

Amendment No. 1 to HB1242

Eldridge
Signature of Sponsor

AMEND Senate Bill No. 1360

House Bill No. 1242*

by deleting all language after the enacting clause and substituting instead the following:

SECTION 1. Tennessee Code Annotated, Title 47, is amended by adding the following new chapter thereto:

47-51-101. This chapter shall be known and may be cited as the "Tennessee Litigation Financing Consumer Protection Act."

47-51-102. As used in this chapter:

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

(2) "Director" means the director of the division or the director's designee;

(3) "Division" means the division of consumer affairs in the department of commerce and insurance;

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

(5) "Litigation financing" or "litigation financing transaction":

(A) Means a non-recourse transaction in which financing is provided to a consumer in return for a consumer assigning to the lender a contingent right to receive an amount of the potential proceeds of the consumer's judgment, award, settlement or verdict obtained with respect to the consumer's legal claim; and

(B) Does not include:

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(i) Legal services provided on a contingency fee basis, or advanced legal costs, where such services or costs are provided to or on behalf of a consumer by an attorney representing the consumer in the dispute and in accordance with the Tennessee Rules of Professional Conduct;

(ii) A commercial tort claim as defined by § 47-9-102; or

(iii) A claim under the Workers' Compensation Law, compiled in title 50, chapter 6.

47-51-103.

(a) No person shall engage in the business of litigation financing without first obtaining a certificate of registration from the secretary of state. A person shall be deemed to be engaged in the business of litigation financing in this state, if the person induces a consumer, while the consumer is located in this state, to enter into an agreement to finance a lawsuit in this state.

(b) To obtain or renew a certificate of registration, a person shall file an application with the secretary of state. Each application for a certificate of registration shall be in writing and made under oath to the secretary of state, in a form prescribed by the secretary of state, and shall include the following:

(1) The legal name, residence and business address of the applicant and, if the applicant is a partnership, association, or corporation, of every member, officer, managing employee and director of the business entity;

(2) The location at which the registered agent of the applicant will be located; and

(3) Other data and information the secretary of state may require with respect to the applicant, its directors, trustees, officers, members, managing employees or agents.

(c) Each application for a certificate of registration or renewal shall be accompanied by a fee prescribed by the secretary of state, which shall not be subject to refund but which, if the certificate of registration is granted, shall constitute the registration fee for the first registration year. The fee shall be in an amount that provides for the cost of administering the registration of litigation financiers. Fees shall be adjusted as necessary to provide that the registration of litigation financiers is fiscally self-sufficient and that revenues from fees do not exceed necessary and required expenditures.

(d) The secretary of state shall issue a certificate of registration to any applicant who provides the secretary of state with the information required in subsection (b) and pays the fee required in subsection (c).

(e) The litigation financier shall also file with the secretary of state, the reporting requirements pursuant to § 47-51-111.

(f) The secretary of state is authorized to promulgate rules to effectuate this section. All such rules shall be promulgated in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

47-51-104. A litigation financier shall fulfill each of the following requirements when engaged in litigation financing:

(1) The terms of the litigation financing transactions shall be set forth in a written contract that is completely filled-in with no incomplete sections when the contract is offered or presented to the consumer;

(2) The litigation financing contract shall contain a right of rescission, allowing the consumer to cancel the litigation financing contract without penalty or further obligation if, within five (5) business days following the consumer's receipt of the funds or goods, or execution of the litigation financing contract, whichever is later, the consumer gives notice of the rescission and returns any money or goods already provided to the consumer by the litigation financier;

(3) The litigation financing contract shall contain a written acknowledgment by the consumer of whether the consumer is represented by an attorney in the dispute;

(4) If the consumer acknowledges that the consumer is represented by an attorney in the dispute, the litigation financing contract shall include a written acknowledgement executed by the consumer's attorney in the dispute in which the attorney acknowledges all of the following:

(A) The attorney has had the opportunity to review the litigation financing contract on behalf of the consumer;

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

(C) That all proceeds of the legal claim shall be disbursed by either the trust account of the attorney representing the consumer in the dispute or a settlement fund established to receive the proceeds of the dispute from the defendant on behalf of the consumer;

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

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

(5) In the event that proceeds are paid into a settlement fund or trust, the litigation financier shall notify the administrator of the fund or trust of any outstanding liens arising from the litigation financing contract.

47-51-105. A litigation financier shall not:

(1) Pay or offer to pay commissions, referral fees or other forms of consideration to any attorney, law firm, medical provider, chiropractor, or physical therapist or any of their employees for referring a consumer to a litigation financier;

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

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

(4) Refer a consumer or potential consumer to a specific attorney, law firm, medical provider, chiropractor, or physical therapist or any of their employees; provided, if a consumer does not have legal representation, the provider shall refer the consumer to a local or state bar referral service operated by a bar association or a non-profit organization;

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

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

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

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

(9) Assign a litigation financing contract in whole or part.

47-51-106.

(a) Litigation financing contracts shall contain the disclosures specified in this section, which shall constitute material terms of the litigation financing contract.

(b) Unless otherwise specified, the disclosures shall be typed in at least fourteen (14) point bold type and be placed clearly and conspicuously within the litigation financing contract, as follows:

(1) On the front page under appropriate headings in not less than fourteen (14) point font, language specifying:

(A) The total amount of money to be provided to the consumer by the litigation financier as part of the litigation financing transaction;

(B) The maximum amount the consumer can be required to provide the litigation financier, including but not be limited to, all fees, charges, interest or other consideration, under the terms of the litigation financing contract;

(C) The maximum annual percentage fee, which shall include, but not be limited to, all fees, charges, interest or other consideration received by a litigation financier in consideration for litigation financing, the consumer may be charged for the litigation financing under the terms of the litigation financing contract;

(D) The following:

Consumer's Right to Cancellation: You may cancel this contract without penalty or further obligation within five (5) business days from the date you signed this contract or

received financing from [insert name of the litigation financier] by: returning the funds to [insert name, office address and office hours of the litigation financier] or by U.S. mail, [insert name and mailing address of litigation financier]. For purposes of the return deadline by U.S. mail, the postmark date on the returned funds or, if mailed by registered or certified mail, the date of the return receipt requested shall be considered the date of return; and

(E) A toll-free telephone line, maintained by the division, for the purpose of encouraging and receiving consumer complaints pertaining to litigation financing;

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

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

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

IF THERE IS NO RECOVERY OF ANY MONEY FROM YOUR LEGAL CLAIM OR IF THERE IS NOT ENOUGH MONEY TO SATISFY THE PORTION ASSIGNED TO [INSERT NAME OF THE LITIGATION FINANCIER] IN FULL, YOU WILL NOT OWE [INSERT NAME OF THE LITIGATION FINANCIER] ANYTHING IN EXCESS OF YOUR RECOVERY.

(4) Located immediately above the place on the litigation financing contract where the consumer's signature is required, the litigation financing contract shall include in fourteen (14) point bold type the following:

Do not sign this contract before you read it completely. If this contract contains any incomplete sections, you are entitled to a completely filled-in copy of the contract prior to signing it. Before you sign this contract, you should obtain the advice of an attorney. Depending on the circumstances you may want to consult a tax advisor, a financial professional or an accountant.

47-51-107. Any violation of this chapter shall make the litigation financing contract unenforceable by the litigation financier, the consumer or any successor-in-interest to the litigation financing contract.

47-51-108.

(a) The attorney general and reporter shall have the power and authority to enforce this chapter in the attorney general's discretion. Any violation of this chapter may be enforced by the attorney general, after consultation with the director of the division of consumer affairs, in accordance with chapter 18 of this title. Nothing in this chapter shall limit the exercise of powers or the performance of the duties of the attorney general, that the attorney general is otherwise authorized or required to exercise or perform by law.

(b) Any person aggrieved by a litigation financier in connection with litigation financing, may file a written complaint with the director, and the director or the director's designee who may investigate the complaint.

(c) In the course of the investigation of the complaint, the director may:

- (1) Subpoena witnesses;
- (2) Administer oaths;

(3) Examine any individual under oath; and

(4) Compel the production of records, books, papers, contracts, or other documents relevant to the investigation.

(d) If any person fails to comply with a subpoena of the director under this chapter or to testify concerning any matter about which the person may be interrogated under this chapter, the director may petition any court of competent jurisdiction for enforcement.

(e) Any certificate of registration issued under this chapter may be suspended after the director conducts a hearing pursuant to the Uniform Administrative Procedure Act, compiled in title 4, chapter 5. If the director determines, after notice and hearing for the appellant, that the litigation financier failed to comply with a subpoena, then the director, in the director's discretion, in consultation with the secretary of state, may suspend any certificate of registration issued under this chapter.

(f) The director has the administrative power to investigate any and all complaints filed by any person against a litigation financier that are not criminal in nature.

(g) If any party to the litigation financing agreement is found to be in violation of this chapter after a proper notice and hearing by the director, the party found by the director to be in violation shall pay the reasonable and actual expenses for any inspection or compliance examination conducted under this chapter. The expenses shall be payable in addition to other fees and taxes required by law and shall be expendable receipts for the use of the director in defraying the cost of administration of this chapter. In addition to the investigation and compliance examination fees, the violating party shall pay to the director the actual expenses incurred for out-of-state investigation, examination and inspection of books and records and papers maintained by the litigation financier out of state.

47-51-109.

(a) The contingent right to receive an amount of the potential proceeds of a legal claim may be assigned by a consumer and that assignment is valid for the purposes of obtaining a loan from a litigation financier.

(b) Any lien, subrogation interest or right of reimbursement against the consumer's legal claim shall take priority over any lien, subrogation interest or right of reimbursement of the litigation financier.

47-51-110.

(a) All consumers entering into litigation financing agreements shall pay the litigation financier an annual fee of not more than ten percent (10%) of the original amount of money provided to the consumer for the litigation financing transaction.

(b) Litigation financiers shall not charge a consumer the annual fee authorized by subsection (a) more than one time each year with regard to any single legal claim regardless of the number of litigation financing transactions that the litigation financier enters into with the consumer with respect to such legal claim.

(c) Litigation financing transactions shall not exceed a term of three (3) years and are limited to a maximum yearly fee, which shall be calculated to include any underwriting and organization fees, and any other charges, fees, or consideration, not to exceed three hundred sixty dollars (\$360) per year, up to a maximum of three (3) years, for each one thousand dollars (\$1,000) of the unpaid principal amount of the funds advanced to the consumer. The maximum yearly fee shall not include the annual fee pursuant to subsection (a).

(d) Litigation financiers shall not enter into an agreement with a consumer that has the effect of incorporating the consumer's obligations to the litigation financier that are contained in the original litigation financing transaction into a subsequent litigation financing transaction.

47-51-111. The division, in cooperation with the secretary of state, shall provide a report to the governor, the speaker of the house of representatives, the speaker of the senate, the consumer and human resources committee of the house of representatives and the commerce and labor committee of the senate not later than January 31, 2015, and thereafter on January 31 annually. The report shall include:

- (1) The number of lawsuit financing transactions in this state;
- (2) The amount of lawsuit financing transactions in this state;
- (3) The number of lawsuit financing transactions required to be repaid by the consumer in this state;
- (4) The amount charged to the consumer, including all fees, charges, interest or other consideration in an itemized list in this state;
- (5) The dollar amount and number of cases in which the lawsuit financier received less than what was contracted in this state; and
- (6) The number of cases in which the lawsuit financier refused to finance in this state.

SECTION 2. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SECTION 3. The director of the division of consumer affairs in the department of commerce and insurance is authorized to promulgate rules to effectuate the purposes of this act. All such rules shall be promulgated in accordance with Tennessee Code Annotated, Title 4, Chapter 5.

SECTION 4. For the purposes of promulgating rules, this act shall take effect upon becoming law, the public welfare requiring it. For all other purposes, this act shall take effect

July 1, 2014, and shall apply to litigation financing contracts executed on or after that date, the public welfare requiring it.