

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 2680

BY DELEGATES WESTFALL, WAXMAN, KESSINGER AND

HIGGINBOTHAM

[Introduced January 25, 2019; Referred
to the Committee on Government Organization then
the Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §46A-60-1, §46A-60-2, §46A-60-3, §46A-60-4, §46A-60-5, §46A-60-6, §46A-
3 60-7, §46A-60-8, and §46A-60-9, all relating to third-party litigation financing; providing
4 that a litigation financier shall register as a litigation financier in this state; providing
5 registration requirements for business entities, partnerships, and individuals; providing
6 that litigation financiers shall secure a bond or an irrevocable letter of credit; providing to
7 whom the bond is payable; requiring that the litigation financiers amend their registration
8 if their information changes or becomes inaccurate; providing that the Secretary of State
9 may promulgate rules; providing that the terms of the litigation financing transaction shall
10 be set forth in a completed, written contract; providing that the litigation financing contract
11 shall contain a right of rescission; providing that a litigation financing contract shall contain
12 certain written acknowledgements and disclosures; providing that a litigation financier
13 shall not pay or offer to pay commissions, referral fees, or other consideration to any
14 attorney, law firm, medical provider, chiropractor, or physical therapist or any of their
15 employees for referring a consumer to the litigation financier; providing that a litigation
16 financier shall not accept commissions, referral fees, or other consideration; providing that
17 a litigation financier shall not advertise false or misleading information; providing that a
18 litigation financier shall not refer a consumer to a specific attorney, law firm, medical
19 provider, chiropractor, or physical therapist; providing an exception; providing that a
20 litigation financier shall supply copies of the contract to the consumer or consumer's
21 attorney; providing that a litigation financier shall not attempt to waive any of consumer's
22 remedies; providing that a litigation financier shall not attempt to effect arbitration or
23 otherwise effect waiver of a consumer's right to a jury trial; providing that a litigation
24 financier shall not offer legal advice; providing that a litigation financier shall not assign the
25 litigation financing contract; providing that a litigation financing contract shall contain
26 certain disclosures and terms; providing form disclosures; providing that a violation shall

27 render the contract unenforceable; providing that a court may award costs and attorneys'
28 fees against defendant; clarifying authority of the Attorney General; providing that a
29 contingent right to receive an amount under a legal claim may be assigned by a consumer;
30 providing a priority of liens; providing exceptions for certain liens and claims; providing a
31 maximum annual fee; providing maximum frequency annual fee charges; providing that
32 fees may compound semiannually but not based on any lesser time period; providing
33 means for calculating annual percentage fee or rate of return; providing maximum terms
34 for fees; and restricting incorporation of prior obligations.

Be it enacted by the Legislature of West Virginia:

ARTICLE 60. CONSUMER LITIGATION FUNDING.

§46A-60-1. Definitions.

1 For purposes of this article:

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

4 (2) "Litigation financier" means a person, entity, or partnership engaged in the business of
5 litigation financing; and

6 (3) "Litigation financing" or "litigation financing transaction":

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

11 (B) Does not include:

12 (i) 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 (ii) A consumer loan, as defined by §46A-1-102 of this code;

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

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

§46A-60-2. 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-60-3. Litigation financier requirements.

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

3 (1) 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 (2) 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 (3) 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 (4) 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 (A) The attorney has had the opportunity to review the litigation financing contract on
17 behalf of the consumer;

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

20 (C) 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 (D) The attorney is representing the consumer with regard to the dispute that is the subject
24 of the litigation financing contract;

25 (E) 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 (F) 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-60-4. 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, physical therapist, or any of their employees for
4 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, physical therapist, or any of their employees;

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

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

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

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

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

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

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

§46A-60-5. 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 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-60-6. Third party agreements.

1 Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a
2 discovery request, provide to the other parties any agreement under which any litigation financier,
3 other than an attorney permitted to charge a contingent fee representing a party, has a right to
4 receive compensation that is contingent on and sourced from any proceeds of the civil action, by
5 settlement, judgment, or otherwise.

§46A-60-7. 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-60-8. 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-60-9. 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
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.

NOTE: The purpose of this bill is to establish Consumer Litigation Funding requirements,

including definitions, financier requirements, prohibitions, mandatory contract language, third party agreements, violations, and contingency rights.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.