

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Committee Substitute

for

Senate Bill 360

SENATOR TRUMP, *original sponsor*

[Originating in the Committee on the Judiciary;

Reported on February 15, 2019]

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

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

Be it enacted by the Legislature of West Virginia:

ARTICLE 6N. CONSUMER LITIGATION FUNDING.

§46A-6N-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;

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's 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;
17 (iv) A claim under the Workers' Compensation Law, compiled in chapter 23 of this code;
18 or
19 (v) Normal or course of business lending or financing arrangements between an attorney
20 or law firm and a lending institution.

§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-2(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 with the Secretary of State and have approved by
26 the Office of the West Virginia Attorney General a surety bond or irrevocable letter of credit issued
27 and confirmed by a financial institution authorized by law to transact business in the State of West
28 Virginia in an amount not less than \$50,000.

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

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

36 (d) The Secretary of State, as appropriate, may promulgate rules in implementing this
37 article, including, but not limited to, the adoption of fees to cover any administrative costs relating
38 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 (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) The attorney is representing the consumer with regard to the dispute that is the subject
19 of the litigation financing contract;

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

22 (D) In the event that proceeds are paid into a settlement fund or trust, the litigation financier
23 shall notify the administrator of the fund or trust of any outstanding liens arising from the litigation
24 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, 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 in the litigation for which the litigation financing transaction exists, a
15 waiver of any remedy, including, but not limited to, compensatory, statutory, or punitive damages,
16 that the consumer might otherwise have;

17 (7) Attempt to effect in the litigation for which the litigation financing transaction exists
18 mandatory arbitration or otherwise effect waiver of a consumer's right;

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

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

23 (A) §46A-6N-4(9) of this code does not prevent a litigation financier that retains
24 responsibility for collecting payment, administering, or otherwise enforcing the litigation financing
25 contract from making an assignment that is:

26 (i) To a wholly owned subsidiary of the litigation financier;

27 (ii) To an affiliate of the litigation financier that is under common control with the litigation
28 financier; or

29 (iii) A grant of a security interest that is pursuant to §46-9-1 *et seq.* of this code or is
30 otherwise permitted by law; and

31 (B) If an assignment is authorized and made pursuant to §46A-6N-4(9) of this code, for
32 purposes of this section, “litigation financier” includes a successor-in-interest to a litigation
33 financing contract;

34 (10) Report a consumer to a credit reporting agency if insufficient funds remain from the
35 net proceeds to repay the company;

36 (11) An attorney or law firm retained by a consumer shall not have a financial interest in a
37 company offering litigation funding to the consumer and shall not receive a referral fee or other
38 consideration from the company, its employees, or its affiliates;

39 (12) A personal injury attorney or law firm, practicing in the State of West Virginia, retained
40 by a consumer shall not have a financial interest in a company offering litigation financing to
41 consumers and shall not receive a referral fee or other consideration from the company, its
42 employees, or its affiliates; or

43 (13) Receive any right to, nor make any decisions with respect to, the conduct of the
44 consumer’s legal claim or any settlement or resolution. The right to make such decisions shall
45 remain solely with the consumer and his or her attorney.

§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) Each contract shall include consumer disclosures on the first two pages, to the extent
6 possible. The consumer disclosures shall include:

7 (A) Notification that some or all of the funded amount may be taxable;

8 (B) A description of the consumer’s right of rescission;

9 (C) The total funded amount provided to the consumer under the contract;

10 (D) An itemization of charges; and

11 (E) The total amount due from the consumer, in six-month intervals for 36 months,
12 including all charges and fees;

13 (i) A statement that there are no charges or fees to be paid by the consumer other than
14 what is disclosed on the disclosure form;

15 (ii) In the event the consumer seeks more than one litigation financing contract, a
16 disclosure providing the cumulative amount due from the consumer for all transactions, including
17 charges under all contracts, if repayment is made any time after the contracts are executed;

18 (F) A statement that if there is no recovery of any money from the consumer's legal claim,
19 the consumer shall owe nothing to the company; and

20 (G) A statement that if the net proceeds of the claim are insufficient to repay the
21 consumer's indebtedness to the company, defined as the complete funded amount and charges,
22 the company shall accept as full payment of its funded amount and charges a reduced sum;

23 (H) The following:

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

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

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

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

37 THE FUNDED AMOUNT AND AGREED-TO CHARGES SHALL BE PAID ONLY FROM
38 THE PROCEEDS OF YOUR LEGAL CLAIM AND SHALL BE PAID ONLY TO THE EXTENT
39 THAT THERE ARE AVAILABLE PROCEEDS FROM YOUR LEGAL CLAIM. YOU WILL NOT
40 OWE (INSERT NAME OF THE CONSUMER LITIGATION FUNDER) ANYTHING IF THERE ARE
41 NO PROCEEDS FROM YOUR LEGAL CLAIM, UNLESS YOU HAVE VIOLATED ANY
42 MATERIAL TERM OF THIS AGREEMENT OR YOU HAVE COMMITTED FRAUD AGAINST THE
43 CONSUMER LITIGATION FUNDER.

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

46 DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT COMPLETELY. IF THIS
47 CONTRACT CONTAINS ANY INCOMPLETE SECTIONS, YOU ARE ENTITLED TO A
48 COMPLETELY FILLED-IN COPY OF THE CONTRACT PRIOR TO SIGNING IT. BEFORE YOU
49 SIGN THIS CONTRACT, YOU SHOULD OBTAIN THE ADVICE OF AN ATTORNEY.
50 DEPENDING ON THE CIRCUMSTANCES YOU MAY WANT TO CONSULT A TAX ADVISOR,
51 A FINANCIAL PROFESSIONAL, OR AN ACCOUNTANT.

§46A-6N-6. Third-party agreements.

1 Unless as otherwise stipulated to, or ordered by the court, a person who is engaged in
2 civil action shall disclose to the other party in the litigation whether the person has entered into
3 any agreement under which a third-party person, other than an attorney permitted to charge a
4 contingent fee representing a party, has a right to receive compensation that is contingent on and
5 required to be paid from any proceeds of the civil action, by settlement, judgment, or otherwise.
6 Third-party agreements shall only be produced in discovery upon the requesting party's
7 presenting a motion seeking leave of the court, and, then, shall only be produced following in
8 camera inspection by the court and a subsequent order of the court ordering production pursuant
9 to the rules of discovery.

§46A-6N-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-6N-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-6N-9. Fees; terms; incorporation of obligations in agreement.

1 (a) A litigation financier may not charge the consumer an annual fee of more than 18
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
5 §46A-6N-9(a) of this code more than one time each year with regard to any single legal claim

6 regardless of the number of litigation financing transactions that the litigation financier enters into
7 with the 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.

18 (g) Litigation financiers shall not knowingly provide funding to a consumer who has
19 previously assigned and/or sold a portion of the consumer's right to proceeds from his or her legal
20 claim without first making payment to and/or purchasing a prior unsatisfied litigation financing
21 company's entire funded amount and contracted charges unless a lesser amount is otherwise
22 expressly agreed to in writing by the litigation financing companies; except multiple companies
23 may agree to contemporaneously provide funding to a consumer provided that the consumer and
24 the consumer's attorney consent to the agreement in writing.