

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 Fiscal Policy

BILL: CS/SB 1276

INTRODUCER: Fiscal Policy Committee and Senator Collins

SUBJECT: Litigation Financing

DATE: February 8, 2024

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Collazo</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u>Collazo</u>	<u>Yeatman</u>	<u>FP</u>	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1276 creates the “Litigation Investment Safeguards and Transparency Act,” to regulate persons participating in legal proceedings funded by litigation financing.

Generally, the bill:

- Prohibits litigation financiers from:
 - Directing the course of legal proceedings.
 - Contracting for a larger share of the proceeds of a legal proceeding than collectively recovered by the plaintiffs.
 - Paying or offering to pay a referral fee or commission to any person.
 - Assigning or securitizing litigation financing agreements.
- Requires attorneys and their clients to make disclosures in connection with any litigation financing agreements or other relationships they have with foreign or domestic litigation financiers.
- Requires litigation financiers to indemnify plaintiffs and their counsel for any adverse costs, attorney fees, damages, or sanctions awarded against them.
- Authorizes courts to take the existence of litigation financing agreements into account when determining whether a class representative or counsel can fairly represent class interests.
- Provides definitions for the term “litigation financing agreement” and other terms.
- Provides for general enforcement of the bill’s provisions, including enforcement of the bill’s prohibited conduct and indemnification provisions under the Florida Deceptive and Unfair Trade Practices Act.

The bill’s disclosure requirements apply to legal proceedings pending on, or commenced on or after, July 1, 2024, and its litigation financing agreement requirements apply to agreements entered into on or after July 1, 2024.

The bill takes effect on July 1, 2024.

II. Present Situation:

Litigation Financing

Generally

Third-party litigation financing is a non-recourse transaction¹ where a funder – known as a “litigation financier” or “litigation funder” – that is not a party to a lawsuit agrees to provide funding to a litigant (typically a plaintiff) or law firm in exchange for an interest in the potential recovery in the lawsuit. Plaintiffs do not have to repay the funding if the lawsuit is not successful.²

Litigation financing is available to both the commercial and consumer sectors.³ In the commercial sector, the funds are provided to sophisticated litigants and used primarily for litigation costs in commercial disputes.⁴ Sometimes litigation financiers finance multiple cases belonging to a lawyer or law firm, with the return on invested capital coming from the settlement or judgment of many individual or group of cases. Portfolio funding allows the litigation financier to essentially bankroll all or a portion of a law firm’s cases in exchange for a portion of any proceeds. This practice makes litigation funding less risky by allowing funders to spread their risk over multiple cases.⁵ As of early 2023, 44 active litigation funders in the U.S. market had a combined \$13.5 billion invested in litigation financing.⁶

In the consumer sector, the funds are paid directly to individuals and used primarily for living expenses while the consumer waits for resolution of the civil action or claim that is the subject of

¹ A non-recourse transaction is a financial transaction in which the borrower is not personally liable to the lender, so that the lender can only pursue the collateral to collect what the borrower owes. In other words, the lender does not have a lien on, and cannot seize, the borrower’s assets to repay the debt. U.S. Department of the Treasury, Internal Revenue Service, *Resource vs. Nonrecourse Debt*, https://apps.irs.gov/app/vita/content/36/36_02_020.jsp (last visited Jan. 12, 2024).

² U.S. Government Accountability Office, *Report to Congressional Requesters, Third-Party Litigation Financing: Market Characteristics, Data, and Trends* (Dec. 2022), 1, available at <https://www.gao.gov/assets/gao-23-105210.pdf> [hereinafter *Report to Congressional Requesters*]; Bloomberg Law, *How Litigation Finance Works*, Feb. 24, 2020, <https://pro.bloomberglaw.com/brief/how-litigation-finance-works/>; Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigation Funding*, 104 CORNELL L. REV. 1133, 1135 fn. 9 (2019), available at <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4802&context=clr> [hereinafter *An Empirical Investigation*].

³ *Report to Congressional Requesters*, supra note 2, at Preface; *An Empirical Investigation*, supra note 2, at 1135.

⁴ *Id.*; see also Paige Marta Skiba & Jean Xiao, *Consumer Litigation Funding: Just Another Form of Payday Lending?*, 80 LAW AND CONTEMP. PROB. 117, 125 (2017), available at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4840&context=lcp> [hereinafter *Consumer Litigation Funding*].

⁵ Curiam, *Portfolio Finance: The Benefits of Portfolio Financing*, <https://www.curiam.com/portfolio-finance/> (last visited Jan. 12, 2024).

⁶ Sara Merken, *Litigation funders deployed \$3.2 billion in U.S. investments last year – report*, Reuters, Feb. 16, 2023, <https://www.reuters.com/markets/us/litigation-funders-deployed-32-bln-us-investments-last-year-report-2023-02-16/>.

the litigation financing agreement.⁷ Industry data suggest that more than half of such consumers have an annual family income of \$50,000 or less and lack a college degree, while less than half are homeowners, suggesting that lower-income consumers with access to fewer resources are the primary market for litigation funding agreements.⁸

A consumer can apply for litigation financing any time before resolution of his or her civil action or claim.⁹ Unlike a traditional loan, where a lender might look at a consumer's credit score, income, and other indicators of the consumer's ability to pay, a litigation financier looks at the strength of the consumer's civil action or claim, the consumer's likelihood of prevailing at trial or in settlement, and the potential damages a consumer could obtain.¹⁰ A litigation financier also assesses the consumer's attorneys' fees and other debts, such as medical or child support liens,¹¹ which might take priority over the litigation financier's repayment.¹²

Some Pros and Cons of Litigation Financing

Litigation financing proponents argue that the product provides a necessary funding source for some consumers suffering an unexpected economic loss connected to a pending legal action or claim, giving consumers financial stability and helping them meet immediate personal needs, such as rent, utilities, and groceries.¹³ Proponents also point out that, because litigation financing is a non-recourse transaction, if the consumer loses the subject action or claim, he or she owes nothing under a litigation financing agreement, making litigation financing less risky than traditional loans.¹⁴ Additionally, because the agreement obligation is paid only out of the proceeds of a subject action or claim, there are no monthly or upfront payments required before the subject action or claim resolves.¹⁵

Litigation financing opponents point out that in order to estimate the total amount owed under a litigation financing agreement, including interest¹⁶ and fees, a consumer must accurately predict the date of the subject action or claim's resolution and the amount of any settlement or judgment that will result in the consumer's favor.¹⁷ Because agreement terms may be unclearly stated or require complicated calculations, opponents argue that consumers may end up owing much more

⁷ *Report to Congressional Requesters, supra* note 2, at Preface; *An Empirical Investigation, supra* note 2, at 1135; *see also Consumer Litigation Funding, supra* note 4, at 122.

⁸ Eric Schuller, President, Alliance for Responsible Consumer Legal Funding, *Consumer Legal Funding 101: Also Known As...Everything You Wanted To Know About Consumer Legal Funding But Were Afraid to Ask*, presented to the Florida House of Representatives Civil Justice Subcommittee, Dec. 12, 2019, at 134:09 https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2019121124 [hereinafter *Consumer Legal Funding 101*].

⁹ *See Consumer Litigation Funding, supra* note 4, at 122.

¹⁰ *Id.*; *see also Consumer Legal Funding 101, supra* note 8, at 1:31:15.

¹¹ A lien is a claim against property evidencing a debt, obligation, or duty. A lien can be created by judgment, equity, agreement, or statute. 37 FLA. JUR. 2D, *Liens* s. 1.

¹² *See Consumer Litigation Funding, supra* note 4, at 123.

¹³ *Report to Congressional Requesters, supra* note 2, at Preface; The Alliance for Responsible Consumer Legal Funding (ARC), *More than A Trade Association*, <http://arclegalfunding.org/> (last visited Jan. 12, 2024).

¹⁴ *See Consumer Legal Funding 101, supra* note 8, at 1:29:15; *see also* ARC, *What is Consumer Legal Funding?*, <http://arclegalfunding.org/consumer-legal-funding/> (last visited Jan. 12, 2024).

¹⁵ *Id.*

¹⁶ Interest is the cost of borrowing money, expressed as a percentage of the borrowed amount. *See Anya Martin, The Interest Rate v. the Annual Percentage Rate*, *The Wall Street Journal*, May 21, 2015, <https://www.wsj.com/articles/the-interest-rate-vs-the-annual-percentage-rate-1432215724>.

¹⁷ *See Consumer Litigation Funding, supra* note 4, at 126.

than they might have anticipated at the agreement's initiation.¹⁸ Additionally, the interest charged on a litigation financing agreement, even if clearly stated, can be high.¹⁹ A consumer who realizes he or she may owe more than he or she may recover may drive up the defendant's litigation costs by rejecting reasonable settlement offers for a chance to win a larger verdict in court.²⁰

Additional Issues and Concerns

There are additional issues and concerns with litigation financing to consider. One issue is the extent to which consumers – especially commercial consumers, but all consumers – risk losing control over their own cases due to litigation financing. For example, last year U.S. food distributor Sysco filed a lawsuit against litigation funder Burford Capital, alleging that it prevented Sysco from accepting reasonable settlements in Sysco's antitrust litigation against chicken, beef, and pork suppliers.²¹ Sysco also accused the law firm it hired to handle the antitrust cases of secretly working with Burford by encouraging the company to continue the lawsuits to increase the amount of money the law firm and Burford could make. Burford then counter-sued Sysco. Both sides later came to an agreement and dropped their lawsuits against each other, although publicly available documents show that Burford, through an affiliate it owns, will now have complete control over the antitrust litigation.²²

Another issue is the extent to which foreign litigation funding could pose risks to U.S. national and economic security interests. Available information suggests that sovereign wealth funds – investment funds owned or controlled by a foreign principal or a foreign principal's agent²³ – and non-U.S. citizens are participating in litigation funding.²⁴ Such participation could make it possible for foreign entities doing business in the U.S. to harm the U.S. in different ways; for example, by creating competitive advantages over their U.S. competitors by tying up U.S. companies in lengthy and expensive court cases; by gaining access to proprietary and sensitive commercial information through litigation discovery; and by funding litigation on political issues

¹⁸ *Id.* at 137-38.

¹⁹ *Id.* at 122.

²⁰ *See id.*; *see also Report to Congressional Requesters, supra* note 2, at Preface.

²¹ Alison Frankel, *Sysco sues litigation funder Burford, blasts Boies Schiller over \$140 million soured deal*, Reuters, Mar. 9, 2023, <https://www.reuters.com/legal/legalindustry/sysco-sues-litigation-funder-burford-blasts-boies-schiller-over-140-million-2023-03-09/>.

²² *Id.*; Alison Frankel, *Sysco cedes antitrust claims to litigation funder Burford as two sides drop cases*, Reuters, Jun. 29, 2023, <https://www.reuters.com/legal/litigation/column-sysco-cedes-antitrust-claims-litigation-funder-burford-two-sides-drop-2023-06-29/>.

²³ *See* Oxford Reference, *Sovereign Wealth Fund*, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100520417> (last visited Jan. 16, 2024) (providing that a sovereign wealth fund is an investment fund owned by a sovereign nation and managed by a central bank, state pension fund, or official investment company, and that most of the world's largest sovereign wealth funds belong to developing nations, although important funds are also held by Russia and others).

²⁴ Letter from Senator John Kennedy to U.S. Attorney General Merrick B. Garland and U.S. Supreme Court Chief Justice Roberts, Jan. 6, 2023, available at https://www.kennedy.senate.gov/public/_cache/files/0/7/077acc52-6622-453b-b9a5-bbecd358e136/32C50A661400A5B670DC1D48B8D75E73.letter-to-ag-garland-chief-justice-roberts.pdf; Letter from Georgia Attorney General Christopher M. Carr et al., to U.S. Attorney General Merrick B. Garland et al., Re: Threats Posed by Third-Party Litigation Funding, Dec. 22, 2022, available at <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2022/pr22-55-letter.pdf>.

that divide the U.S. public.²⁵ In a recent letter to the chief judges of Florida’s three federal districts, U.S. Senators Marco Rubio and Rick Scott expressed concern that the “potential impacts of allowing unfettered and undisclosed foreign [third-party litigation funding] throughout the judiciary could be severe, unless properly addressed.”²⁶

Still another issue is how much litigation financiers recover from the cases they finance compared to the plaintiffs they are funding. In some cases, litigation financiers have recovered significantly more money than the plaintiffs. In a 2023 television interview, Burford’s CEO, Christopher Bogart, admitted that although “it doesn’t happen very often ... it certainly can happen” that Burford recovers more money than the person who was wronged.²⁷

Potential Impact on Attorney-Client and Work Product Privileges

Uncertainty exists as to whether an attorney can discuss a litigation financing agreement with a litigation financier without waiving the attorney-client²⁸ or work product²⁹ privileges. Such privileges are typically waived or limited when protected information is shared with a third party, but attorney-financier communications may be necessary for a litigation financier to evaluate a consumer’s claim.³⁰ The American Bar Association urges attorneys discussing a litigation financing contract with a litigation financier to safeguard against waiving privilege, warning that infringing upon rights that clients would otherwise have, resulting from the presence of alternative litigation finance, requires the informed consent of the client after full, candid disclosure of all associated risks and benefits.³¹

²⁵ Covington Alert, *DOJ Officials Signal New Trends in Enforcement and Interpretation of the Foreign Agents Registration Act*, Dec. 7, 2023, <https://www.cov.com/en/news-and-insights/insights/2023/12/doj-officials-signal-new-trends-in-enforcement-and-interpretation-of-the-foreign-agents-registration-act>.

²⁶ Press Release, Marco Rubio, U.S. Senator for Florida, *Rubio, Scott Push for Transparency for Foreign Third Party Litigation Funding in U.S. Courts*, Nov. 3, 2023, <https://www.rubio.senate.gov/rubio-scott-push-for-transparency-for-foreign-third-party-litigation-funding-in-u-s-courts/>.

²⁷ Lesley Stahl, CBS News, *Litigation Funding: A multibillion-dollar industry for investments in lawsuits with little oversight*, 60 MINUTES, Jul. 23, 2023, <https://www.cbsnews.com/news/litigation-funding-60-minutes-transcript-2023-07-23/>.

Founded in 2009, Burford is the world’s largest litigation funder, with \$5 billion invested in multiple lawsuits. *Id.*

²⁸ Under the attorney-client privilege, communication between an attorney and his or her client is typically confidential if such persons do not intend to disclose it to a third party. This protects the giving of information to an attorney so that the attorney can give sound and informed legal advice. Section 90.502(1)(c), F.S.; *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).

²⁹ Under the work product doctrine, documents prepared by or on behalf of a party in anticipation of litigation are not discoverable. *GKK, etc. v. Cruz*, 251 So. 3d 967, 969 fn. 3 (Fla. 3d DCA 2018). Work product is almost absolutely protected under Florida common law if it contains mental impressions, conclusions, opinions and legal theories about litigation. *State v. Rabin*, 495 So. 2d 257, 262 (Fla. 3d DCA 1986).

³⁰ ARC, *What is Consumer Legal Funding?*, <http://arclegalfunding.org/consumer-legal-funding/> (last visited Jan. 12, 2024).

³¹ American Bar Association, *Commission on Ethics 20/20, Informational Report to the House of Delegates*, available at https://web-stage.law.columbia.edu/sites/default/files/microsites/clwa/CIAA/keynote_third_party_funding.pdf (last visited Jan. 12, 2024).

Litigation Financing Regulations in Florida

Florida regulates consumer loans and financing, usury,³² and interest.³³ However, at least one state court has specifically found that litigation financing is not a loan subject to existing law, leaving litigation financing and associated interest charges unregulated in the state.

In *Fausone v. U.S. Claims*,³⁴ the borrower was struck by a dump truck while riding her bicycle. In order to fund her lawsuits against the owner of the dump truck, in 2001 she entered into a series of litigation financing agreements with the financing company for \$30,000, which were secured by her personal injury claims. By 2005, the court noted that she apparently owed the financing company more than \$102,007 plus attorneys' fees.³⁵ The borrower's agreement with the financing company provided that if the proceeds of the claim were less than the money owed, the financing company would be entitled to 100 percent of the proceeds. It also included a repayment schedule with an interest rate well above the rates normally allowed for consumer transactions.³⁶

Noting that “[t]here appear to be no laws regulating [litigation financing] agreements in Florida” and “[t]hey are not treated like consumer loans,” the court affirmed the judgment on appeal and granted the financing company's motion for attorneys' fees pursuant to the financing agreement.³⁷ But it also noted that “if The Florida Bar is going to allow lawyers to promote and provide such agreements to their clients, it would seem that the legislature might wish to examine this industry to determine whether Florida's citizens are in need of any statutory protection.”³⁸

Given the lack of regulation, The Florida Bar³⁹ generally “discourages the use of [litigation financing] companies,” allowing an attorney to inform a client about litigation financing only if the attorney feels it is in the client's best interests.⁴⁰

Litigation Financing Regulations in Other States

Several states have enacted laws addressing consumer third-party litigation financing.⁴¹ These laws may require litigation funders to disclose certain information in their funding agreements,

³² “Usury” means loaning money at an exorbitant or illegally high interest rate. States set their own maximum interest rates. Florida declares interest higher than 18 percent per year for loans up to \$500,000 and higher than 25 percent for loans over \$500,000 usurious unless otherwise allowed by law. Cornell Law School, Legal Information Institute, *Usury*, <https://www.law.cornell.edu/wex/usury> (last visited Jan. 12, 2024); *see also* s. 687.02(1), F.S. (defining usurious contracts) and s. 687.071(2)-(3), F.S. (criminalizing certain kinds of usury and loan sharking).

Ss. 687.02(1) and 687.071(2) and (3), F.S.

³³ *See generally* chs. 516 (regulating consumer finance) and 687, F.S. (regulating interest, usury, and lending practices).

³⁴ 915 So. 2d 626 (Fla. 2nd DCA 2005).

³⁵ *Id.* at 627-28.

³⁶ *Id.* at 628.

³⁷ *Id.* at 629.

³⁸ *Id.* at 630.

³⁹ The Florida Constitution gives the Florida Supreme Court exclusive and ultimate regulatory authority over persons admitted to practice law in Florida. The Court performs this function through The Florida Bar, an investigative and prosecutorial authority charged with ensuring that all attorneys meet the minimum standards of conduct set out in the Rules Regulating the Florida Bar. *See* FLA. CONST. art V, s. 15.

⁴⁰ The Florida Bar, *Ethics Opinion 00-3* (Mar. 15, 2002), <https://www.floridabar.org/etopinions/etopinion-00-3/>.

⁴¹ *Report to Congressional Requesters, supra* note 2, at Appendix 3.

including financial terms such as the amount that must be repaid and the annual percentage rate. States may also require registration or impose reporting requirements. In addition, some states limit the interest rates and fees that litigation funders can charge consumers.⁴²

The following chart, published by the U.S. Government Accountability Office, identifies 10 examples of state laws addressing consumer third-party litigation financing:⁴³

State	Law	Example of requirements or provisions
Arkansas	Consumer Lawsuit Lending Ark. Code Ann. § 4-57-109	Litigation funders cannot charge consumers annual interest rates greater than 17 percent. Funding contracts must disclose the annual percentage rate applicable to the transaction. Any amount paid to a litigation funder that exceeds the amount provided to the consumer in connection with the dispute must be included as interest.
Maine	Maine Consumer Credit Code Legal Funding Practices Me. Rev. Stat. Ann. tit. 9-A, art. 12	Litigation funders must register with the state. Funding contracts must include the total amount that consumers must repay, in 6-month intervals for 42 months, and the annual percentage fee on advance, compounded semiannually. Litigation funders are prohibited from assessing fees for any period exceeding 42 months from the date of the funding contract. Fees cannot be compounded more frequently than semiannually.
Nebraska	Nonrecourse Civil Litigation Act Neb. Rev. Stat. §§ 25-3301 - 25-3309	Litigation funders must register with the state. Funding contracts must include the total dollar amount to be repaid by the consumer, in 6-month intervals for 36 months, including all fees, and the annual percentage rate of return, calculated as of the last day of each 6-month interval, including frequency of compounding.
Nevada	Consumer Litigation Funding Nev. Rev. Stat. ch. 604C (2021)	Litigation funders must be licensed. The provisions apply to consumer litigation funding transactions that do not exceed \$500,000. The litigation funder must require the amount to be paid to be set as a predetermined amount based on intervals of time. The amount may not exceed the funded amount plus charges not to exceed a rate of 40 percent annually. The funding contract must disclose the maximum amount to be assigned by the consumer to the litigation funder and a payment schedule listing all dates and the amount due at the end of each 180-day period from the funding date.
Ohio	Nonrecourse Civil Litigation Advance Contracts Ohio Rev. Code § 1349.55	Funding contracts must include the total dollar amount to be repaid by the consumer, in 6-month intervals for 36 months, including all fees, and the annual percentage rate of return, calculated as of the last day of each 6-month interval, including frequency of compounding.
Oklahoma	Consumer Litigation Funding Agreements Okla. Stat. tit. 14A, art. 3, pt. 8	Litigation funders must obtain a license from the state's Department of Consumer Credit. Funding contracts must include a payment schedule that includes the funded amount and charges, and lists all dates and the amount due at the end of each 180-day period from the funding date until the due date of the maximum amount due to the funder by the consumer to satisfy the amount owed under the agreement.

⁴² *Id.*

⁴³ *Id.* at Appendix 3, Table 3. The chart omits Indiana, which enacted Indiana Code s. 24-12 in 2016. *See* P.L.153-2016, s. 7 (2016). The Indiana law requires financing companies to register with the state, caps interest rates and fees, and protects the attorney-client privilege. *See id.* Indiana also recently added a disclosure provision to the law. Mark Popolizio, Verisk, *Indiana enacts statutory provision regarding Third-Party Litigation Funding (TPLF) disclosure*, Jun. 9, 2023, <https://www.verisk.com/insurance/visualize/indiana-enacts-statutory-provision-regarding-third-party-litigation-funding-tplf-disclosure/>.

Tennessee	Tennessee Litigation Financing Consumer Protection Act Tenn. Code. Ann. tit. 47, ch. 16	Litigation funders must be registered in the state. Funders cannot charge consumers an annual fee that is more than 10 percent of the original amount of money provided to the consumer. The term of funding transactions is limited to 3 years, and the maximum yearly fees funders can charge consumers (which are separate from the annual fee and include underwriting fees and other charges) are limited to a maximum of \$360 per year for each \$1,000 of the unpaid principal amount of funds advanced to the consumer.
Vermont	Consumer Litigation Funding Companies Vt. Stat. Ann. tit. 8, ch. 74	Litigation funders must register with the state. Funders must file annual reports, which include the number of contracts entered into, the dollar value of funded amounts to consumers and charges under each contract, the dollar amount and number of litigation funding transactions in which the realization to the funder was as contracted, and the dollar amount and number of transactions in which the realization to the funder was less than contracted. Funding contracts must include the total funded amount provided to the consumer under the contract, an itemization of charges, and the annual percentage rate of return.
West Virginia	Consumer Litigation Financing W. Va. Code. ch. 46A, art. 6N	Litigation funders must register with the state. Funding contracts must disclose the total funded amount provided to the consumer under the contract and the total amount due from the consumer, in 6-month intervals for 42 months, including all fees and charges. Litigation funders may not charge the consumer an annual fee of more than 18 percent of the original amount of money provided to the consumer for the litigation financing transaction and a litigation funder may not assess fees for any period exceeding 42 months from the date of the contract with the consumer. Parties to a civil action must disclose to other parties agreements which provide litigation funders a contingent right to compensation from the proceeds of the action.
Wisconsin	2017 Wisconsin Act 235, § 12 Wis. Stat. § 804.01(2)(bg)	Parties to a civil action must disclose to other parties in the action agreements which provide to any person—other than an attorney permitted to charge a contingent fee representing a party—a contingent right to compensation from the proceeds of the action. ⁴⁴

Source: GAO analysis of state laws. | GAO-23-105210

Note: This table reflects the referenced laws as of November 4, 2022 and is not exhaustive. Other states may have enacted laws that address consumer third-party litigation financing.

*The related statutory provision does not expressly distinguish between agreements that are consumer or commercial in nature. According to literature we reviewed, Wisconsin is the only state to require litigation funding disclosure in commercial litigation. See, e.g., Elizabeth Korchin, Patrick Dempsey, and Eric Blinderman, “The Third Party Litigation Funding Law Review: USA,” (November 22, 2021), accessed July 13, 2022. <https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/usa>.

Montana recently enacted a law requiring the disclosure of litigation funding agreements in all civil cases before Montana courts. The law also requires litigation funders to register with the Montana secretary of state; makes litigation funders jointly liable for costs; and establishes a 25 percent cap on the amount that a funder may receive or recover from any judgment, award, settlement, verdicts, or other form of monetary relief obtained from the lawsuit.⁴⁴

New York currently regulates litigation financing through administrative action; its Attorney General requires litigation financing agreements to provide certain consumer protections.⁴⁵ Since 2017, however, New York has also introduced each session, but has not passed, a bill that would limit interest rates, restrict fee-sharing, require disclosures, set penalties, define how litigation loans would impact attorney-client privilege, and require registration and reporting.⁴⁶

Courts in Colorado, Kentucky, and North Carolina have also deemed litigation financing a loan subject to state usury laws.⁴⁷ Uniquely, Pennsylvania courts have invalidated litigation financing agreements under a common law champerty doctrine,⁴⁸ and Alabama courts have held that

⁴⁴ Noël Fletcher, *Montana Reins in Third-Party Lawsuit Financiers*, *Transport Topics*, May 15, 2023, <https://www.ttnews.com/articles/montana-third-party-lawsuit>; see also ch. 360, Laws of Montana 2023 (enacting S.B. 269).

⁴⁵ See Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 653-55 (2007), available at <https://lawreview.vermontlaw.edu/wp-content/uploads/2012/02/mclaughlin.pdf>.

⁴⁶ Heather R. Abraham & Maura Graham, New York State Bar Association, *New York’s Unregulated Litigation Lending Industry*, Oct. 13, 2023, <https://nysba.org/new-yorks-unregulated-litigation-lending-industry/>.

⁴⁷ *Oasis Legal Fin. Grp., LLC v. Coffman*, 361 P. 3d 400, 606-10 (Co. S.Ct. 2015); *Boling v. Prospect Funding Holdings, LLC*, 2017 WL 1193064, *4-*8 (W.D. Ky. 2017); *Odell v. Legal Bucks, LLC*, 192 N.C.App. 298, 312-20 (N.C. Ct. of Appeals 2008).

⁴⁸ The champerty doctrine prohibits “the sale of the fruit of legal judgment or settlement, in advance of such judgment or settlement, to an otherwise disinterested party.” See Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150

litigation financing agreements are a form of gambling, or speculating, in litigation and therefore void as against public policy.⁴⁹

III. Effect of Proposed Changes:

The bill creates the “Litigation Investment Safeguards and Transparency Act,” to regulate persons participating in legal proceedings funded by litigation financing.

Short Title and Organization

Section 1 provides a short title for the bill, the “Litigation Investment Safeguards and Transparency Act.”

Section 2 of the bill designates ss. 69.011, 69.021, 69.031, 69.041, 69.051, 69.061, 69.071, and 69.081, F.S., as part I of chapter 69, F.S., entitled “General Provisions.”

Section 3 of the bill creates part II of chapter 69, F.S., consisting of ss. 69.101, 69.103, 69.105, 69.107, 69.109, and 69.111, F.S., entitled “Litigation Financing.”

Definitions

The bill creates s. 69.101, F.S., which defines the following terms for purposes of the Act: “Foreign person” means a person or an entity that is not:

- A citizen of the U.S.
- An alien lawfully admitted for permanent residence in the U.S.
- An unincorporated association, a majority of members of which are citizens of the U.S. or aliens lawfully admitted for permanent residence in the U.S.
- A corporation that is incorporated in the U.S.

“Foreign principal” means:

- The government or a government official of any country other than the U.S.
- A political subdivision or political party of a country other than the U.S.
- A partnership, association, corporation, organization, or other combination of persons organized under the laws of, or having its principal place of business in, a country other than the U.S., whose shares or other ownership interest is owned by the government or a government official of a country other than the U.S., or owned by a political subdivision or political party of a country other than the U.S.

“Health care practitioner” means any person licensed under the statutes regulating:⁵⁰

- Acupuncture.
- Medical practice.
- Osteopathic medicine.

U. PENN. L. REV. 1297, 1297 (2002), available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3271&context=penn_law_review; *WFIC, LLC v. LaBarre*, 148 A.3d 812, 818-19 (Sup. Ct. Pa. 2016).

⁴⁹ *Wilson v. Harris*, 688 So. 2d 265, 268-70 (Ala. Civ. App. 1996).

⁵⁰ See s. 456.001(4), F.S. (listing chs. 457-467, F.S.; parts I, II, III, V, X, XIII, and XIV, ch. 468, F.S.; ch. 478, F.S.; ch. 480, F.S.; parts I, II, and III, ch. 483, F.S.; ch. 484, F.S.; ch. 486, F.S.; and chs. 490-491, F.S.).

- Chiropractic medicine.
- Podiatric medicine.
- Naturopathy.
- Optometry.
- Nursing.
- Pharmacy.
- Dentistry, dental hygiene, and dental laboratories.
- Midwifery.
- Speech-language pathology and audiology.
- Nursing home administration.
- Occupational therapy.
- Respiratory therapy.
- Dietetics and nutrition practice.
- Athletic trainers.
- Orthotics, prosthetics, and pedorthics.
- Electrolysis.
- Massage therapy practice.
- Clinical laboratory personnel.
- Medical physicists.
- Genetic counseling.
- Dispensing of optical devices and hearing aids.
- Physical therapy practice.
- Psychological services.
- Clinical, counseling, and psychotherapy services.

“Litigation financier” means a person engaged in the business of providing litigation financing.

“Litigation financing agreement” or “litigation financing” means a transaction in which a litigation financier agrees to provide financing to a person who is a party to, or counsel of record for, a civil action, administrative proceeding, claim, or other legal proceeding, in exchange for a right to receive payment, which right is contingent in any respect on the outcome of such action, claim, or proceeding, or on the outcome of any matter within a portfolio that includes such action, claim, or proceeding, and involves the same counsel or affiliated counsel.

However, the terms do not apply to:

- An agreement wherein funds are provided for or to a party to a civil action, administrative proceeding, claim, or other legal proceeding, for such person’s use in paying his or her costs of living or other personal or familial expenses during the pendency of such action, claim, or proceeding, and where such funds are not used to finance any litigation or other legal costs.
- An agreement wherein an attorney consents to provide legal services on a contingency fee basis or to advance his or her client’s legal costs, and where such services or costs are provided by the attorney in accordance with the Florida Rules of Professional Conduct.
- An entity with a preexisting contractual obligation to indemnify or defend a party to a civil action, administrative proceeding, claim, or other legal proceeding.

- A health insurer that has paid, or is obligated to pay, any sums for health care for an injured person under the terms of a health insurance plan or agreement.
- The repayment of a financial institution⁵¹ for loans made directly to a party to a civil action, administrative proceeding, claim, or other legal proceeding, or to such party's attorney when repayment of the loan is not contingent upon the outcome of such action, claim, or proceeding, or on the outcome of any matter within a portfolio that includes such action, claim, or proceeding and involves the same counsel or affiliated counsel.
- Funding provided to a nonprofit organization, provided the nonprofit organization uses the funding to seek relief other than compensatory damages in excess of \$100,000 or punitive damages, whether as a party or on behalf of a client or member of the organization, and irrespective of whether the nonprofit organization seeks an award of costs or attorney fees in providing pro bono representation.
- Funding provided by a nonprofit organization exempt from federal income tax under s. 501(c)(3) of the U.S. Internal Revenue Code, by grant or otherwise, to support the pursuit of pro bono, no-cost litigation.

“National security interests” means those interests relating to the national defense, foreign intelligence and counterintelligence, international, and domestic security, and foreign relations.

“Proprietary information” means information developed, created, or discovered by a person, or which became known by or was conveyed to the person, which has commercial value in the person's business. The term includes, but is not limited to, domain names, trade secrets, copyrights, ideas, techniques, inventions, regardless of whether patentable, and other information of any type relating to designs, configurations, documentation, recorded data, schematics, circuits, mask works, layouts, source code, object code, master works, master databases, algorithms, flow charts, formulae, works of authorship, mechanisms, research, manufacture, improvements, assembly, installation, intellectual property including patents and patent applications, and information concerning the person's actual or anticipated business, research, or development or received in confidence by or for the person from any other source.

“Sovereign wealth fund” means an investment fund owned or controlled by a foreign principal or an agent thereof.

Litigation Financing Agreements and Representation of Client Interests

The bill creates s. 69.103, F.S., which regulates litigation financing agreements and the representation of client interests.

Specifically, the bill provides that a court may take the existence of a litigation financing agreement into account:

⁵¹ See s. 655.005(1)(i), F.S. (providing that “financial institution” means “a state or federal savings or thrift association, bank, savings bank, trust company, international bank agency, international banking corporation, international branch, international representative office, international administrative office, international trust entity, international trust company representative office, qualified limited service affiliate, credit union, or an agreement corporation operating pursuant to s. 25 of the Federal Reserve Act, 12 U.S.C. ss. 601 et seq. or Edge Act corporation organized pursuant to s. 25(a) of the Federal Reserve Act, 12 U.S.C. ss. 611 et seq.”).

- In a class action lawsuit brought in the courts of this state, when determining whether a class representative or class counsel would adequately and fairly represent the interests of the class.
- In actions involving a common question of law or fact pending before the court which may be or have been consolidated, when determining whether the lead counsel or any co-lead counsel would adequately and fairly represent the interests of the parties to such actions.

Prohibited Conduct by Litigation Financiers

The bill creates s. 69.105, F.S., which prohibits certain conduct by litigation financiers.

Specifically, the bill provides that a litigation financier may not:

- Direct, or make any decisions with respect to, the course of any civil action, administrative proceeding, claim, or other legal proceeding for which the litigation financier has provided financing, or any settlement or other disposition thereof. This prohibition includes, but is not limited to, decisions in appointing or changing counsel, choice or use of expert witnesses, and litigation strategy. All rights to make decisions with respect to the course and settlement or other disposition of the subject civil action, administrative proceeding, claim, or other legal proceeding remain solely with the parties to such action, claim, or proceeding and their counsel of record.
- Contract for or receive, whether directly or indirectly, a larger share of the proceeds of a civil action, administrative proceeding, claim, or other legal proceeding financed by a litigation financing agreement than the share of the proceeds collectively recovered by the plaintiffs to any such action, claim, or proceeding, after the payment of any attorney fees and costs owed in connection to such action, claim, or proceeding.
- Pay or offer to pay a commission, referral fee, or other consideration to any person, including an attorney, law firm, or health care practitioner, for referring a person to the litigation financier.
- Assign or securitize a litigation financing agreement in whole or in part.
- Be assigned rights to or in a civil action, administrative proceeding, claim, or other legal proceeding, for which the litigation financier provided financing, other than the right to receive a share of the proceeds of such action, claim, or proceeding, pursuant to the litigation financing agreement.

Required Disclosures and Discovery Obligations

The bill creates s. 69.107, F.S., which requires certain disclosures and identifies certain discovery obligations in connection with litigation financing.

Disclosures by Attorneys Who Enter into Litigation Financing Agreements

The bill requires an attorney who enters into a litigation financing agreement to disclose its existence, and deliver a copy of the agreement to the client he or she represents in the civil action, administrative proceeding, claim, or other legal proceeding financed by the agreement, within 30 days after being retained as counsel by such client, or within 30 days after entering into the litigation financing agreement, whichever is earlier.

Disclosures by Parties to, or Counsel of Record for, Legal Proceedings

Additionally, except as otherwise stipulated to by the parties to a civil action, administrative proceeding, claim, or other legal proceeding, or as otherwise ordered by a court of competent jurisdiction, a party to or counsel of record for a civil action, administrative proceeding, claim, or other legal proceeding who enters into a litigation financing agreement with respect to such action, claim, or proceeding must, without awaiting a discovery request and within 30 days after commencement of such action, claim, or proceeding, disclose its existence and deliver a copy of the litigation financing agreement to:

- All parties to the civil action, administrative proceeding, claim, or other legal proceeding.
- The court, agency, or tribunal in which the civil action, administrative proceeding, claim, or other legal proceeding is pending.
- Any known person, including an insurer, with a preexisting contractual obligation to indemnify or defend a party to the civil action, administrative proceeding, claim, or other legal proceeding.

Disclosures by Class Counsel of a Putative Class in Class Action Lawsuits

The bill provides that in addition to complying with the previous two provisions, the class counsel of a putative class in a class action lawsuit for which litigation financing is obtained must disclose to the following persons the existence of any legal, financial, or other relationship between the class counsel and the litigation financier that exists separate and apart from the litigation financing agreement itself within 30 days after commencement of such action, or of the execution of the litigation financing agreement, whichever is earlier:

- All parties to the civil action, administrative proceeding, claim, or other legal proceeding.
- The court, agency, or tribunal in which the civil action, administrative proceeding, claim, or other legal proceeding is pending.
- Any known person, including an insurer, with a preexisting contractual obligation to indemnify or defend a party to the civil action, administrative proceeding, claim, or other legal proceeding.

The class counsel in a class action or putative class action lawsuit for which litigation financing is obtained must, upon the request of a class member, disclose and deliver a copy of the litigation financing agreement to the class member.

Disclosures by Lead and Co-Lead Counsel in Consolidated Civil Actions

The bill also provides that in addition to complying with the first two provisions above, the lead counsel and co-lead counsel, if any, for civil actions consolidated in the courts of this state must disclose to the following parties the existence of, and deliver a copy of, any litigation financing agreement entered into in connection with any of the consolidated actions:

- All parties to the consolidated civil actions.
- The court, agency, or tribunal in which the civil actions are pending.
- Any known person, including an insurer, with a preexisting contractual obligation to indemnify or defend a party to the civil actions.

Disclosures by Parties and Counsel of Record of the Involvement of Foreign Persons, Foreign Principals, or Sovereign Wealth Funds

Additionally, a party to a civil action, administrative proceeding, claim, or other legal proceeding, or such party's counsel of record, must, except as otherwise stipulated to by the parties to such action, claim, or proceeding, or as otherwise ordered by a court of competent jurisdiction, disclose as prescribed in the following provision the name, address, and citizenship or country of incorporation or registration of any foreign person, foreign principal, or sovereign wealth fund that, with respect to the action, claim, or proceeding:

- Obtained or will obtain a right to receive any payment that is contingent in any respect on the outcome of such civil action, administrative proceeding, claim, or other legal proceeding, or on the outcome of any matter within a portfolio that includes such civil action, administrative proceeding, claim, or other legal proceeding and involves the same counsel or affiliated counsel.
- Provided or will provide funds, whether directly or indirectly, which funds have been or will be used to satisfy any term of a litigation financing agreement into which the party or the party's counsel of record has entered to finance such civil action, administrative proceeding, claim, or other legal proceeding.
- Has received or is entitled to receive proprietary information or information affecting national security interests obtained as a result of the financing of such civil action, administrative proceeding, claim, or other legal proceeding by a litigation financing agreement entered into by the party or the party's counsel of record.

The disclosures required in the previous provision must be made to the following persons:

- All parties to the civil action, administrative proceeding, claim, or other legal proceeding.
- The court, agency, or tribunal in which the civil action, administrative proceeding, claim, or other legal proceeding is pending.
- Any known person, including an insurer, with a preexisting contractual obligation to indemnify or defend a party to the civil action, administrative proceeding, claim, or other legal proceeding.
- The Department of Financial Services.
- The Office of the Attorney General.

The Existence of Litigation Financing Agreements is Discoverable

The bill provides that the fact of the existence of a litigation financing agreement and the identities of all parties to the agreement are discoverable in any civil action, administrative proceeding, claim, or other legal proceeding financed by such an agreement, unless the court, for good cause shown, determines otherwise.

All Disclosure Obligations are Ongoing

The disclosure obligations in the bill are ongoing obligations. Thus, when a party to a civil action, administrative proceeding, claim, or other legal proceeding, or his or her counsel of record:

- Enters into or amends a litigation financing agreement after the commencement of such action, claim, or proceeding, the party or attorney has 30 days after the date of entering into

or amending the litigation financing agreement to comply with the disclosure obligations established in the bill.

- Obtains information on the involvement of a foreign person, foreign principal, or sovereign wealth fund after the commencement of such action, claim, or proceeding, which involvement would require disclosure under this section, the party or attorney has 30 days after the date of obtaining the information to comply with the disclosure obligations established in the bill.

Redaction

The bill provides that a party, or the party's counsel, who is required to disclose a copy of the litigation financing agreement under certain provisions of the bill⁵² may redact from the agreement the dollar amounts being financed.

Another party may petition the circuit court in the county where the civil action, administrative proceeding, claim, or other legal proceeding is pending to:

- Dispute the extent of such redactions if information other than the dollar amounts being financed has been improperly redacted from the agreement; or
- Show cause that the dollar amounts being financed should be disclosed.

In the case of such a petition, the party or counsel disclosing the agreement must submit an unredacted copy of the agreement to the court for inspection in camera. If the court finds that information other than the dollar amounts being financed has been improperly redacted from the agreement or that cause has been shown to disclose the dollar amounts being financed, the court must order that such information be disclosed to all parties to whom the agreement must be disclosed.

Indemnification by Litigation Financiers

The bill creates s. 69.109, F.S., which requires certain indemnifications by litigation financiers.

Specifically, in any litigation financing agreement, the litigation financier must agree to indemnify the plaintiffs to the civil action, administrative proceeding, claim, or other legal proceeding funded in the agreement, and such plaintiffs' counsel of record, against any adverse costs, attorney fees, damages, or sanctions that may be ordered or awarded against such persons in such action, claim, or proceeding. However, indemnification is not required for those adverse costs, attorney fees, damages, or sanctions that the litigation financier can show resulted from the intentional misconduct of such plaintiffs or plaintiffs' counsel of record.

Violations and Enforcement

The bill creates s. 69.111, F.S., which regulates violations and provides for enforcement.

⁵² Specifically, proposed s. 69.107(2) or (5), F.S. Subsection (2) requires disclosure of a copy of the litigation financing agreement by "a party to or counsel of record for a civil action, administrative proceeding, claim, or other legal proceeding who enters into a litigation financing agreement with respect to" the legal proceeding. Subsection (5) requires disclosure of a copy of the litigation financing agreement by "the lead counsel and co-lead counsel, if any, for civil actions consolidated in the courts of this state[.]"

Specifically, the bill provides that:

- A litigation financing agreement executed in violation of this part is void and unenforceable.
- A violation of s. 69.105 or s. 69.109 is a deceptive and unfair trade practice actionable under the Florida Deceptive and Unfair Trade Practices Act.⁵³
- A court, agency, or tribunal of competent jurisdiction may impose fines or any other sanction it deems appropriate upon any person who violates s. 69.107.

Severability

Section 4 of the bill provides that if any provision of the bill or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the bill which can be given effect without the invalid provision or application, and to this end the provisions of the bill are severable.

Applicability

Section 5 of the bill provides for applicability.

Specifically, the disclosure requirements in s. 69.107, F.S., as created by the bill apply to any civil action, administrative proceeding, claim, or other legal proceeding pending or commenced on or after July 1, 2024. Any party to or counsel of record for a civil action, administrative proceeding, claim, or other legal proceeding pending on July 1, 2024, who would have been required to make a disclosure under s. 69.107, F.S., had it been in effect at the time the relevant action occurred must make the disclosure under that section within 30 days after July 1, 2024. Failure to do so is sanctionable as provided in s. 69.111, F.S.

Section 6 of the bill provides that except as otherwise provided in the bill, this Act applies to litigation financing agreements entered into on or after July 1, 2024.

Effective Date

Section 7 of the bill provides that it takes effect July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

⁵³ Chapter 501, part II, F.S. See s. 501.201, F.S. (providing the short title).

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 will positively impact consumers entering into litigation financing agreements by effectively capping the recovery of litigation financiers (*i.e.* by prohibiting litigation financiers from contracting for a larger share of the proceeds of a legal proceeding than collectively recovered by the plaintiffs). Conversely, the bill may reduce the potential of consumers to obtain funding that might be necessary to bring a claim.

The bill will negatively impact litigation financiers by requiring them to indemnify plaintiffs and their counsel for any adverse costs, attorney fees, damages, or sanctions awarded against the plaintiffs; prohibiting them from engaging in business development by paying third parties commissions or referral fees; prohibiting them from assigning or securitizing litigation financing agreements; and prohibiting them from being assigned any rights other than the right to receive a share of the proceeds from successful litigation pursuant to the litigation financing agreement.

A litigation financier who willfully uses a deceptive or unfair trade act or practice may face a civil penalty of up to \$10,000 per violation, or \$15,000 per violation if such victim was a senior citizen, disabled person, or military service member.

C. Government Sector Impact:

The bill authorizes courts, agencies, or tribunals of competent jurisdiction to impose fines or other sanctions they deem appropriate upon any person who violates the disclosure and discovery provisions of the Act. Accordingly, the bill will, to some unknown extent, result in increased revenues to these courts, agencies, and tribunals.

Under the bill, the Department of Legal Affairs or the Office of the State Attorney may also collect civil penalties from litigation financiers who violate the Florida Deceptive and Unfair Trade Practices Act. Litigation financiers who willfully use deceptive or unfair trade practices may face civil penalties of up to \$10,000 per violation, or \$15,000 per violation if the victim is a senior citizen, disabled person, or military service member. Accordingly, the bill is likely to result in increased revenues to the state.

The bill may also cause an indeterminate, but likely insignificant, workload increase on the Department of Legal Affairs and Office of the State Attorney for each judicial circuit, either of which could be responsible for prosecuting such violations. However, these costs will likely be absorbed by each entity's operating budget.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 69.011, 69.021, 69.031, 69.041, 69.051, 69.061, 69.071, and 69.081.

This bill creates the following sections of the Florida Statutes: 69.101, 69.103, 69.105, 69.107, 69.109, and 69.111.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Fiscal Policy on February 7, 2024:

The amendment:

- Clarifies, in connection with the nonprofit organization exemption from litigation financing requirements, that nonprofits may seek:
 - Relief other than compensatory damages in excess of \$100,000 or punitive damages.
 - Relief as parties themselves, in addition to seeking relief on behalf of clients or members of the organization.
 - An award of costs or attorney fees in providing pro bono representation.
- Provides that funding provided by a nonprofit organization exempt from federal income tax, by grant or otherwise, to support the pursuit of pro bono, no-cost litigation, does not qualify as litigation financing.
- Provides, in connection with certain disclosure requirements in the bill, that parties to legal proceedings or their counsel may redact the dollar amounts being financed from the copies of the litigation financing agreements that they disclose.
- Allows other parties to petition the court to dispute the extent of redactions if more than just dollar amounts have been redacted, or to show cause that the dollar amounts being financed should be disclosed; if, after an in camera inspection, the court agrees with the petitioner, the court must then order disclosure to all parties.

B. Amendments:

None.

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