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National Council of Insurance Legislators (NCOIL)

Transparency in Third Party Litigation Financing Model Act

**Sponsored by Rep. Matt Lehman (IN) and co-sponsored by Del. Steve Westfall (WV)*

**Draft as of November 12~~September 13~~~~July 1~~~~March 13~~, 2024. To be discussed and considered by the NCOIL Financial Services & Multi-Lines Issues Committee on November 23~~September 20~~~~July 18~~~~April 13~~, 2024.*

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Section 1. Title

This Act shall be known and cited as the “[State] Transparency in Third Party Litigation Financing Act.”

Section 2. Purpose

In an effort to promote consumer protections related to third party litigation funding transactions, this Act establishes that such transactions must be subject to state regulation and sets forth requirements regarding disclosure, registration, funding company and attorney responsibilities and limitations, violations, and other items. The Act also requires the disclosure of commercial litigation financing agreements and sets forth certain prohibitions regarding commercial litigation funding.

Section 3. Definitions

As used in this Act, the following terms shall have the following meanings:

1. "Advertise" means publishing or disseminating any written, oral, electronic or printed communication or any communication by means of recorded telephone messages or transmitted or broadcast on radio, television, the internet or similar communications media, including audio recordings, film strips, motion pictures and videos, published, disseminated, circulated or placed before the public, directly or indirectly, for the purpose of inducing a consumer to enter into a consumer litigation funding.

2. "Charges" means the amount of money to be paid to the consumer litigation funding company by or on behalf of the consumer, above the funded amount provided by or on behalf of the company to a consumer pursuant to this Act. Charges include all administrative, origination, underwriting or other fees, including interest, no matter how denominated. Such charges shall annually not exceed 36% the maximum annual percentage rate as provided for in Title 10, United States Code, section 987(b) and a one-time document preparation fee as established by the Department of Consumer Affairs [official identified in Section 18]. Any contract which exceeds such rate shall be considered usurious as defined by [insert citation to state usury law].

Drafting Note: States may wish to replace Department of Consumer Affairs to a different state agency in this and other sections depending on their state regulatory structure.

3. "Commercial litigation financier" means a person that enters into, or offers to enter into, a commercial litigation financing agreement with a plaintiff or with lawyers or law firms asserting legal claims on behalf of the plaintiff in a civil proceeding. The term does not include a nonprofit organization exempt from federal income tax under section 501(c)(3) of the United States Internal Revenue Code.

4. "Commercial litigation financing agreement" means a nonrecourse agreement that a commercial litigation financier enters into, or offers to enter into, to provide funding to support a

plaintiff or the plaintiff's attorney in prosecuting the civil proceeding, if the repayment of the funded amount is:

- (a) required only if the plaintiff prevails in the civil proceeding; and
- (b) sourced entirely from the proceeds of the civil proceeding, whether the proceeds result from a judgment, a settlement, or some other resolution.

The term does not include a consumer litigation funding transaction, an agreement between an attorney and a client for the attorney to provide legal services on a contingency fee basis or to advance the client's legal costs, a health insurance plan or agreement, a repayment agreement of a financial institution if repayment is not contingent upon the outcome of the civil proceeding, a funding agreement to a nonprofit organization that represents a client on a pro bono basis, or an agreement of an assigned claim to prosecute an environmental contamination matter seeking remediation of, or to recover the cost of remediating, a site that is or has been on the U.S. Environmental Protection Agency's Superfund National Priorities List.

85. "Foreign country or person of concern" includes the following:

- (a) A foreign government or person listed in 15 CFR 7.4.
- (b) A country designated as a threat to critical infrastructure by the governor under [insert citation to state law].

96. "Foreign entity of concern" means ~~an individual,~~ partnership, association corporation, organization, or other combination of persons:

- (a) organized or incorporated in a foreign country of concern;
- (b) owned or controlled by the government, a political subdivision, or a political party of a foreign country of concern;
- (c) that has a principal place of business in a foreign country of concern; or
- (d) that is owned, organized, or controlled by or affiliated with a foreign organization that has been:
 - (i) placed on the federal Office of Foreign Assets Control specially designated nationals and blocked persons list ("SDN List"); or
 - (ii) designated by the United States Secretary of State as a foreign terrorist organization.

(e) "Foreign entity of concern" shall also include any individual that owns, has a controlling interest in, or is a director or senior officer of any entity that falls within subsections 9(a) through (d).

67. "Consumer litigation funding" means a non-recourse transaction in which a consumer litigation funding company purchases, with funds paid directly to the consumer, and a consumer assigns to the company a contingent right to receive an amount of the potential proceeds of a settlement, judgment, award, or verdict obtained in the consumer's legal claim.

78. "Consumer litigation funding company" or "company" means a person or entity that enters into a consumer litigation funding contract ~~of no more than xxxxxxxx dollars~~ with a consumer. This term shall not include:

- (a) an immediate family member of the consumer;
- (b) a bank, lender, financing entity, or other special purpose entity:
 - (i) that provides financing to a consumer litigation funding company; or
 - (ii) to which a consumer litigation funding company grants a security interest or transfers any rights or interest in a consumer litigation funding; or
- (c) an attorney or accountant who provides services to a consumer.

59. "Consumer" means a natural person ~~or estate for a decedent related to wrongful death claims who has a pending legal claim and~~ who resides or is domiciled in [State] or is a plaintiff in a civil action in [State]. The term includes estate for a decedent related to wrongful death claims.

10. "Funded amount" means the amount of monies provided to, or on behalf of, the consumer in the consumer litigation funding contract. "Funded amount" excludes charges.

11. "Funding date" means the date on which the funded amount is transferred to the consumer by the consumer litigation funding company either by personal delivery or via wire, ACH or other electronic means or mailed by insured, certified or registered United States mail.

12. "Immediate family member" means a parent; sibling; child by blood, adoption, or marriage; spouse; grandparent; or grandchild.

13. "Legal claim" means a ~~bona fide~~ civil claim or cause of action.

14. "Resolution date" means the date the funded amount, plus the agreed upon charges, are delivered to the consumer litigation funding company by the consumer, the consumer's attorney or otherwise.

Section 4. Contract Requirements; Right of Rescission

1. All consumer litigation funding contracts shall meet the following requirements:

- (a) a contract shall be written in a clear and coherent manner using words with common, everyday meanings to enable the average consumer who makes a reasonable effort under

ordinary circumstances to read and understand the terms of the contract without having to obtain the assistance of a professional;

(b) the contract shall be completely filled in when presented to the consumer for signature;

(c) the contract shall contain, in twelve-point bold type font, a right of rescission, allowing the consumer to cancel the contract without penalty or further obligation if, within ten business days after the funding date, the consumer returns to the consumer litigation funding company the full amount of the disbursed funds;

(d) the contract shall contain the initials of the consumer on each page;

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

(f) in the event the consumer seeks more than one litigation funding contract from the same company, a disclosure providing the cumulative amount due from the consumer for all transactions, including charges under all contracts, if repayment is made any time after the contracts are executed;

(g) a statement of the maximum amount the consumer may be obligated to pay under the contract other than in a case of material breach, fraud or misrepresentation by or on behalf of the consumer; and

(h) clear and conspicuous detail of how charges, including any applicable fees, are incurred or accrued.

2. The contract shall contain a written acknowledgement by the attorney retained by the consumer in the legal claim that attests to the following:

(a) the attorney has reviewed the mandatory disclosures in Section 7 of this Act with the consumer;

(b) the attorney is being paid on a contingency basis pursuant to a written fee agreement;

(c) all proceeds of the legal claim will be disbursed via either the trust account of the attorney or a settlement fund established to receive the proceeds of the legal claim on behalf of the consumer;

(d) the attorney is obligated to disburse funds from the legal claim and take any other steps to ensure that the terms of the litigation funding contract are fulfilled;

(e) the attorney has not received a referral fee or other consideration from the consumer litigation funding company in connection with the consumer litigation funding, nor will the attorney receive such fee or other consideration in the future; and

(f) the attorney in the legal claim has provided no tax, public or private benefit planning, or financial advice regarding this transaction.

3. In the event that the acknowledgement required pursuant to ~~paragraph (c)~~ of subdivision two of this section is not ~~completed~~ provided by the attorney or firm retained by the consumer in the legal claim, the contract shall be null and void. The contract shall remain valid and enforceable in the event the consumer terminates the initial attorney ~~and~~/or retains a new attorney with respect to the legal claim.

4. Notwithstanding [insert citation to State law governing prepayment penalties within usury section], no prepayment penalties or fees shall be charged or collected on consumer litigation funding. A prepayment penalty on consumer litigation funding shall be unenforceable.

Section 5. Prohibitions and Charge Limitations

1. Consumer litigation funding companies shall be prohibited from:

(a) paying or offering to pay commissions, referral fees, or other forms of consideration to any attorney, law firm, ~~medical~~healthcare provider, chiropractor or physical therapist or any of their employees for referring a consumer to the company;

(b) accepting any commissions, referral fees, rebates or other forms of consideration from an attorney, law firm, ~~medical~~healthcare provider, chiropractor or physical therapist or any of their employees;

(c) intentionally advertising materially false or misleading information regarding its products or services;

(d) referring, in furtherance of an initial legal funding, a customer or potential customer to a specific attorney, law firm, ~~medical~~healthcare provider, chiropractor or physical therapist or any of their employees; provided, however, if a customer needs legal representation, the company may refer the customer to a local or state bar association referral service;

(e) knowingly providing funding to a consumer who has previously assigned ~~and~~/or sold a portion of the consumer's right to proceeds from his or her legal claim without first making payment to ~~and~~/or purchasing a prior unsatisfied consumer litigation funding company's entire funded amount and contracted charges, unless a lesser amount is otherwise agreed to in writing by the consumer litigation funding companies, except that multiple companies may agree to contemporaneously provide funding to a consumer provided that the consumer and the consumer's attorney consent to the arrangement in writing;

(f) having any influence, receiving any right to, or making, any decisions with respect to the conduct of the underlying legal claim or any settlement or resolution thereof. The

right to make such decisions shall remain solely with the consumer and the attorney in the legal claim;

(g) attempting to obtain a waiver of any remedy or right by the consumer, including but not limited to the right to trial by jury; and

(h) knowingly paying or offering to pay for court costs, filing fees or attorney's fees either during or after the resolution of the legal claim, using funds from the consumer litigation funding transaction.

2. An attorney or law firm retained by the consumer in the legal claim shall not have a financial interest in the consumer litigation funding company offering consumer litigation funding to that consumer.

3. Any attorney who has referred the consumer to his or her retained attorney shall not have a financial interest in the consumer litigation funding company offering consumer litigation funding to that consumer.

4. The attorney may only disclose privileged information to the consumer litigation funding company with the written consent of the consumer.

5. A consumer litigation funding company may not provide funding to a consumer litigation funding transaction that is directly or indirectly financed by anyone included within Section 3.(85) or (96).

Section 6. Contracted Amounts

The contracted amount to be paid to the consumer litigation funding company shall be a predetermined amount based upon intervals of time from the funding date through the resolution date, and shall not be determined as a percentage of the recovery from the legal claim.

Section 7. Disclosures

~~1. Except as otherwise stipulated or ordered by the court, a party or his or her counsel shall, without awaiting a discovery request, provide to the other parties, and each insurer that has a duty to defend another party in the civil proceeding, any agreement under which any consumer litigation funding company, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent in any respect on the outcome of the legal claim.~~

(a) In a civil proceeding in which a plaintiff enters into a consumer litigation financing agreement, and thus the contracted funds are not provided for the prosecution of the litigation, the plaintiff or the plaintiff's attorney shall provide to each of the other parties in the civil proceeding, and each insurer that has a duty to defend another party in the civil proceeding, written notice that the plaintiff has entered into a consumer litigation funding contract.

~~(b) In a civil proceeding in which a plaintiff enters into a consumer litigation financing agreement, and the contracted funds are provided for the prosecution of the litigation, the plaintiff or the plaintiff's attorney shall provide to each of the other parties in the civil proceeding, and each insurer that has a duty to defend another party in the civil proceeding, a copy of any such contract.~~

2. In a civil proceeding in which a plaintiff enters into a consumer litigation funding contract, the contents of the consumer litigation funding contract are subject to discovery under the [State] Rules of Civil Trial Procedure and Evidence, subject to this legislative finding that said contents are relevant to the civil proceeding, by a party other than the plaintiff, or an insurer that has a duty to defend another party in the civil proceeding.

~~23. A plaintiff or the plaintiff's attorney shall provide the agreement written notice required by subsection 12. within a reasonable time after the date on which the consumer litigation funding contract was executed.~~

Drafting Note: States may wish to replace "a reasonable time" with a numeric entry for specificity.

4. The written notice provided under subsection 1(a). is not admissible as evidence in a court proceeding.

534. All consumer litigation funding contracts shall contain the disclosures specified in this section, which shall constitute material terms of the contract. Unless otherwise specified, such disclosures shall be typed in at least twelve-point bold type font and be placed clearly and conspicuously within the contract, as follows:

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

(i) the funded amount to be paid to the consumer by the consumer litigation funding company;

(ii) an itemization of one-time charges;

(iii) the maximum total amount to be assigned by the consumer to the company, including the funded amount and all charges; and

(iv) a payment schedule to include the funded amount and charges, listing all dates and the amount due at the end of each ~~six month~~ ~~one hundred eighty day~~ period from the funding date, until the date the maximum amount due to the company pursuant to the contract is paid.

~~(b)5-~~ Pursuant to the provisions set forth in this section, within the body of the contract: "Consumer's right to cancellation: you may cancel this contract without penalty or further obligation within ten business days after the funding date if you return to the consumer litigation funding company the full amount of the disbursed funds."

(c)6. The consumer litigation funding company shall have no role in deciding whether, when and how much the legal claim is settled for, however, the consumer and consumer's attorney must notify the company of the outcome of the legal claim by settlement or adjudication prior to the resolution date. The company may seek updated information about the status of the legal claim but in no event shall the company interfere with the independent professional judgement of the attorney in the handling of the legal claim or any settlement thereof.

(d)7. Within the body of the contract, in all capital letters in at least twelve-point bold type font contained within a box: "THE FUNDED AMOUNT AND AGREED UPON CHARGES SHALL BE PAID ONLY FROM THE PROCEEDS OF YOUR LEGAL CLAIM, AND SHALL BE PAID ONLY TO THE EXTENT THAT THERE ARE AVAILABLE PROCEEDS FROM YOUR LEGAL CLAIM. YOU WILL NOT OWE (INSERT NAME OF THE CONSUMER LITIGATION FUNDING COMPANY) ANYTHING IF THERE ARE NO PROCEEDS FROM YOUR LEGAL CLAIM, UNLESS YOU HAVE VIOLATED ANY MATERIAL TERM OF THIS CONTRACT OR YOU HAVE COMMITTED FRAUD AGAINST (INSERT NAME OF CONSUMER LITIGATION FUNDING COMPANY)."

(e)8. Located immediately above the place on the contract where the consumer's signature is required, in twelve-point bold type font: "Do not sign this contract before you read it completely. Do not sign this contract if it contains any blank spaces. You are entitled to a completely filled-in copy of the contract before you sign this contract. You should obtain the advice of any attorney. Depending on the circumstances, you may want to consult a tax, public or private benefits planning, or financial professional. You acknowledge that your attorney in the legal claim has provided no tax, public or private benefit planning, or financial advice regarding this transaction. You further acknowledge that your attorney has explained the terms and conditions of the consumer litigation funding contract."

(f)9. A copy of the executed contract shall promptly be delivered to the attorney for the consumer.

Section 8. Violations

1. Any consumer litigation funding company found in willful violation of any provision of this article in a specific funding case:

(a) waives its right to recover both the funded amount and any and all charges, as defined in Section 3 of this Act, in that particular case; and

(b) shall be liable for a civil penalty of not more than xxxxxxxxx dollars for each violation, which shall accrue to the [State] and may be recovered in a civil action brought by the attorney general.

2. Nothing in this Act shall be construed to restrict the exercise of powers or the performance of the duties of the [State] attorney general, which he or she is authorized to exercise or perform by law

Section 9. Assignability; Liens

1. The contingent right to receive an amount of the potential proceeds of a legal claim is assignable by a consumer to a consumer litigation funding company.
2. Only attorney's liens related to the legal claim which is the subject of the consumer litigation funding or Medicare or other statutory liens related to the legal claim shall take priority over any lien of the consumer litigation funding company.

Section 10. Effect of Communication on Privileges

~~All communications between the a consumer's attorney in the legal claim and the a consumer legal litigation funding company to allow the consumer litigation funding company to ascertain that status of a legal claim or a legal claim's expected value as it pertains to the consumer legal funding shall not be discoverable by a person against whom the legal claim is asserted or filed ~~fall within the scope of the attorney-client privilege, including, without limitation, the work product doctrine.~~~~

Section 11. Registration

1. Unless a consumer litigation funding company or commercial litigation financier has first registered with the [State] pursuant to this Act, the company or financier may not engage in the business of consumer or commercial litigation funding in this state.
2. An applicant's registration must be filed in the manner prescribed by the secretary of state and must contain all the information required by the department of consumer affairs~~state~~ to make an evaluation of the character and fitness of the applicant company or financier, including but not limited to any beneficial ownership exceeding 20%. The initial application must be accompanied by a xxxxxxxx dollar fee. A renewal registration must include a xxxxxxxx dollar fee. A registration must be renewed every two years and expires on the thirtieth of September.
3. A certificate of registration may not be issued unless the department of consumer affairs~~state~~, upon investigation, finds that the character and fitness of the applicant company or financier, and of the officers and directors thereof, are such as to warrant belief that the business will be operated honestly and fairly within the purposes of this Act.
4. Every registrant shall also, at the time of filing such application, file with the department of consumer affairs~~state~~, if the department of consumer affairs~~state~~ so requires, a bond satisfactory to the department of consumer affairs~~state~~ in an amount not to exceed xxxxxxxx dollars. In lieu of the bond at the option of the registrant, the registrant may post an irrevocable letter of credit. The terms of the bond must run concurrent with the period of time during which the registration will be in effect. The bond must provide that the registrant will faithfully conform to and abide by the

provisions of this Act and to all rules lawfully made by the administrator under this act and to any such person or persons any and all amounts of money that may become due or owing to the state or to such person or persons from the registrant under and by virtue of this Act during the period for which the bond is given.

5. Upon written request, the applicant shall be entitled to a hearing on the question of the applicant's qualifications for registration if:

(a) the department of consumer affairs~~state~~ has notified the applicant in writing that the application has been denied, or

(b) the department of consumer affairs~~state~~ has not issued a registration within sixty days after the application for the registration was filed.

6. A request for a hearing may not be made more than fifteen days after the department has mailed a written notice to the applicant that the application has been denied and stating in substance the department of consumer affairs~~state~~'s findings supporting denial of the application.

7. Notwithstanding the prior approval requirement of subdivision one of this section, a consumer litigation funding company or commercial litigation financier that registered with the department of consumer affairs~~state~~ between the effective date of this article or when the department of consumer affairs~~state~~ has made applications available to the public, whichever is later, and one hundred eighty days thereafter may engage in consumer or commercial litigation funding while the ~~company's~~ registration is pending approval with the department of consumer affairs~~state~~. All funding and financing agreements entered into prior to the effective date of this Act are not subject to the terms of this Act.

8. No consumer litigation funding company or commercial litigation financier may use any form of consumer litigation funding or commercial litigation funding contract in this state unless it has been filed with the department of consumer affairs~~state~~ in accordance with the filing procedures set forth by the secretary of state. Such procedures shall designate a reasonable timeframe for the state to raise objections to any filed form.

9. The director of the department of consumer affairs~~secretary of state~~ is hereby authorized to adopt rules and regulations to implement the provisions of this section as needed.

Section 12. Reporting

1. Each consumer litigation funding company and commercial litigation financier that engages in business in the state shall submit a report to the department of consumer affairs~~state~~ no later than the thirty-first of January of each year specifying:

(a) number of ~~consumer~~ litigation fundings by the company or financier;

(b) summation of funded amounts in dollar figure; and

(c) annual percentage charged to each consumer or commercial funding recipient where repayment was made.

2. The department of consumer affairs~~state~~ shall make such information available to the public, in a manner which maintains the confidentiality of the name of each company, financier, customer, and consumer, no later than ninety days after the reports are submitted.

Section 13. Commercial Litigation Funding Prohibitions

A commercial litigation financier may not ~~provide funding to enter into~~ a commercial litigation financing agreement ~~that is directly or indirectly financed by~~ with a foreign entity of concern, or a foreign country or person of concern.

Section 14. Commercial Litigation Disclosure Prohibitions

A party or an attorney or law firm for a party ~~shall~~ may not disclose or share any documents or information subject to a court order to seal or protect that is received in the course of the civil proceeding with a commercial litigation financier.

Section 15. Commercial Litigation Conduct Prohibitions

A commercial litigation financier may not make any decision, have any influence, or direct the plaintiff or the plaintiff's attorney with respect to the conduct of the underlying civil proceeding or any settlement or resolution of the civil proceeding, or make any decision with respect to the conduct of the underlying civil proceeding or any settlement or resolution of the civil proceeding. The right to make these decisions remains solely with the plaintiff and the plaintiff's attorney in the civil proceeding.

Section 16. Disclosure of Commercial Litigation Financing Agreement

1. A party or his or her counsel shall, without awaiting a discovery request, provide to the other parties, and each insurer that has a duty to defend another party in the civil proceeding, any agreement under which any commercial litigation financier, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent in any respect on the outcome of the legal claim. In a civil proceeding in which a plaintiff enters into a commercial litigation financing agreement, the plaintiff or the plaintiff's attorney shall provide to each of the other parties in the civil proceeding, and each insurer that has a duty to defend another party in the civil proceeding, written notice that the plaintiff has entered into a commercial litigation financing agreement.

2. In a civil proceeding in which a plaintiff enters into a commercial litigation financing agreement, the contents of the commercial litigation financing agreement are subject to discovery under the [State] Rules of Trial Procedure by a party other than the plaintiff, or an insurer that has a duty to defend another party in the civil proceeding. 2. The admissibility of commercial litigation financing agreements at trial shall be governed by the [State] Rules of Civil Procedure and Evidence. Such agreements are relevant and shall be admissible at trial

~~based solely on their disclosure pursuant to this Section. Commercial litigation financing agreements shall be admissible at trial.~~

3. A plaintiff or the plaintiff's attorney shall provide the ~~agreement~~written notice required by subsection ~~12~~. within a reasonable time after the date on which the commercial litigation financing agreement was executed.

Drafting Note: States may wish to replace "a reasonable time" with a numeric entry for specificity.

~~4. The written notice provided under subsection 1. is not admissible as evidence in a court proceeding.~~

Section 17. Severability

If any provision of this Act is, for any reason, declared unconstitutional or invalid, in whole or in part, by any court of competent jurisdiction, such portion shall be deemed severable, and such unconstitutionality or invalidity shall not affect the validity of the remaining portions of this Act, which remaining portions shall continue in full force and effect.

Section 18. Rules

The department of consumer affairs shall have authority to promulgate rules necessary to effectuate the purposes of this Act.

Section 19. Effective Date

This Act shall take effect xxxx days after it shall have become a law; provided, however, it shall not apply or in any way affect or invalidate any consumer or commercial litigation funding previously effectuated prior to the effective date of this Act.