

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 7041 PCB CJS 20-01 Litigation Financing Consumer Protection

SPONSOR(S): Commerce Committee, Civil Justice Subcommittee, Leek

TIED BILLS: **IDEN./SIM. BILLS:** SB 1828

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee	15 Y, 0 N	Mawn	Luczynski
1) Appropriations Committee	20 Y, 2 N	Jones	Pridgeon
2) Commerce Committee	20 Y, 3 N, As CS	Hinshelwood	Hamon

SUMMARY ANALYSIS

Consumer litigation financing is a non-recourse transaction in which a third party (“litigation financier”) provides funds to a consumer in exchange for an assignment of the consumer’s contingent right to receive an amount of the potential proceeds of a civil action or claim. 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 action or claim, the consumer’s likelihood of prevailing, and the potential damages a consumer could obtain. A litigation financier also assesses the consumer’s other debts, such as attorneys’ fees or liens, which might take priority over the litigation financier’s repayment.

Funds are paid directly to consumers and are used primarily for living expenses while the consumer waits for resolution of the civil action or claim that is the subject of the litigation financing contract (“subject claim”). Because the contract obligation can only be collected out of the subject claim’s proceeds, if the consumer recovers nothing in the subject claim, he or she owes the litigation financier nothing, and there are no monthly payments required while the subject claim is pending. However, because interest and fees for a litigation financing contract can be extremely high, and litigation financing contract terms may be unclearly stated or require complicated calculations, some argue that consumers may end up owing much more than they might have anticipated at the contract’s initiation, driving up litigation costs as they reject reasonable settlement offers on the chance of winning more in court. Some also argue that consumers may reject reasonable settlement offers at the direction of a litigation financier that hopes to ensure full payment of the contract obligation. Florida courts have held that litigation financing is not a loan subject to the state’s existing consumer finance laws and caps on interest rates; thus, the product is unregulated in the state.

HB 7041 creates the Litigation Financing Consumer Protection Act (“Act”). Specifically, the bill:

- Applies only to litigation financing in which the funded amount is \$500,000 or less.
- Requires a litigation financier to register with the Department of State and file a bond and allows revocation of a registration for non-compliance.
- Requires all litigation financing contracts to be in writing, be completely filled in, and contain mandatory terms (such as a right of rescission) and disclosures.
- Prohibits a litigation financier from engaging in specified conduct, including making settlement decisions.
- Sets a maximum interest rate of 30 percent simple interest and specifies how long interest can accrue.
- Caps fees and charges at \$500 for any civil action or claim, regardless of the number of contracts a litigation financier enters into with the consumer with respect to that civil action or claim.
- Specifies the priority of a litigation financier’s lien on the potential proceeds of a civil action or claim.
- Requires disclosure of litigation financing contracts to other parties in a civil action.
- Protects the work-product and attorney-client privileges despite communication with a litigation financier.
- Provides that a violation of the Act is a violation of the Florida Deceptive and Unfair Trade Practices Act.

The bill will have an indeterminate impact on state government. See Fiscal Analysis and Economic Impact Statement. The bill does not appear to impact local governments.

The bill provides an effective date of July 1, 2020.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Litigation Financing

Litigation financing is a non-recourse transaction¹ in which a third party (“litigation financier”) provides funds to a person bringing a civil action or claim in exchange for an assignment of the person’s contingent right to receive an amount of the civil action or claim’s potential proceeds.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 a commercial dispute.⁴ However, in the consumer sector (“consumer litigation financing”), 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 the litigation financing contract (“subject action or claim”).⁵ Industry data suggests 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 contracts.⁶

A consumer can apply for litigation financing any time before resolution of his or her civil action or claim.⁷ 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.⁸ A litigation financier also assesses the consumer’s attorneys’ fees and other debts, such as medical or child support liens,⁹ which might take priority over the litigation financier’s repayment.¹⁰

Benefits and Criticisms

Litigation financing proponents argue that the product provides a necessary funding source for 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, including rent, utilities, and groceries.¹¹ 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

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. See United States Department of the Treasury, Internal Revenue Service, *Recourse vs. Nonrecourse Debt*, https://apps.irs.gov/app/vita/content/36/36_02_020.jsp (last visited Jan. 22, 2020).

² See Ronen Avraham and Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigation Funding*, 104 Cornell L. Rev. 1133 (2019), <https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/Empirical-Investigation-Sebok.pdf> (last visited Jan. 22, 2020).

³ *Id.*

⁴ *Id.*

⁵ Paige Marta Skiba and Jean Xiao, *Consumer Litigation Funding: Just Another Form of Payday Lending?*, Law and Contemporary Problems Vol. 80 No. 117 (Nov. 3, 2017), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4840&context=lcp> (last visited Jan. 22, 2020).

⁶ 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, https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2019121124 (last visited Jan. 22, 2020).

⁷ See Skiba and Xiao, *supra* note 5.

⁸ *Id.*; see also Schuller, *supra* note 6.

⁹ A lien is a claim against property evidencing a debt, obligation, or duty. A lien can be created by judgment, equity, agreement, or statute. Fla. Jur. 2d Liens § 37:1.

¹⁰ See Skiba and Xiao, *supra* note 5.

¹¹ The Alliance for Responsible Consumer Legal Funding (ARC), *More than A Trade Association*, <http://arclegalfunding.org/> (last visited Jan. 22, 2020).

financing contract, making litigation financing less risky than a traditional loan.¹² Additionally, because the contract 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.¹³

However, litigation financing opponents point out that in order to estimate the total amount owed under a litigation financing contract, including interest¹⁴ 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.¹⁵ Because contract terms may be unclearly stated or require complicated calculations, opponents argue that consumers may end up owing much more than they might have anticipated at the contract's initiation.¹⁶ Additionally, the interest charged on a litigation financing contract, even if clearly stated, can be extremely high.¹⁷ A consumer who realizes he or she may owe more than he or she may recover may drive up litigation costs by rejecting reasonable settlement offers for a chance to win a larger verdict in court.¹⁸

Further, uncertainty exists as to whether an attorney can discuss a litigation financing contract with a litigation financier without waiving the attorney-client¹⁹ or work product²⁰ privileges. Such privileges are typically waived or limited when protected information is shared with a third party, but attorney-financier communication may be necessary for a litigation financier to evaluate a consumer's claim.²¹ The American Bar Association urges attorneys discussing a litigation financing contract with a litigation financier to safeguard against waiving privilege, warning that infringing a client's rights requires the client's informed consent after full, candid disclosure of all associated risks and benefits.²²

To address these issues, the Alliance for Responsible Consumer Funding ("ARC"), a national coalition of litigation financiers, requires its members to provide certain consumer protections in their litigation financing contracts.²³ These protections include clearly-defined contract terms, which a consumer's attorney must review, and no hidden fees or complicated calculations.²⁴ However, ARC membership is not mandatory for litigation financiers, leaving each state the responsibility for regulating litigation financing within its borders. To that end, ARC advocates for state regulation creating litigation financing consumer protections while preserving a consumer's access to litigation financing.²⁵

¹² See Schuller, *supra* note 6; see also ARC, *What is Consumer Legal Funding?*, <http://arclegalfunding.org/consumer-legal-funding/> (last visited Jan. 22, 2020).

¹³ See Schuller, *supra* note 6; see also ARC, *What is Consumer Legal Funding?*, <http://arclegalfunding.org/consumer-legal-funding/> (last visited Jan. 22, 2020).

¹⁴ 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> (last visited Jan. 22, 2020).

¹⁵ See Skiba and Xiao, *supra* note 5.

¹⁶ *Id.*

¹⁷ A plaintiff suing a litigation financing company for violating Florida's usury laws, alleging that his litigation financing contract charged interest at a rate of 3.5 percent compounded monthly, which, if the subject civil action or claim did not quickly resolve, could result in an effective 51 percent interest rate. See *Taylor v. Certified Legal Funding, Inc.*, No. 8:18CV00027, (M.D. Fla. 2018).

¹⁸ See Skiba and Xiao, *supra* note 5.

¹⁹ 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. S. 9.502(1)(c), F.S.; *Upjohn Co. v. United States*, 101 S.Ct. 677 (1981).

²⁰ Work product means "documents and other tangible things...prepared in anticipation of litigation or for trial." Work product is almost absolutely protected under Florida common law if it contains mental impressions, conclusions, opinions and legal theories about litigation. Fla. R. Civ. P. 1.280(b)(3); *State v. Rabin*, 495 So. 2d 257(Fla. 3d DCA 1986).

²¹ See ARC, *supra* note 11.

²² American Bar Association, Commission on Ethics 20/20, *Informational Report to the House of Delegates*, https://www.law.columbia.edu/sites/default/files/microsites/clwa/CIAA/keynote_third_party_funding.pdf (last visited Jan. 22, 2020).

²³ See Schuller, *supra* note 6; see also ARC, *What is Consumer Legal Funding?*, <http://arclegalfunding.org/consumer-legal-funding/> (last visited Jan. 22, 2020).

²⁴ See ARC, *What is Consumer Legal Funding?*, <http://arclegalfunding.org/consumer-legal-funding/> (last visited Jan. 22, 2020).

²⁵ *Id.*

Litigation Financing - Florida

Florida regulates consumer loans and financing, usury,²⁶ and interest.²⁷ However, Florida courts have specifically found that litigation financing is not a loan subject to existing law, leaving litigation financing and associated interest charges unregulated in the state.²⁸ Given the lack of regulation, the Florida Bar²⁹ 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.³⁰

Litigation Financing Regulation - Other States

Since 2007, 11 states have passed legislation regulating litigation financing. Of these, most require a litigation financier to register with the state prior to engaging in litigation financing and cap the interest or fees chargeable on a litigation financing contract. Two states require litigation financing contract disclosure in civil actions or claims, and four protect privileged communications.

State (Statute)	Year Passed	Registration Required	Interest Caps	Fee Caps	Disclosure Required	Privilege Protected
Arkansas (§ 4-57-109)	2015		X			
Indiana (§ 24-12)	2016	X	X	X		X
Maine (§ 9A-12)	2007	X				
Nebraska (§§ 25-3301 to 3309)	2010	X		X		X
Nevada (§ 604C)	2019	X	X	X		
Ohio (§ 1349.55)	2008					X
Oklahoma (§§ 14A-3-801 to 817)	2013	X				
Tennessee (§ 47-16)	2014	X	X	X		
Vermont (§74-2251 to 2260)	2016	X				X
West Virginia (§ 46A-6N)	2019	X	X	X	X	
Wisconsin (§801.01(2)(bg))	2018				X	

New York and South Carolina took a different approach, regulating litigation financing through administrative action. Specifically, New York’s Attorney General requires litigation financing contracts to provide certain consumer protections,³¹ while South Carolina’s Department of Consumer Affairs declared the product a loan subject to the state’s consumer protection code.³² Courts in Colorado, Kentucky, and North Carolina have also deemed litigation financing a loan subject to state usury laws.³³ Uniquely, Pennsylvania courts have invalidated litigation financing contracts under a common law

²⁶ “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. Legal Information Institute, *Usury*, <https://www.law.cornell.edu/wex/usury> (last visited Jan. 22, 2020); Ss. 687.02(1) and 687.071(2) and (3), F.S.

²⁷ See generally chs. 516 and 687, F.S.

²⁸ *Fausone v. U.S. Claims, Inc.*, 915 So. 2d 626 (Fla. 2nd DCA 2005); see also *Taylor*, No. 8:18CV00027.

²⁹ Article V, s. 15 of 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.

³⁰ 00-3 Fla. Ethics Op. Fla. Bar (Mar. 15, 2002), <https://www.floridabar.org/etopinions/etopinion-00-3/> (last visited Jan. 22, 2020).

³¹ See Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 Vt. L. Rev. 615 (2007),

<https://lawreview.vermontlaw.edu/wp-content/uploads/2012/02/mclaughlin.pdf> (last visited Jan. 22, 2020).

³² U.S. Chamber Institute for Legal Reform, *Lawsuit Lending: South Carolina Calls it Like It Is*,

<https://www.instituteforlegalreform.com/resource/lawsuit-lending-south-carolina-calls-it-like-it-is> (last visited Jan. 22, 2020).

³³ *Oasis Legal Fin. Grp., LLC v. Coffman*, 361 P. 3d 400 (Co. S.Ct. 2015); *Boling v. Prospect Funding Holdings, LLC*, 2017 WL 1193064, (W.D. Ky. 2017); *Odell v. Legal Bucks, LLC*, 192 N.C.App. 298 (N.C. Ct. of Appeals 2008).

champerty doctrine,³⁴ and Alabama courts have held that litigation financing contracts are a form of gambling, or speculating, in litigation and thus void as against public policy.³⁵

Effect of Proposed Changes

The bill creates the Litigation Financing Consumer Protection Act, regulating litigation financing to protect Florida consumers.

The bill defines litigation financing as a non-recourse transaction in which a litigation financier provides to a consumer a funded amount³⁶ of \$500,000 or less in exchange for an assignment of the consumer's contingent right to receive an amount of a civil action or claim's potential proceeds.³⁷ This term specifically excludes, and thus the bill does not apply to:

- Legal services provided by an attorney on a contingency fee³⁸ basis;
- A commercial tort claim;³⁹
- A Workers' Compensation claim;⁴⁰
- Lending or financial arrangements between an attorney or law firm and a lending institution to fund litigation costs in the ordinary course of business; and
- A consumer finance loan.⁴¹

Florida regulates these excluded products, practices, and claims under other existing laws and rules.

Registration and Revocation

The bill requires a litigation financier to register as a litigation financier with the Department of State ("Department") before offering litigation financing and to file with the Department a \$250,000 bond:

- Issued by a surety company authorized to do business in the state;
- Payable to the Department for the payment of damages awarded to a consumer in an action under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"); and
- Effective so long as the Department's records designate a litigation financier as such or a litigation financing contract with the litigation financier is effective.

Corporate, Limited Liability Company, and Partnership Registration

Florida law already requires a corporation, limited liability company ("LLC"), or partnership to register with the Department by filing an organizational document⁴² or certificate of authority application⁴³ and meeting other requirements. The bill supplements existing registration requirements for such businesses wishing to engage in litigation financing by providing that a corporation, LLC, or partnership is registered as a litigation financier if it:

³⁴ The champerty doctrine prohibits selling legal judgment or settlement proceeds before such judgement or settlement to a disinterested party. See Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. Penn. L. Rev. 1297 (2002), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3271&context=penn_law_review (last visited Jan. 22, 2020); *WFIC, LLC v. LaBarre*, 2016 WL 4769436 (Pa. 1st J.D. 2016).

³⁵ *Wilson v. Harris*, 688 So. 2d 265 (Ala. Civ. App. 1996).

³⁶ The "funded amount" means the funds actually received and retained by a consumer under a litigation financing contract.

³⁷ The bill expressly provides that a consumer may assign his or her contingent right to receive an amount of the potential proceeds of a civil action or claim.

³⁸ In certain lawsuits, such as a personal injury lawsuit, an attorney may agree to accept a portion of the money a client recovers from his or her civil action or claim as the fee for the attorney's service. Such agreements must be in writing and entered into at the outset of the representation. See The Florida Bar, Consumer Pamphlet: Attorney's Fees, <https://www.floridabar.org/public/consumer/pamphlet003/> (last visited Jan. 22, 2020).

³⁹ A "commercial tort claim" is a claim arising in tort with respect to which the claimant is an organization or the claimant is an individual and the claim arose in the course of the claimant's business or profession and does not include damages arising out of personal injury to or the death of an individual. S. 679.1021(1)(m), F.S.

⁴⁰ A "workers' compensation claim" is a claim for disability and medical benefits made by an injured worker. Such benefits are paid at the employer's expense. See ch. 440, F.S.

⁴¹ A "consumer finance loan" is a loan of money, credit, or goods in an amount or to a value of \$25,000 or less for which the lender charges, contracts for, collects, or receives interest at a rate greater than 18 percent per annum. S. 516.01(2), F.S.

⁴² Organizational documents include articles of organization or incorporation and a certificate of limited partnership.

⁴³ A certificate of authority allows a foreign corporation or limited liability company to do business in the state.

- Meets the bond requirements;
- Has a status of active and in good standing in Department records; and
- Indicated in its organizational document, or certificate of authority application, that it is a litigation financier.

A litigation financier that is a corporation, LLC, or partnership must amend its registration within 30 days after the information contained in the registration changes or becomes inaccurate by updating its organizational document or certificate of authority application in the manner already prescribed by the Department for updating such documents.

Sole Proprietorship Registration

Florida law does not require sole proprietorships to register with the Department, and thus the bill creates a unique registration process for sole proprietorships wishing to engage in litigation financing. Under the bill, a sole proprietorship is registered as a litigation financier in the state if it:

- Meets the bond requirements; and
- Files a litigation financier registration application with the Department containing:
 - The applicant's full legal name and fictitious name, if any;
 - The applicant's physical and mailing addresses and telephone number;
 - A statement that the applicant is a litigation financier; and
 - Any other information the Department requires.

A litigation financier that is a sole proprietorship must amend its registration within 30 days after the information contained in the registration changes or becomes inaccurate by filing an amendment on a form prescribed by the Department.

Registration Revocation

The bill gives the Department the authority to revoke a litigation financier's registration for non-compliance with the registration, registration amendment, and bond requirements. Specifically, if the Department determines that a litigation financier violated any of these requirements, the Department must serve the litigation financier notice of its intent to revoke the litigation financier's registration. Such notice must specifically list all revocation grounds and may be sent by electronic mail if the litigation financier gave the Department an electronic mail address. A litigation financier has 60 days from the date the Department sends such notice to correct each revocation ground or to show there were no such violations. Otherwise, the Department must revoke the litigation financier's registration, after which the litigation financier may not continue to offer litigation financing in the state.

Contract Terms and Disclosures

The bill requires that all litigation financing contracts be in writing and completely filled in when offered or presented to a consumer. The bill also provides mandatory contract terms and disclosures designed to inform consumers of their financial obligations under the contract.

Mandatory Terms

The bill requires that a litigation financing contract contain a right of rescission allowing the consumer to cancel the contract without penalty if the consumer gives written rescission notice and returns any funds already provided under the contract to the litigation financier within five business days after contract execution or receipt of the funds. This prevents a litigation financier from assessing interest, fees, or charges to a consumer who timely and correctly cancels a litigation financing contract.

The bill also requires that a litigation financing contract include:

- The consumer's written acknowledgement of whether he or she has an attorney; and
- A statement indicating that, if the subject action or claim's proceeds are paid into a settlement fund or trust, the litigation financier must notify the fund or trust administrator of any outstanding financial obligations under the contract.

Mandatory Disclosures

The bill requires that a litigation financing contract disclose that a litigation financier may not, and will not, make any decisions about the subject action or claim or try to influence its direction. Further, the PCB requires a litigation financing contract to contain specifically worded disclosures pertaining to a consumer's contract rescission rights and warning that a consumer should not sign the contract without completely reading it or if any part of the contract is incomplete or blank.

The bill also requires a litigation financing contract to include notice that, if the net proceeds⁴⁴ of the subject action or claim are insufficient to fully repay the litigation financier, the litigation financier will accept a reduced sum as full payment of what is owed under the contract, which sum cannot exceed the net proceeds less proceeds specifically awarded for medical expenses. If the consumer recovers nothing in the subject action claim, the consumer owes the litigation financier nothing.

Additionally, the bill requires a litigation financing contract to specifically state:

- The total funded amount;
- An itemized list of all fees and charges;
- The interest rate; and
- The total amount the consumer owes in six-month intervals for three years.

Prohibited Conduct

The bill prohibits a litigation financier from engaging in conduct harmful to consumers. Specifically, the bill prohibits a litigation financier from:

- Paying, offering to pay, or accepting a commission, referral fee or other consideration.
- Advertising false or misleading information about its products or services.
- Referring a consumer to a specific attorney or health care practitioner.⁴⁵
- Failing to promptly give a consumer a copy of any complete litigation financing contract.
- Trying to obtain a waiver of a consumer's remedy in the subject action or claim.
- Trying to effect arbitration or waiver of a consumer's jury trial right in the subject action or claim.
- Offering or giving a consumer legal advice about the litigation financing contract or the subject action or claim.
- Assigning a litigation financing contract in whole or in part.
- Reporting to a consumer credit agency if there are not enough funds left from the net proceeds of the subject action or claim to repay the litigation financier.
- Directing, or making, any decisions about, the subject action or claim.
- Entering into a litigation financing contract with a consumer incorporating the consumer's obligations to the litigation financier under an existing contract.
- Knowingly entering into a litigation financing contract with a consumer who already has a contract with another litigation financier without first paying off the amount owed under that contract, unless the consumer consents to multiple contracts in writing.

Interest, Fees, Charges, and Penalties

The bill limits the amount and duration of interest, fees, charges, and penalties a litigation financier may assess a consumer, preventing exorbitant assessments and enabling a consumer to determine at the time of contract execution the maximum amount owed under the contract.

Interest

⁴⁴ "Net proceeds" means the portion of the proceeds of a civil action or claim remaining after satisfaction of all liens with a higher priority than that of the litigation financier as specified in s. 559.957(2), F.S.

⁴⁵ "Health care practitioner" has the same meaning as in s. 456.001(4), F.S.

The bill prohibits a litigation financier from assessing an interest⁴⁶ rate greater than 30 percent of the funded amount and requires that, in determining this rate, the computations used are simple interest.⁴⁷ Interest can only accrue on the funded amount, not on any fees, charges, or interest assessed.

The bill also specifies that interest only accrues until a court enters a final order or a settlement agreement is executed in the subject action or claim, whichever is earlier, but provides that in no case can interest accrue for more than three years from the date the consumer receives the funds. Further, the bill prohibits a litigation financier from assessing interest on a rescinded contract. This means that a consumer will not pay more than three years' worth of interest on the funded amount regardless of how long the subject action or claim's resolution takes, and will owe no interest if he or she properly rescinds the contract.

Fees, Charges, and Penalties

The bill caps fees a litigation financier may charge at \$500 with regard to any civil action or claim. This means that if a consumer enters into multiple litigation financing contracts with a litigation financier in exchange for assigning to the litigation financier his or her contingent right to proceeds from a single action or claim, the consumer will not owe more than \$500 in charges and fees. Additionally, the bill prohibits a litigation financier from assessing any fee, charge, or penalty for contract rescission, so that a consumer properly rescinding the contract will owe nothing.

Lien Priority

A litigation financier's lien on the potential proceeds of a civil action or claim has priority over liens that attach to such proceeds subsequent to the attachment of the litigation financier's lien, except for:

- Attorney, insurance carrier, or healthcare practitioner liens or liens based upon subrogation interests or reimbursement rights related to the subject civil action or claim; and
- Child support, Medicare, tax, or any other statutory or governmental lien.

Privilege and Discovery

Privilege

The bill specifies that communication between an attorney and a litigation financier about a litigation financing contract does not limit, waive, or abrogate any statutory or common-law privilege, including the attorney-client privilege and the work product doctrine. This means that an attorney may discuss a litigation financing contract with a litigation financier within the bounds of any applicable Florida Bar rules without waiving these privileges.

Discovery

The bill requires a party to a civil action or claim to provide the other parties any litigation financing contract relating to such action or claim without waiting for a discovery request, except as otherwise ordered by the court. This gives a defendant notice of a plaintiff's obligation to a litigation financier.

Violations and Enforcement Under FDUTPA

The bill specifies that a violation of the Act is actionable under FDUTPA.⁴⁸ Such violations occurring in or affecting a single judicial circuit are enforced by the office of the state attorney ("OSA") for the affected circuit, or the Department of Legal Affairs ("DLA") if the state attorney defers to DLA in writing

⁴⁶ "Interest" means the cost of obtaining litigation financing and includes any profit or advantage of any kind whatsoever that a litigation financier may charge, contract for, collect, receive, or in any way obtain as a condition for a litigation financing contract. Charges and fees specifically authorized by the Act are not interest.

⁴⁷ "Simple interest" is interest paid on the amount lent, at a certain rate, which does not become part of the base on which future interest is calculated. Black's Law Dictionary 561 (6th ed. 1991).

⁴⁸ FDUTPA is set forth in ch. 501, F.S., part II.

or fails to act within 90 days after a written complaint is filed.⁴⁹ DLA also enforces violations occurring in or affecting more than one judicial circuit.⁵⁰

Enforcement Actions

The FDUTPA enforcing authority has numerous enforcement remedies, which may be brought after the enforcement authority reviews the matter and determines that such an action serves the public interest.⁵¹ These remedies include bringing an action:

- For a declaratory judgment stating that an act or practice violates FDUTPA.⁵²
- To enjoin a litigation financier violating FDUTPA.⁵³
- On behalf of a consumer or governmental entity for the actual damages caused by an act or practice violating FDUTPA.⁵⁴

Any litigation financier who willfully⁵⁵ uses a deceptive or unfair trade act or practice faces a civil penalty of up to \$10,000 per violation, and a civil penalty of up to \$15,000 per violation if the victim was a senior citizen,⁵⁶ disabled person,⁵⁷ or military service member.⁵⁸ Further, the litigation financier could be ordered to pay the enforcing authority's attorneys' fees and costs if the enforcing authority prevails.⁵⁹

Cease and Desist Orders

If DLA believes a litigation financier is violating FDUTPA, and that a cease and desist order ("order") would serve the public interest, DLA must serve the litigation financier with a complaint and order stating its charges.⁶⁰ Such complaint must contain a notice setting a hearing for a date and time at least 30 days after service, which hearing must comply with the Administrative Procedures Act.⁶¹ An order, appealable to the circuit court of appeals, takes effect ten days after all administrative action concludes or, if appealed, when the appellate court enters a final order in favor of DLA.⁶² A litigation financier violating such an order faces a civil penalty of up to \$5,000 per violation.⁶³

Declaratory Judgment Actions

A consumer harmed by a litigation financier's FDUTPA violation may bring an action for a declaratory judgment that a litigation financier's act or practice violates FDUTPA and to enjoin the litigation financier from committing such an act or practice.⁶⁴ A consumer bringing a declaratory judgment action may recover his or her actual damages, plus attorneys' fees and costs, from the litigation financier, and damages may be paid from the bond held by the Department.⁶⁵

B. SECTION DIRECTORY:

Section 1: Provides that this Act may be cited as the Litigation Financing Consumer Protection Act.

Section 2: Creates s. 559.952, F.S., relating to definitions.

⁴⁹ S. 501.203(2), F.S.

⁵⁰ *Id.*

⁵¹ S. 501.207(2), F.S.

⁵² S. 501.207(1)(a), F.S.

⁵³ S. 501.207(1)(b), F.S.

⁵⁴ S. 501.207(1)(c), F.S.

⁵⁵ A willful violation occurs when a person knew or should have known his or her conduct was unfair or deceptive and prohibited. S. 501.2075, F.S.

⁵⁶ As used here, "senior citizen" means a person 60 years of age or older. S. 501.2077(1)(e), F.S.

⁵⁷ As used here, "disabled person" means a person who has a mental or educational impairment that substantially limits one or more major life activities. S. 501.2077(1)(d), F.S.

⁵⁸ Ss. 501.2075 and s. 501.2077(2) and (3), F.S.

⁵⁹ S. 501.2105, F.S.

⁶⁰ S. 501.208(1), F.S.

⁶¹ *Id.*

⁶² S. 501.208(4), F.S.

⁶³ S. 501.208(7), F.S.

⁶⁴ S. 501.211(1), F.S.

⁶⁵ S. 501.211(2), F.S.

- Section 3:** Creates s. 559.953, F.S., relating to litigation financier registration; registration revocation.
- Section 4:** Creates s. 559.954, F.S., relating to litigation financing contracts; terms.
- Section 5:** Creates s. 559.955, F.S., relating to prohibited conduct.
- Section 6:** Creates s. 559.956, F.S., relating to required disclosures.
- Section 7:** Creates s. 559.957, F.S., relating to contingent right to proceeds assignable; priority of lien or right to proceeds.
- Section 8:** Creates s. 559.958, F.S., relating to interest, fees, charges, and penalties.
- Section 9:** Creates s. 559.959, F.S., relating to litigation financing contracts; discovery.
- Section 10:** Creates s. 559.961, F.S., relating to effect of communication on privilege.
- Section 11:** Creates s. 559.962, F.S., relating to violation; enforcement.
- Section 12:** Provides an effective date of July 1, 2020.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The state may collect a civil penalty from a litigation financier that has violated FDUTPA. 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.

2. Expenditures:

The bill may have an indeterminate negative impact on the Department, as it requires the Department to process a new type of registration, revoke such registration for specified violations after notice and opportunity to cure, and to hold bonds. However, these costs could possibly be absorbed in the Department's operating budget as the Department currently serves a similar registration function for corporations, limited liability companies, and partnerships.

Additionally, because the bill creates a FDUTPA violation, the bill may cause an indeterminate, but likely insignificant, workload increase on the DLA and the OSA for each judicial circuit, as both are currently charged with prosecuting such violations. However, these costs may be absorbed in such entities' respective operating budgets.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may positively impact a consumer entering a litigation financing contract by capping allowable interest, fees, and charges to the consumer, and providing greater transparency regarding the total amount due from the consumer when he or she enters the contract.

The bill may negatively impact litigation financiers who will be subject to additional requirements and prohibitions under the bill, including state registration requirements and maximum allowable interest, fees, and charges to consumers. 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 the victim was a senior citizen, disabled person, or military service member.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill gives the Department the authority to promulgate rules necessary to implement the bill's registration, bond, and revocation requirements.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 22, 2020, the Civil Justice Subcommittee adopted one amendment and reported the PCB favorably as amended. The amendment changed the definition of "consumer" from a "natural person" located in the state to an "individual" without regard to location.

On February 27, 2020, the Commerce Committee considered two amendments, which were adopted, and reported the bill favorably as a committee substitute. The committee substitute makes the following changes to the bill:

- Moves the Act from ch. 501, F.S., to ch. 559, F.S., and makes conforming changes.
- Limits application of the Act to litigation financing in which the funded amount is \$500,000 or less.

The staff analysis has been updated to reflect the committee substitute.