

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Committee Substitute

for

Senate Bill 57

BY SENATOR ROMANO

[Originating in the Committee on the Judiciary;

Reported on February 8, 2018]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
2 designated §22B-1-7a; to amend said code by adding thereto a new section, designated
3 §24-1-7a; and to amend said code by adding thereto a new article, designated §46A-6N-
4 1, §46A-6N-2, §46A-6N-3, §46A-6N-4, §46A-6N-5, §46A-6N-6, §46A-6N-7, and §46A-6N-
5 8, all relating to third-party litigation financing; providing that a party involved in a
6 proceeding before the environmental boards shall disclose whether their attorney is being
7 paid for by someone other than the party involved; providing disclosure requirements;
8 providing that a party involved in a proceeding before the Public Service Commission shall
9 disclose whether their attorney is being paid for by someone other than the party involved;
10 providing disclosure requirements; defining terms; providing that a litigation financier shall
11 register as a litigation financier in this state; providing registration requirements for
12 business entities, partnerships, and individuals; providing that litigation financiers shall
13 secure a bond or an irrevocable letter of credit; providing to whom the bond is payable;
14 requiring that the litigation financiers amend their registration if their information changes
15 or becomes inaccurate; providing that the Secretary of State may promulgate rules;
16 providing that the terms of the litigation financing transaction shall be set forth in a
17 completed, written contract; providing that the litigation financing contract shall contain a
18 right of rescission; providing that a litigation financing contract shall contain certain written
19 acknowledgements and disclosures; providing that a litigation financier shall not pay or
20 offer to pay commissions, referral fees, or other consideration to any attorney, law firm,
21 medical provider, chiropractor, or physical therapist or any of their employees for referring
22 a consumer to the litigation financier; providing that a litigation financier shall not accept
23 commissions, referral fees, or other consideration; providing that a litigation financier shall
24 not advertise false or misleading information; providing that a litigation financier shall not
25 refer a consumer to a specific attorney, law firm, medical provider, chiropractor, or physical
26 therapist; providing an exception; providing that a litigation financier shall supply copies of
27 the contract to the consumer or consumer's attorney; providing that a litigation financier

28 shall not attempt to waive any of consumer's remedies; providing that a litigation financier
29 shall not attempt to effect arbitration or otherwise effect waiver of a consumer's right to a
30 jury trial; providing that a litigation financier shall not offer legal advice; providing that a
31 litigation financier shall not assign the litigation financing contract; providing that a litigation
32 financing contract shall contain certain disclosures and terms; providing form disclosures;
33 providing that a violation shall render the contract unenforceable; providing that a court
34 may award costs and attorneys' fees against defendant; clarifying authority of the Attorney
35 General; providing that a contingent right to receive an amount under a legal claim may
36 be assigned by a consumer; providing a priority of liens; providing exceptions for certain
37 liens and claims; providing a maximum annual fee; providing a maximum frequency
38 annual fee charges; providing that fees may compound semiannually but not based on
39 any lesser time period; providing means for calculating annual percentage fee or rate of
40 return; providing maximum terms for fees; and restricting incorporation of prior obligations.

Be it enacted by the Legislature of West Virginia:

CHAPTER 22B. ENVIRONMENTAL BOARDS.

ARTICLE 1. GENERAL POLICY AND PURPOSE.

§22B-1-7a. Disclosure of attorney source payment.

1 Any party involved in a proceeding before the boards, as an appellant, intervenor, or other
2 interested party, that files a document with the board prepared by an attorney shall disclose
3 whether the attorney is being paid for by someone other than the party involved in the proceeding
4 and, if so, the name and address of the person or entity who is paying for the party's attorney in
5 the proceeding.

CHAPTER 24. PUBLIC SERVICE COMMISSION.

ARTICLE 1. GENERAL PROVISIONS.

§24-1-7a. Disclosure of attorney source payment.

1 Any party involved in a proceeding before the commission, as an appellant, intervenor, or
2 other interested party, that files a document with the commission prepared by an attorney shall

3 disclose whether the attorney is being paid for by someone other than the party involved in the
4 proceeding and, if so, the name and address of the person or entity who is paying for the party's
5 attorney in the proceeding.

**CHAPTER 46A. WEST VIRGINIA CONSUMER AND CREDIT
PROTECTION ACT.**

ARTICLE 6N. CONSUMER LITIGATION FUNDING.

§46A-6N-1. Definitions.

1 For purposes of this article:

2 “Consumer” means any natural person who resides, is present, or is domiciled in this state,
3 or who is or may become a plaintiff or complainant in a dispute in this state;

4 “Litigation financier” means a person, entity, or partnership engaged in the business of
5 litigation financing; and

6 “Litigation financing” or “litigation financing transaction”:

7 (1) Means a nonrecourse transaction in which financing is provided to a consumer in return
8 for a consumer assigning to the litigation financier a contingent right to receive an amount of the
9 potential proceeds of the consumer’s judgment, award, settlement, or verdict obtained with
10 respect to the consumer’s legal claim; and

11 (2) Does not include:

12 (A) Legal services provided on a contingency fee basis, or advanced legal costs, where
13 such services or costs are provided to or on behalf of a consumer by an attorney representing the
14 consumer in the dispute and in accordance with the West Virginia Rules of Professional Conduct;

15 (B) A consumer loan, as defined by §46A-1-102 of this code;

16 (C) A commercial tort claim, as defined by §46-9-102 of this code; or

17 (D) A claim under the Workers’ Compensation Law, compiled in chapter 23 of this code.

§46A-6N-2. Litigation financier; registration; bond; public record; rules.

1 (a)(1) No litigation financier shall engage in a litigation financing transaction in this state
2 unless it is registered as a litigation financier in this state.

3 (2) A litigation financier that is a business entity or partnership is registered in this state if:

4 (A) It is in compliance with the bond requirements of §46A-6N-3(b) of this code;

5 (B) It has a status of active and is in good standing as reflected in the records of the
6 Secretary of State; and

7 (C) Its charter, articles of organization, certificate of limited partnership, or other
8 organizational document, or, if a foreign entity, its West Virginia application for a certificate of
9 authority, contains a statement that it shall be designated as a litigation financier pursuant to this
10 article.

11 (3) A litigation financier that is not a business entity or partnership is registered in this state
12 if:

13 (A) It is in compliance with the bond requirements of §46A-6N-2(b) of this code; and

14 (B) It files an application for registration as a litigation financier on a form prescribed by
15 the Secretary of State that contains the following:

16 (i) Applicant's full legal name;

17 (ii) Business name of applicant, if any;

18 (iii) Physical street address and mailing address of the applicant;

19 (iv) A telephone number through which the applicant can be reached;

20 (v) The name, physical street address, mailing address, and telephone number for a West
21 Virginia registered agent appointed to accept service of process on behalf of the applicant;

22 (vi) A statement that the applicant shall be designated as a litigation financier pursuant to
23 this article; and

24 (vii) Any other information the Secretary of State deems necessary.

25 (b)(1) Each litigation financier shall file and have approved by the Secretary of State a
26 surety bond or irrevocable letter of credit issued and confirmed by a financial institution authorized
27 by law to transact business in the State of West Virginia in an amount not less than \$50,000.

28 (2) Such bond shall be payable to this state for the use of the Attorney General and any
29 person who may have a cause of action against the obligor of the bond for any violation of this
30 article. The bond shall continue in effect so long as a litigation financier is designated as a litigation
31 financier in the records of the Secretary of State.

32 (c) A litigation financier shall amend its registration with the Secretary of State within 30
33 days whenever the information contained in such record changes or becomes inaccurate or
34 incomplete in any respect.

35 (d) The Secretary of State, as appropriate, may promulgate rules in implementing this
36 article, including, but not limited to, the adoption of fees to cover any administrative costs relating
37 to administering this article.

§46A-6N-3. Litigation financier requirements.

1 A litigation financier shall fulfill each of the following requirements when engaged in
2 litigation financing:

3 (a) The terms of the litigation financing transaction shall be set forth in a written contract
4 that is completely filled in with no incomplete sections when the contract is offered or presented
5 to the consumer;

6 (b) The litigation financing contract shall contain a right of rescission, allowing the
7 consumer to cancel the litigation financing contract without penalty or further obligation if, within
8 five business days following the consumer's receipt of the funds, or execution of the litigation
9 financing contract, whichever is later, the consumer gives notice of the rescission and returns any
10 money already provided to the consumer by the litigation financier;

11 (c) The litigation financing contract shall contain a written acknowledgment by the
12 consumer of whether the consumer is represented by an attorney in the dispute;

13 (d) If the consumer acknowledges that the consumer is represented by an attorney in the
14 dispute, the litigation financing contract shall include a written acknowledgment executed by the
15 consumer's attorney in the dispute in which the attorney acknowledges all of the following:

16 (1) The attorney has had the opportunity to review the litigation financing contract on
17 behalf of the consumer;

18 (2) Whether the attorney is being paid on a contingency basis pursuant to a written fee
19 agreement;

20 (3) That all proceeds of the legal claim shall be disbursed by either the trust account of
21 the attorney representing the consumer in the dispute or a settlement fund established to receive
22 the proceeds of the dispute from the defendant on behalf of the consumer;

23 (4) The attorney is representing the consumer with regard to the dispute that is the subject
24 of the litigation financing contract; and

25 (5) The attorney has neither received nor paid a referral fee or any other consideration
26 from or to the litigation financier, nor will the attorney in the future; and

27 (e) In the event that proceeds are paid into a settlement fund or trust, the litigation financier
28 shall notify the administrator of the fund or trust of any outstanding liens arising from the litigation
29 financing contract.

§46A-6N-4. Litigation financier prohibitions.

1 A litigation financier shall not:

2 (1) Pay or offer to pay commissions, referral fees, or other forms of consideration to any
3 attorney, law firm, medical provider, chiropractor, or physical therapist, or any of their employees
4 for referring a consumer to a litigation financier;

5 (2) Accept any commissions, referral fees, rebates, or other forms of consideration from
6 an attorney, law firm, medical provider, chiropractor, or physical therapist, or any of their
7 employees;

8 (3) Advertise false or misleading information regarding its products or services;

9 (4) Refer a consumer or potential consumer to a specific attorney, law firm, medical
10 provider, chiropractor, or physical therapist, or any of their employees: *Provided*, That if a
11 consumer does not have legal representation, the provider may refer the consumer to a local or
12 state bar referral service operated by a bar association;

13 (5) Fail to promptly supply copies of any and all complete litigation financing contracts to
14 the consumer and the attorney representing the consumer in the dispute;

15 (6) Attempt to obtain a waiver of any remedy, including but not limited to, compensatory,
16 statutory, or punitive damages, that the consumer might otherwise have;

17 (7) Attempt to effect mandatory arbitration or otherwise effect waiver of a consumer's right
18 to a trial by jury;

19 (8) Offer or provide legal advice to the consumer regarding the litigation financing or the
20 underlying dispute; or

21 (9) Assign, which includes securitizing, a litigation financing contract, in whole or in part,
22 to a third party.

§46A-6N-5. Litigation financing contracts; disclosures.

1 (a) Litigation financing contracts shall contain the disclosures specified in this section,
2 which shall constitute material terms of the litigation financing contract.

3 (b) Unless otherwise specified, the disclosures shall be typed in at least 14-point, bold font
4 and be placed clearly and conspicuously within the litigation financing contract, as follows:

5 (1) On the front page under appropriate headings, language specifying:

6 (A) The total amount of money to be provided to the consumer by the litigation financier
7 as part of the litigation financing transaction;

8 (B) The maximum amount the consumer can be required to provide the litigation financier
9 including but not limited to all fees, charges, interest, or other consideration, under the terms of
10 the litigation financing contract;

11 (C) The maximum annual percentage fee, which shall include, but not be limited to, all
12 fees, charges, interest, or other consideration received by a litigation financier in consideration for
13 litigation financing: *Provided*, That the consumer may be charged for the litigation financing
14 transaction under the terms of the litigation financing contract;

15 (D) The following:

16 Consumer's Right to Cancellation: You may cancel this contract without penalty or further
17 obligation within five (5) business days from the date you signed this contract or received financing
18 from [insert name of the litigation financier] by: returning the funds to [insert name, office address
19 and office hours of the litigation financier] or by U. S. mail [insert name and mailing address of
20 litigation financier]. For purposes of the return deadline by U. S. mail, the postmark date on the
21 returned funds or, if mailed by registered or certified mail, the date of the return receipt requested,
22 shall be considered the date of return.

23 (2) Within the body of the litigation financing contract, the following:

24 The litigation financier agrees that it has no right to and will not make any decisions about
25 the conduct of your lawsuit or dispute and that the right to make those decisions remains solely
26 with you and your attorney;

27 (3) Within the body of the litigation financing contract, in all capital letters contained within
28 a box the following:

29 THE FUNDED AMOUNT AND AGREED TO CHARGES SHALL BE PAID ONLY FROM
30 THE PROCEEDS OF YOUR LEGAL CLAIM AND SHALL BE PAID ONLY TO THE EXTENT
31 THAT THERE ARE AVAILABLE PROCEEDS FROM YOUR LEGAL CLAIM. YOU WILL NOT
32 OWE (INSERT NAME OF THE CONSUMER LITIGATION FUNDER) ANYTHING IF THERE ARE
33 NO PROCEEDS FROM YOUR LEGAL CLAIM, UNLESS YOU HAVE VIOLATED ANY
34 MATERIAL TERM OF THIS AGREEMENT OR YOU HAVE COMMITTED FRAUD AGAINST THE
35 CONSUMER LITIGATION FUNDER.

36 (4) Located immediately above the place on the litigation financing contract where the
37 consumer's signature is required, the litigation financing contract shall include the following:

38 DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT COMPLETELY. IF THIS
39 CONTRACT CONTAINS ANY INCOMPLETE SECTIONS, YOU ARE ENTITLED TO A
40 COMPLETELY FILLED-IN COPY OF THE CONTRACT PRIOR TO SIGNING IT. BEFORE YOU
41 SIGN THIS CONTRACT, YOU SHOULD OBTAIN THE ADVICE OF AN ATTORNEY.
42 DEPENDING ON THE CIRCUMSTANCES YOU MAY WANT TO CONSULT A TAX ADVISOR,
43 A FINANCIAL PROFESSIONAL, OR AN ACCOUNTANT.

§46A-6N-6. Violation; enforcement.

1 (a) Any violation of this article shall make the litigation financing contract unenforceable
2 by the litigation financier, the consumer, or any successor-in-interest to the litigation financing
3 contract. The court may, in the event that judgment is awarded to the plaintiff, assess costs of the
4 action, including reasonable attorneys' fees against the defendant.

5 (b) Nothing in this article shall be construed to limit the exercise of powers or the
6 performance of the duties of the Attorney General, including those provided by the West Virginia
7 Consumer Credit and Protection Act, which the Attorney General is otherwise authorized or
8 required to exercise or perform by law.

§46A-6N-7. Contingency rights; assignments; priority of lien, subrogation interest, or right
of reimbursement.

1 (a) The contingent right to receive an amount of the potential proceeds of a legal claim
2 may be assigned by a consumer, and that assignment is valid for the purposes of obtaining
3 litigation financing from a litigation financier.

4 (b) The lien of a litigation financier on a consumer's legal claim has priority over liens that
5 attach and take effect subsequent to the attachment of the litigation financier's lien to the
6 consumer's legal claim, except for the following:

7 (1) Attorney liens, insurance carrier liens, medical provider liens, or liens based upon
8 subrogation interests or rights of reimbursement related to the consumer's legal claim; and

9 (2) Child support, Medicare, tax, or any other statutory or governmental lien.

§46A-6N-8. Fees; terms; incorporation of obligations in agreement.

1 (a) A litigation financier may not charge the consumer an annual fee of more than 10
2 percent of the original amount of money provided to the consumer for the litigation financing
3 transaction.

4 (b) Litigation financiers shall not charge a consumer the annual fee authorized by §46A-
5 6N-8(a) of this code more than one time each year with regard to any single legal claim regardless
6 of the number of litigation financing transactions that the litigation financier enters into with the
7 consumer with respect to such legal claim.

8 (c) Fees assessed by a litigation funding provider may compound semiannually but may
9 not compound based on any lesser time period.

10 (d) In calculating the annual percentage fee or rate of return, a litigation funding provider
11 must include all charges payable directly or indirectly by the consumer, and must compute the
12 rate based only on amounts actually received and retained by a consumer.

13 (e) A litigation funding provider may not assess fees for any period exceeding 42 months
14 from the date of the contract with the civil litigant.

15 (f) Litigation financiers shall not enter into an agreement with a consumer that has the
16 effect of incorporating the consumer's obligations to the litigation financier that are contained in
17 the original litigation financing transaction into a subsequent litigation financing transaction.