

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL: SB 1750

INTRODUCER: Senator Broxson

SUBJECT: Litigation Financing Consumer Protection

DATE: March 23, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson	Knudson	BI	Pre-meeting
2.			JU	
3.			RC	

I. Summary:

SB 1750 creates the Litigation Financing Consumer Protection Act, which requires the registration of litigation financiers with the Department of State (Department) and provides consumer protections relating to such transactions. In a litigation financing transaction, a third party (financier) provides a nonrecourse cash advance to a consumer in exchange for an assignment of the consumer's contingent right to receive a portion of the potential proceeds of his or her civil action or claim. If the consumer loses the lawsuit, the financing firm generally does not receive a payment. For individuals involved in personal injury litigation, the cash advance may be used to pay medical expenses, mortgages, or other expenses.

The bill requires such litigation financiers (financiers) to register with Department and file a \$250,000 surety bond that must be payable to the Department for the payment of damages awarded to a consumer under part II of ch. 501, F.S. The Department may revoke the registration of a financier if the financier does not comply with the registration requirements.

The bill caps the interest rate on litigation financing contracts (contracts) at 10 percent of the funded amount per year. A financier may impose fees up to a combined total of \$500 with regard to a single civil claim, regardless of the number of contracts the consumer enters into with the financier respecting the civil action or claim. Further, the bill requires specified terms, conditions, and disclosures for a contract, including a right of rescission of the contract by the consumer within 5 business days after execution of the contract or the consumer's receipt of the funds, without penalty, interest, charges, fees, or other obligation.

The bill provides that a financier may not:

- Pay, offer to pay, or accept a commission, a referral fee, or other consideration for referring a consumer to a litigation financier;
- Advertise false or misleading information about its products or services;
- Refer a consumer to a specific attorney, law firm, or health care practitioner with exception;

- Fail to provide a copy of all complete litigation financing contracts promptly to the consumer;
- Attempt to effect arbitration or waiver of a consumer's right to a jury trial in the subject's civil action or claim;
- Offer or provide legal advice to the consumer regarding the contract or the subject civil action or claim;
- Assign a litigation-financing contract in whole or in part;
- Enter into a contract with a consumer incorporating the consumer's obligations to the litigation financier under an existing contract; and
- Knowingly entering into a litigation-financing contract with a consumer, who already has a contract with another litigation financier without first paying the entire funded amount and all charges owed under the existing contract, unless the consumer provides written consent for such an arrangement.

A violation of this act is considered an unfair and deceptive trade practice actionable under part II of ch. 501, F.S.

The provisions of the bill do not apply to legal services provided to a consumer on a contingency fee basis or advanced legal costs where such services or costs are provided by an attorney representing the consumer in accordance with Florida Rules of Professional Conduct; commercial tort claims; workers' compensation claims; lending or financing arrangements between an attorney or a law firm and lending institution; or a consumer finance loan.

The bill requires disclosure of litigation financing contracts in a civil action and protects communications between a consumer's attorney and a litigation financier about a litigation-financing contract.

The fiscal impact of the bill on the Department is indeterminate at this time. The bill does not provide fees or other funding for the registration program.

II. Present Situation:

Third party litigation financing typically refers to financing provided by entities other than the plaintiffs, defendants, or their lawyers. In regards to individuals, litigation financing typically involves a nonrecourse loan or cash advance made to a consumer, who is represented by an attorney, in personal injury lawsuits.¹ The financing company (financier) contracts with the consumer, who agrees to repay the company the amount financed plus any financing fees or charges; however, the consumer is obligated to repay no more than his or her proceeds of the litigation at the conclusion of the action.

A funding is typically 5-10 percent of the expected value of a claim. The financier provides the financing agreement to the consumer and his or her attorney for review and approval. Both the

¹ Neil Rickman, and et. al., *Innovations in the Provision of Legal Services in the United States, An Overview for Policymakers*, (2011) Rand Corp. available at https://www.rand.org/content/dam/rand/pubs/occasional_papers/2011/RAND_OP354.pdf (last visited Feb. 20, 2021).

consumer and the attorney must sign the agreement.² After providing the final approval, the financier disburses the funds to the consumer.

The typical amount of such agreements varies; one source noted that it is around \$2,000.³ Another source noted that the average size of these consumer transactions ranges from \$2,500 to \$7,500, with monthly financing fees that can be considerably higher than the monthly interest rates on credit card balances or consumer loans.⁴ Further, some researchers suggest consumers who accept this type of funding have exhausted more common sources of financing and are attracted to it because they need to meet pressing financial obligations or because a non-recourse loan may guarantee them some recovery from their lawsuits.⁵

In some states, concerns have been raised that some cash advance arrangements may exploit consumers due to the complex nature of the transaction and potentially significant financing fees that may substantially reduce the proceeds from the litigation.⁶ Advocates of litigation financing contend that such financing levels the playing field and reduces the risks for firms and their clients to settle for less than what their cases are valued.⁷ Critics of litigation financing contend that the financing disrupts the legal process by involving outside parties that can potentially exert control, encourages the filing of frivolous claims, and gives plaintiff's attorney an unfair advantage in settlement negotiations.⁸

Discovery Issues Related to Consumer Litigation Financing

Prior to executing a litigation finance contract for a cash finance, the litigation financier and the consumer seeking the funds must discuss the potential transactions, which involves due diligence and an analysis of the merits of the litigation to be funded. These communications may involve a litigant's attorney. Based on a review of a case, a financier determines the potential value of the claim.⁹ A financier and a litigant may enter nondisclosure or confidentiality agreements, and the opposing party may not know about the role of the financier.¹⁰ There is concern that these communications and materials may be subject to discovery.

² Alliance for Responsible Consumer Legal Funding, *Consumer Legal Funding 101*, on file with Banking and Insurance Committee.

³ *Id.*

⁴ Zakara, Laura, Overview of Alternative Litigation Financing in the United States, Research Brief, RAND Institute of Civil Justice (2010) available at https://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf (last visited Jan. 2, 2021).

⁵ *Id.*

⁶ *Personal injury cash advance firms say yes to reforms*, (Feb. 28, 2005), Claims Journal, at <https://www.claimsjournal.com/news/east/2005/02/28/51995.htm> (last viewed Feb. 21, 2021).

⁷ Egan, Mary Ellen, *Other People's Money: Rise of litigation finance companies raises legal and ethical concerns* (Dec. 1, 2018) ABA Journal (Dec. 2018) at http://www.abajournal.com/magazine/article/litigation_finance_legal_ethical_concerns (last visited Feb. 20, 2021).

⁸ *Id.*

⁹ See *Supra* note 2.

¹⁰ Jacob Gersham, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, (Mar. 21, 2018), The Wall Street Journal.

Oversight of Litigation Financing in Florida

In Florida, interest rates and usury are governed under ch. 687, F.S., generally.¹¹ Any charges, including interest, in excess of the combined total of all charges of a consumer loan exceed the statutory limits under the Florida Consumer Finance Act, constitute a violation of ch. 687, F.S.¹² In a 2005 case, the Court noted that there are no laws regulating such agreements in Florida and this method of funding may warrant regulation in Florida.¹³ In another case relating to litigation financing, a Florida resident sought relief under Florida's Unfair Trade Practices Act,¹⁴ Florida's Consumer Finance Act,¹⁵ and Florida's Interest, Usury, and Lending Practices Act.¹⁶ The funding agreement in this complaint alleged that the financier charged him 51 percent interest, a \$600 processing fee, and a \$345 origination fee, which was charged every 6 months.¹⁷

In a 2002 opinion, the Florida Bar provided the following comments¹⁸ regarding litigation financing:

The Florida Bar discourages the use of non-recourse advance funding companies. The terms of the funding agreements offered to clients may not serve the client's best interests in many instances. The Committee continues to have concerns, as discussed in Opinion 92-6, of the problems that can arise when a client obtains financial assistance from a party, such as the client's lack of incentive to cooperate. This Committee can conceive of only limited circumstances under which it would be in a client's best interests for an attorney to provide clients with information about funding companies that offer non-recourse advance funding or other financial assistance to clients in exchange for an assignment of an interest in the case. Under these limited circumstances, an attorney may advise a client that such companies exist only if the attorney also discusses with the client whether the costs of the transaction outweigh the benefits of receiving the funds immediately and the other potential problems that can arise. Only after this discussion may a lawyer provide the names of advance funding companies to clients.

¹¹In Florida, a usurious contract is a loan with an interest rate higher than 18 percent per year for a loan up to \$500,000 or a loan exceeding \$500,000 with an interest rate greater than 25 percent, with some exceptions, as provided in ss. 687.071 and 687.02, F.S.

¹² Section 516.031(1) and (3), F.S. The maximum interest rate is 30 percent per annum, computed on the first \$3,000 of the principal amount; 24 percent per annum on that part of the principal amount exceeding \$3,000 and up to \$4,000; and 18 percent per annum on that part of the principal amount exceeding \$4,000 and up to \$25,000.

¹³ *Fausone v. U.S. Claims, Inc.*, 915 So.2d 626 (2005).

¹⁴ Part II, ch. 501, F.S.

¹⁵ Ch. 516, F.S.

¹⁶ Ch. 687, F.S.

¹⁷ *Taylor v. Certified Legal Funding, Inc.* 2018 WL 3860243 (M.D. FL 2018). On October 30, 2018, a stipulated final judgment was entered in favor of Certified Legal Funding, Inc. against Ronald Taylor.

¹⁸ 00-3 Fla. Ethics Op. Fla. Bar (Mar. 15, 2002) at <https://www.floridabar.org/etopinions/etopinion-00-3/> (visited Feb. 21, 2021).

Oversight of Consumer Litigation Financing Transactions in Other States¹⁹

Registration or Licensure; Interest Rate Caps

Committee staff conducted a limited survey relating to the state regulation of litigation financing. Eight states require registration or licensure of these entities.²⁰ Some states, such as Ohio, do not require registration, and instead mandate terms and disclosures in the contract.²¹

Five states have enacted laws relating to interest rates or fees.²² For example, Nevada licenses and regulates consumer litigation financing and requires that the funded amount plus charges and fees of each transaction must not exceed a rate of 40 percent of the funded amount annually.²³ Tennessee authorizes two types of fees for such loans. A financier may impose a fee of up to 10 percent of the original amount provided to the consumer.²⁴ In addition, a financier may impose a maximum annual fee of \$360 per year for each \$1,000 of the unpaid principal of the funds advanced to the consumer for up to a maximum of 3 years.²⁵ West Virginia caps interest on such transactions at 18 percent.²⁶ Indiana authorizes a litigation financier to impose an annual fee of 36 percent of the funded amount and an annual servicing charge of up to 7 percent of the funded amount, as well as a onetime document charge.²⁷

In Colorado, the Supreme Court held that a litigation finance company that agrees to advance money to tort plaintiffs in exchange for future litigation proceeds is making a loan subject to regulation under Colorado's Uniform Consumer Credit Code even if the plaintiff does not have an obligation to repay any deficiency if the litigation proceeds are ultimately less than the amount due.²⁸ In this particular case, the Court noted that the amount of the loan is usually less than \$1,500, and the interest rates on some of these loans approached triple digits. One sample agreement provided \$1,234 to the consumer, with a payoff of \$1,851 after 6 months and \$4,010.50 after 2 years, for a 60 percent annual return.²⁹ In South Carolina, the Department of

¹⁹ Litigation financing can involve commercial or consumer financing. See National Association of Mutual Insurance Companies, *curbing a Questionable Practice: A Survey of Public Policy Measures to Address Concerns Surrounding Litigation Financing* (2018), available at https://www.namic.org/pdf/publicpolicy/190128_LitigationLendingUpdate.pdf (last visited Feb. 28, 2021).

²⁰ Indiana (IC 24-12), Maine (ME Rev. Stat. Ann. 9-A, s. 12), Nebraska (Neb. Rev. St. s. 25-3301, et. seq.), Nevada (NRS 604C.320), Oklahoma (Okla. Stat. s. 14A-3-801(6)), Tennessee (Tenn. Code Ann. s. 47-16-101, et. seq.), Vermont (8 V.S.A. s. 2252), and West Virginia.

²¹ Ohio Rev. Code s. 1349.55(A)(1).

²² Arkansas (A.C.A. s. 4-57-109), Indiana (Ind. Code 24-4.5-3-110), Nevada (NRS 604C.310), Tennessee, and West Virginia.

²³ State of Nevada, Department of Business and Industry Financial Institutions Division, *FID Guidance S.B. 432, Consumer Litigation Funding* (Sep. 30, 2019) at [http://fid.nv.gov/uploadedFiles/fid.nv.gov/content/Licensing/Installment_Loan_Company\(1\)/SB432_Consumer%20Litigation%20Funding%20Guidance%202009.30.2019.pdf](http://fid.nv.gov/uploadedFiles/fid.nv.gov/content/Licensing/Installment_Loan_Company(1)/SB432_Consumer%20Litigation%20Funding%20Guidance%202009.30.2019.pdf) (last visited Feb. 21, 2021).

²⁴ T.C.A. s. 47-16-110(b).

²⁵ T.C.A. s. 47-16-110(c) (2014).

²⁶ W. Va. Code s. 46A-6N-9.

²⁷ IC 24-4.5-3-202 and IC 24-12.

²⁸ *Oasis Legal. Finance Group v. Coffman*, (Nov. 16, 2015), 2015 CO 63, at <https://www.scribd.com/document/289971303/Lawcash-Colo-Opinion> (last visited Feb. 20, 2021).

²⁹ Fisher, Daniel, *Lawsuit Finance Contracts are Loans Colorado Supreme Court Rules*, Forbes, Nov. 16, 2015, at <https://www.forbes.com/sites/danielfisher/2015/11/16/lawsuit-finance-contracts-are-loans-colorado-supreme-court-rules/#52fab63b182a> (last visited Feb. 21, 2021).

Consumer Affairs ruled that entities that fund litigation in exchange for a portion of the recovery are providing loans that must comply with state laws governing lending.³⁰

Communication Privileges

Vermont³¹ and Indiana³² have enacted legislation that provides the communication between a consumer's attorney and the financing company may not be discoverable or limit the scope of any statutory or common-law privilege, including the work-product doctrine and the attorney-client privilege.

Disclosure of Financing Agreements

West Virginia³³ and Wisconsin³⁴ require disclosure of litigation financing contracts in civil actions or claims.

Department of State

The Secretary of State is the head of the Department of State (DOS). The Secretary is responsible for performing functions conferred by the State Constitution upon the custodian of state records. There are six divisions within the Department, including the Division of Corporations.³⁵

The Division of Corporations (Division) serves as the state's central repository for a number of commercial activities. The Division formalizes the legal standing of a business or activity by accepting and indexing the filing or registration and (2) supplies information and certification regarding the filings and activities of record.³⁶

Pursuant to state law, the Division's duty to file documents is ministerial and does not create a presumption that the information contained in the documents submitted by business entities and individuals is valid or correct.³⁷ The Division utilizes the Corporate Filing System to store and report business information and makes the information available on the Division's Web site, Sunbiz.org.³⁸

Florida law requires a corporation, limited liability company ("LLC"), or partnership to register with the Department and meet other requirements. Each business entity authorized to transact business in the state is required to deliver to the Department for filing a sworn annual report

³⁰ South Carolina, Department of Consumer Affairs, Administrative Interpretation: Legal/Litigation Funding Transactions, (Nov. 14, 2014), Administrative Interpretation 3.104, 106-1403, <https://consumer.sc.gov/sites/default/files/Documents/Business%20Resources%20Laws/Administrative%20Interpretations/Chapter%203/3.104%2C106-1403%20Litigation%20FundingTransactions.pdf> (last visited Mar. 15, 2021).

³¹ 8 V.S.A. s. 2255.

³² IC 24-12.

³³ Section 46A-6N.

³⁴ Wisc. Stat. s. 804.01(2).

³⁵ Section 20.10, F.S.

³⁶ Florida Department of State, Division of Corporations Overview, <https://dos.myflorida.com/sunbiz/about-us/division-overview/> (last visited Mar. 15, 2021).

³⁷ Section 607.0125(4), F.S.

³⁸ Department of State, Sunbiz, <https://dos.myflorida.com/sunbiz/> (last visited Mar. 15, 2021).

between January 1st and May 1st each year.³⁹ In addition, a business entity is to remit to the Department an annual report fee and, as applicable, a supplemental corporate fee,⁴⁰ when filing the annual report.

Department of Legal Affairs

The Division of Consumer Protection of the Department of Legal Affairs⁴¹ is the civil enforcement authority for violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).⁴² FDUTPA provides remedies and penalties for unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.⁴³

The enforcing authority is the office of the state attorney if a violation of this act occurs in or affects the judicial circuit under the office's jurisdiction. If a violation occurs or affects more than one judicial circuit or if the office of the state attorney defers to the Department of Legal Affairs, the enforcing authority is the Department of Legal Affairs.⁴⁴ Remedies for practices prohibited by the act may include an action to enjoin a person from committing such acts,⁴⁵ an action to recover actual damages caused by the violation, as well as the imposition of a civil penalty of generally not more than \$10,000 for each willful violation.⁴⁶ Actions can be brought by a state attorney, the Department of Legal Affairs,⁴⁷ or by a consumer.⁴⁸

III. Effect of Proposed Changes:

Section 1 creates part XIII of ch. 559, F.S., and provides that it may be cited as the "Litigation Financing Consumer Protection Act."

Section 2 creates s. 559.953, F.S., and provides definitions of the following terms: consumer, enforcing authority, funded amount, health care practitioner, interest, litigation financier, litigation financing, and net proceeds. The term, "litigation financing" means a nonrecourse transaction in which a 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 the consumer's civil action or claim. The definition of the term, "litigation financing," does not include:

- Legal services provided to a consumer on a contingency fee basis or advanced legal costs, when an attorney representing the consumer in accordance with the Florida Rules of Professional Conduct provides such services.

³⁹ Sections 605.0212, 607.1622, 617.1622, and 622.1210, F.S.

⁴⁰ Section 607.193, F.S., imposes the supplemental corporate fee on limited liability companies, for-profit corporations, and partnerships. For other fees, See <https://dos.myflorida.com/sunbiz/forms/fees/> (last visited Mar. 15, 2021).

⁴¹ Florida Office of the Attorney General, Division of Consumer Protection of the Department of Legal Affairs at <http://www.myfloridalegal.com/pages.nsf/Main/18A7753257FE439085256CC9004EC4F7> (last viewed Feb. 5, 2020).

⁴² Part II of ch. 501, F.S.

⁴³ Sections 501.202 and 501.204, F.S.

⁴⁴ Section 501.203(2), F.S.

⁴⁵ Section 501.207, F.S.

⁴⁶ Section 501.211(2), F.S.

⁴⁷ Section 501.203(2), F.S.

⁴⁸ Section 501.211(1), F.S.

- A commercial tort claim as defined in s. 679.1021(1)(m), F.S.
- A claim under the Workers' Compensation Law, ch. 440, F.S.
- A consumer finance loan, as defined in s. 516.01, F.S.
- Lending or financing arrangements between an attorney or law firm and a lending institution to fund litigation costs in the ordinary course of business.

Section 3 creates s. 559.954, F.S., to establish registration requirements for litigation financiers under the Department of State (Department). Each financier must file with the Department a \$250,000 surety bond, issued by a surety company, and payable to the Department for the payment of damages awarded to a consumer under part II, ch. 501, F.S. The surety bond must remain in place so long as the DOS designates a litigation financier as such or a litigation-financing contract with the litigation financier is effective.

Corporate, Limited Liability Company, and Partnership Registration

Each litigation financier that is a corporation, limited liability company (LLC), or partnership is considered registered if it has:

- Met the surety bond requirement; and
- A status of active and in good standing as reflected in department records; and filed articles of incorporation, a certificated of limited partnership or another organizational document.

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 who want 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 provides the Department with authority to revoke a registration for noncompliance with the registration requirements, registration amendment, and bond requirements. If the Department determines that a financier violated any of these requirements, the Department must serve the

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 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 financier's registration, after which the financier may not continue to offer litigation financing in the state.

Contract Terms and Disclosures

Section 4 creates s. 559.955, F.S., to establish mandatory terms within a litigation-financing contract. These terms include a right of rescission within 5 business days after execution of the contract or receipt of funds by the consumer, whichever is later; an acknowledgment regarding whether the consumer is represented by an attorney, and a provision requiring notice to a settlement fund or trust regarding any outstanding financial obligations from the contract. A litigation financier may not charge, contract for, or receive any interest, charges, or fees for rescission or cancellation of a contract.

Section 6 creates s. 559.957, F.S., to establish mandatory disclosures within a litigation-financing contract. The disclosures are:

- Notice of the right to a completely filled contract;
- A statement that the litigation financier will not and has no right to make decisions or influence the consumer or his attorney regarding the civil action or claim;
- The total funded amount provided to the consumer;
- An itemized list of all fees and charges;
- The interest rate;
- The total amount due from the consumer in 6-month intervals for 3 years;
- A statement that the consumer will owe no charges or fees other than those described in the disclosures;
- The cumulative amount due from the consumer for all litigation financing contracts if the consumer seeks multiple contracts and makes repayment after contract execution;
- Notice that if the consumer owes the litigation financier nothing if there is no recovery in the civil action or claim;
- Notice that the litigation financier will accept a reduced sum not exceeding the net proceeds of the civil action or claim if the net proceeds are insufficient to make a full repayment; and
- Notice that the consumer has the right to cancel and should exercise due diligence before signing the contract.
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Section 8 creates s. 559.959, F.S., relating to interest rate, fees, charges, and penalties applicable to the contract. The bill:

- Caps the interest rate of such contracts at 10 percent of the funded amount per year, calculated using simple interest. Interest may only accrue until a court enters a final order or a settlement agreement is executed in the civil action or claim subject to the contract, whichever is earlier, but no longer, than 3 years from the date the consumer receives the funds from the litigation financier.
- Prohibits a litigation financier from charging, contracting for, or receiving any charges or fees the combined total of which exceeds \$500 with regard to a single civil action or claim,

regardless of the number of litigation financing contracts the consumer enters into with the litigation financier.

- Provides that a litigation financier may not charge, contract for, or receive any interest, fees, or charges for rescission or cancellation of a contract.

Prohibited Acts

Section 5 creates s. 559.956, F.S., to provide prohibited acts of litigation financiers. The litigation finance may not:

- Pay or accept a referral fee to or from any person, including an attorney, law firm, or health care practitioner;
- Engage in false advertising;
- Refer consumers to a specific attorney, law firm, or health care practitioner;
- Fail to promptly supply a copy of any complete contract to the consumer;
- Obtain a waiver of remedies the consumer may have in the civil action or claim;
- Attempt to effect arbitration or a waiver to the right to a jury trial;
- Offer or provide legal advice regarding the contract or subject claim;
- Assign the contract;
- Report to a consumer credit reporting agency if the net proceeds of the civil action are insufficient to repay the litigation financier;
- Direct or make any decision with respect to the course of the subject civil action, claim or any settlement;
- Enter into a litigation financing contract with a consumer incorporating the consumer's obligations to the litigation financier under an existing contract;
- Enter into a contemporaneous financing arrangement without the consumer's written consent; and
- Report to a consumer credit reporting agency if insufficient funds remain from the net proceeds of the civil action or claim to repay the litigation financier.

Section 7 creates s. 559.958, F.S., to authorize a consumer to assign his or her contingent right to receive an amount of the potential proceeds of a civil action or claim. Further, the section establishes a priority of liens.

Section 9 creates s. 559.961, F.S., to require a party to any civil action must provide to the other parties any contract under which a litigation financier has a contingent right to receive compensation sourced from potential proceeds of the civil action or claim. This gives a defendant notice of a plaintiff's obligation to a litigation financier.

Section 10 creates s. 559.962, F.S., to provide that communications between a consumer's attorney and a litigation financier as it pertains to a litigation financing contract do not limit, waive, or abrogate the scope or nature of any statutory or common-law privilege, including the work product doctrine and the attorney-client privilege. 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.

Section 11 creates s. 559.963, F.S., to provide that a violation of part XIII, ch. 559, F.S., is an unfair or deceptive trade act or practice under part II of ch. 501, F.S.

Section 12 provides the bill is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill caps the annual interest rate on litigation funding contracts at 10 percent per year. A financier may impose a fee of up to \$500 with regard to a single civil claim, regardless of the number of financing contracts the consumer enters into with the litigation financier respecting the civil action or claim.

The bill requires disclosure of litigation financing contracts in a civil action and protects communications between a consumer's attorney and a litigation financier about such contracts.

There are no registration filing fees imposed on litigation financiers.

C. Government Sector Impact:

The bill does not provide the Department with funding or the authority to collect registration fees. The Department will incur staffing and system costs associated with the development of a new type of registration system, administrative costs associated with revoking such registration for specified violations after notice and opportunity to cure, administration of held surety bonds, and request payments for damages from surety insurers, if necessary. It is unknown how many litigation financiers currently operate in Florida.⁴⁹ The fiscal impact is indeterminate at this time.

Since the bill creates a FDUTPA violation, the bill may cause an indeterminate fiscal and workload increase on the Department of Legal Affairs and the Offices of State Attorneys for each judicial circuit, as both are currently charged with prosecuting such violations.

VI. Technical Deficiencies:

Section 3 provides a registration process for individuals and entities. It is unclear what the registration period is and if it is subject to renewal. For business entities, it is unclear how the Department could determine an entity was in “good standing” without some type of mandatory background check for owners, officers, etc. The term, “good standing,” is undefined. The bill does not require the department to prescribe forms a litigation financier must use for registration and notification of changes in registration information. The bill does not authorize the Department to impose penalties against litigation financier that do comply with the registration requirements.

The bill allows the Department to serve notice of its intent to revoke the registration of a litigation financier by electronic mail. However, s. 120.60(5), F.S., provides that no revocation of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint, which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57, F.S.

Section 4 of the bill requires a litigation financier to file with the Department of State a \$250,000 surety bond, which is issued by a *surety company* and payable to the DOS for the payment of damages awarded to a consumer under part II, ch. 501, F.S. This surety bond must be effective so long as the DOS designates the financier as such or the litigation-financing contract is in effective. In Florida, a *surety insurer* must be authorized by the Office of Insurance Regulation to issue surety bonds. It is unclear how the DOS would enforce the continuation of the surety bond of the financier until all contracts were effective. Litigation relating to such contracts could continue beyond the contract period or the registration of the litigation financier.

Section 5 of the bill prohibits a financier from failing to promptly supply a copy of any complete contract to the consumer. It may provide greater to specify the number of business days a financier has to provide a copy of the executed, signed contract to the consumer.

⁴⁹ A bill analysis was not received from the Department of State.

Section 6 of the bill requires a litigation-financing contract to contain a notice of the consumer's right to a completely filled in contract. It may provide greater clarity to specify that the disclosure contain a notice of the consumer's right to an executed, signed contract within a certain number of business days after the execution of the contract.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 559.953, 559.954, 559.955, 559.956, 559.957, 559.958, 559.959, 559.961, 559.962, and 559.963.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.