts are Loans Colorado Supreme Court Rules*, *Forbes*, Nov. 16, 2015, at <https://www.forbes.com/sites/danielfisher/2015/11/16/lawsuit-finance-contracts-are-loans-colorado-supreme-court-rules/#52fab63b182a> (last viewed Jan. 20, 2020).

²⁹ O'Brien, John, *South Carolina agency rules lawsuit loans subject to state law*, (Nov. 17, 2014) at <https://legalnewsline.com/stories/510628059-south-carolina-agency-rules-lawsuit-loans-are-traditional-loans-subject-to-state-law> (viewed Jan. 20, 2020).

³⁰ 8 V.S.A. s. 2255.

³¹ IC 24-12.

Disclosure of Financing Agreements

West Virginia³² and Wisconsin³³ require disclosure of litigation financing contracts in civil actions or claims.

Office of Financial Regulation

The Office of Financial Regulation (OFR) is established under the Financial Services Commission, which is composed of the Governor, the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture.³⁴ Commission members serve as the agency head of the Financial Services Commission.³⁵ The OFR regulates state-chartered financial institutions, finance companies, and the securities industry.³⁶

Department of Legal Affairs

The Consumer Protection Division of the Department of Legal Affairs³⁷ is the civil enforcement authority for violations of the Florida Deceptive and Unfair Trade Practices Act.³⁸ The Division protects consumers by pursuing individuals and entities that engage in unfair methods of competition or unconscionable, deceptive and unfair practices in trade or commerce. The Attorney General also collaborates with other state attorneys general as well as state and federal agencies in joint enforcement efforts.

The Florida Deceptive and Unfair Trade Practices Act, provides remedies and penalties for unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.³⁹ Violations of this part include any violation of this act and rules adopted pursuant to the Federal Trade Commission Act⁴⁰ (FTC Act), which would include the standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts. Willful violations of the act occur when the person knew or should have known that the conduct was unfair, deceptive, or prohibited by rule. Remedies for practices prohibited by the act may include an action to enjoin a person from committing such acts,⁴¹ an action to recover actual damages caused by the violation, as well as the imposition of a civil penalty of generally not more than \$10,000 for each willful violation. Actions can be brought by a state attorney, the Department of Legal Affairs,⁴² or by a consumer.⁴³

³² Section 46A-6N.

³³ Wisc. Stat. s. 804.01(2)(bg).

³⁴ Section 20.121(3), F.S.

³⁵ *Id.*

³⁶ Section 20.121(3)(a)2., F.S.

³⁷ Florida Office of the Attorney General, Division of Consumer Protection of the Department of Legal Affairs at <http://www.myfloridalegal.com/pages.nsf/Main/18A7753257FE439085256CC9004EC4F7> (last viewed Feb. 5, 2020).

³⁸ Part II of ch. 501, F.S.

³⁹ Section 501.204, F.S.

⁴⁰ 15 U.S.C. ss. 41-58.

⁴¹ Section 501.207, F.S.

⁴² Section 501.203(2), F.S.

⁴³ Section 501.211(1), F.S.

Mandatory Disclosure of Certain Insurance Information in Florida

Section 627.4137, F.S., requires a liability insurer⁴⁴ to provide to a claimant a statement containing the following information within 30 days of a written request by the claimant:

- The name of the insurer;
- The name of each insured;
- The limits of the liability coverage;
- A statement of any policy or coverage defense which such insurer reasonably believes is available to such insurer at the time of filing such statement; and
- A copy of the policy.

The required statement must be under oath by a corporate officer or the insurer's claims manager or superintendent. Section 627.4137(2), F.S., requires that the disclosure statement be amended immediately upon discovery of facts calling for an amendment to such statement. A review of insurance information required under s. 627.4137, F.S., allows a claimant to evaluate the damages that could be paid by the tortfeasor. Florida courts have explained that the purpose of the disclosure requirements in s. 627.4137, F.S., is to allow a claimant to make an informed decision whether to settle a case.⁴⁵

III. Effect of Proposed Changes:

Section 1 creates part XIII of ch. 559, F.S., and provides that it may be cited as the "Litigation Financing Consumer Protection Act."

Section 2 creates s. 559.952, F.S., and provides definitions for the following terms: consumer, enforcing authority, funded amount, health care practitioner, interest, litigation financier, litigation financing, net proceeds, and office. The term, "litigation financing," does not include:

- Legal services provided to a consumer on a contingency fee basis or advanced legal costs, when an attorney representing the consumer in accordance with the Florida Rules of Professional Conduct provides such services.
- A commercial tort claim as defined in s. 679.1021(1)(l), F.S.
- A claim under the Workers' Compensation Law.
- A consumer finance loan, as defined in s. 516.01, F.S.

Section 3 creates s. 559.953, F.S., to establish registration requirements for litigation financiers under the Office of Financial Regulation (OFR). Provides the OFR with authority to revoke a registration if certain conditions are met.

Section 4 creates s. 559.954, F.S., to establish mandatory terms within a litigation-financing contract. These terms include a right of rescission, an acknowledgment regarding whether the

⁴⁴ Section 627.4137, F.S., does not apply to personal injury protection insurance. *See Progressive American Ins. Co. v. Rural/Metro Corp. of Florida*, 994 So.2d 1202 (Fla. 5th DCA 2008).

⁴⁵ *See Cheverie v. Geisser*, 783 So.2d 1115 (Fla. 4th DCA 2001)(rejecting the argument that compliance with s. 627.4137, F.S., is a technicality and explaining the Legislature recognized the importance to claimants of access to the information required by statute in making settlement decisions); *Gira v. Wolfe*, 115 So.3d 414, 417 (Fla. 2^d DCA 2013)(explaining that "the legislature has recognized the importance of a claimant's access to the type of insurance information covered in the statute in order for a claimant to make settlement decisions").

consumer is represented by an attorney, and a provision requiring notice to a settlement fund or trust regarding any outstanding financial obligations from the contract.

Section 5 creates s. 559.955, F.S., to provide prohibited acts of litigation financiers. The prohibited acts are:

- Paying or accepting a referral fee to or from an attorney, law firm, or health care practitioner;
- False advertising;
- Referring consumers to a specific attorney, law firm, or health care practitioner;
- Failing to promptly supply a copy of the contract to the consumer;
- Obtaining a waiver of remedies the consumer may have in the civil action or claim;
- Attempting to effect arbitration or a waiver to the right to a jury trial;
- Offering or providing legal advice regarding the contract or subject claim;
- Assigning the contract;
- Reporting to a consumer credit reporting agency if the net proceeds of the civil action are insufficient to repay the litigation financier;
- Entering into a litigation financing contract with a consumer incorporating the consumer's obligations to the litigation financier under an existing contract; and
- Entering into a contemporaneous financing arrangement without the consumer's written consent.

Section 6 creates s. 559.956, F.S., to establish mandatory disclosures within a litigation-financing contract. The disclosures are:

- Notice of the right to a completed contract;
- A statement that the litigation financier will not and has no right to make decisions or influence the consumer or his attorney regarding the civil action or claim;
- The total funded amount provided to the consumer;
- An itemized list of all fees and charges;
- The annual percentage rate of return;
- The total amount due from the consumer in 6-month intervals for 3 years;
- A statement that the consumer will owe no charges or fees other than those disclosed;
- The cumulative amount due from the consumer for all litigation financing contracts if the consumer seeks multiple contracts and makes repayment after contract execution;
- Notice that if the consumer owes the litigation financier nothing if there is no recovery in the civil action or claim;
- Notice that the litigation financier will accept a reduced sum not exceeding the net proceeds of the civil action or claim if the net proceeds are insufficient to make a full repayment;
- Notice of the right of rescission; and
- Notice that the consumer should exercise due diligence before signing the contract.

Section 7 creates s. 559.957, F.S., to authorize a consumer to assign his or her contingent right to receive an amount of the potential proceeds of a civil action or claim. Further, the section establishes a priority of liens with exceptions.

Section 8 creates s. 559.958, F.S., relating to interest rate, fees, charges, and penalties applicable to the contract. The bill caps the interest rate of such contracts at 30 percent of the funded

amount per year, calculated using simple interest. Interest may only accrue until a court enters a final order or a settlement agreement is executed in the civil action or claim subject to the contract, whichever is earlier, but no longer, than 3 years from the date the consumer receives the funds from the litigation financier. A litigation financier may not charge, contract for, or receive any charges or fees the combined total of which exceeds \$500 with regard to a single civil action or claim, regardless of the number of litigation financing contracts the consumer enters into with the litigation financier.

A litigation financier may not charge, contract for, or receive any interest, charges, or fees for rescission or cancellation of a contract.

Section 9 creates s. 559.959, F.S., to require a party to any civil action must provide to the other parties any contract under which a litigation financier has a contingent right to receive compensation sourced from potential proceeds of the civil action or claim.

Section 10 creates s. 559.961, F.S., to provide that communications between a consumer's attorney and a litigation financier as it pertains to a litigation financing contract do not limit, waive, or abrogate the scope or nature of any statutory or common-law privilege, including the work product doctrine and the attorney-client privilege.

Section 11 creates s. 559.962, F.S., to provide that a violation of part XIII, ch. 559, F.S., is an unfair or deceptive trade act or practice under part II of ch. 501, F.S.

Section 12 provides this bill takes effect July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill caps the annual interest rate on litigation funding contracts at 30 percent per year. A financier may impose a fee of up to \$500 with regard to a single civil claim, regardless of the number of financing contracts the consumer enters into with the litigation financier respecting the civil action or claim.

The bill requires disclosure of litigation financing contracts in a civil action and protects communications between a consumer's attorney and a litigation financier about such contracts.

C. Government Sector Impact:

The bill would require the OFR to process registration applications. It is unknown how many litigation financiers currently operate in Florida. The bill would require the OFR to provide modifications to the Regulatory Enforcement and Licensing system. The fiscal impact is indeterminate at this time.⁴⁶

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 559.952, 559.953, 559.954, 559.955, 559.956, 559.957, 559.958, 559.959, 559.961, and 559.962.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

⁴⁶ Office of Financial Regulation, *2020 Agency Legislative Bill Analysis of SB 1828* (Jan. 27, 2020).

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
