SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 581 (Caballero)
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Fiscal: Yes
Urgency: No
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SUBJECT

Third-party litigation financing

DIGEST

This bill creates a regulatory structure around the litigation financing industry.

EXECUTIVE SUMMARY

Generally speaking, litigation financing is the practice in which a third party unrelated to an underlying lawsuit provides funds to a plaintiff in return for a portion of any financial recovery resulting from the case. This allows plaintiffs the financial ability to pay bills and other expenses while they wait for their anticipated award. This financing is non-recourse, meaning that the lender only collects if the lawsuit is ultimately successful. However, if the case is successful, the plaintiff is usually required to pay back the loan and a pre-negotiated rate of interest.

Concerns have arisen that many of these litigation financing contracts are predatory and usurious, leaving plaintiffs with a fraction of their ultimate settlement or judgement. Critics argue that this type of lending disproportionately hurts vulnerable communities who have no other financial safety net to rely on. Given their unique nature, this type of financing is not thoroughly regulated, although some states outright ban such lending under a legal doctrine called champerty.

This bill seeks to bring some needed oversight to the industry. It requires litigation financers to register with the Secretary of State's office. It places various consumer protections on the practice, including a cap on interest rates and a restriction on securitizing such loans. Financers are prohibited from receiving or exercising any right to direct, control, or otherwise influence the conduct of the consumer's legal claim or action, including any settlement or resolution thereof. Interestingly, it also requires such agreements to be turned over to other parties in litigation, even though this information is seldom relevant and might unfairly prejudice the plaintiff. The contracts are

presumed inadmissible, but that can be rebutted by the defendant. The bill is author-sponsored. It is supported by a coalition of business and insurance organizations, including the Civil Justice Association of California and the American Property Casualty Insurance Association, and a coalition of community groups, including The Arc of Justice. It is opposed by various consumer groups, including the Consumer Federation of California and the Impact Fund.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the Department of Financial Protection and Innovation (DFPI) as the state agency responsible for licensing, regulating, and supervising a range of financial services companies that provide products or services to California consumers, including but not limited to, securities issuers, broker-dealers, investment advisers, and investment advisers representatives; persons offering or selling off-exchange commodities; persons holding securities as custodians on behalf of securities owners; money transmitters; and persons offering or providing consumer financial products or services. (Fin. Code § 300.)

2) Provides the California Consumer Financial Protection Law (CCFPL), which authorizes DFPI to take enforcement action against a person that engages in an unlawful, unfair, deceptive, or abusive act or practice with respect to consumer financial products or services. (Fin. Code § 90000 et seq.)

3) Establishes the California Financing Law (CFL), which regulates specified finance lenders and brokers making certain types of commercial loans. (Fin. Code § 22000 et seq.)

4) Establishes the Pilot Program for Increased Access to Responsible Small Dollar Loans. The program caps the annual interest rate charged on such loans at 35 and 36 percent depending on the amount of the principle. (Fin. Code §§ 22365, 22370.)

5) Provides that all relevant evidence is admissible (Evid. Code § 351.)

6) Authorizes any party, unless otherwise limited by order of the court, to obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document,

electronically stored information, tangible thing, or land or other property. (Civ. Proc. Code § 2017.010.)

7) Establishes the California Public Records Act (CPRA) and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. (Gov. Code § 7920.000 et seq.)

8) Provides that every person has a right to inspect any public record, exempted as otherwise provided. (Gov. Code § 7922.525.)

This bill:

1) Establishes the Third Party Litigation Financing Consumer Protection Act.

2) Requires a litigation financer to register as a litigation financer and post a surety bond with the Secretary of State (SOS) before engaging in a litigation financing transaction in this state, as provided. SOS is required to adopt regulations to carry out its authority as the regulatory body for litigation financing.

3) Requires litigation financers to file an annual report with SOS with specified information, including information on the owners and on each litigation financing transaction. The latter must include information on each person that received financing. SOS must submit their own annual report to the Legislature with this information and a summary. The information therein is to be kept confidential and is made exempt from the Public Records Act. A redacted version is required to be made available to the public.

4) Prohibits litigation financers from engaging in specified conduct, including:

   a) paying, offering, or accepting commissions, referral fees, or other forms of consideration, as provided;
   b) advertising false or misleading information regarding its products or services;
   c) referring a consumer or potential consumer to a specific legal representative, medical provider, or any of their employees;
   d) failing to promptly supply copies of any complete litigation financing contracts to the consumer and the consumer's legal representative;
   e) attempting to secure a remedy or obtain a waiver of any remedy, including, but not limited to, compensatory, statutory, or punitive damages, that the consumer might otherwise be entitled to pursue;
   f) offering or providing legal advice to the consumer regarding the litigation financing or the underlying dispute.
   g) assigning, which includes securitizing, a litigation financing contract in whole or part;

    h) reporting a consumer to a credit reporting agency if insufficient funds remain from the net proceeds to repay the litigation financer; and
    i) receiving or exercising any right to direct, control, or otherwise influence the conduct of the consumer's legal claim or action, including, but not limited to, any settlement or resolution thereof.

5) Defines relevant terms, including
    a) "litigation financer" means a person, group of persons, or legal entity, engaged in the business of litigation financing or any other economic activity intended to facilitate litigation financing;
    b) "litigation financing" means the funding of a civil claim or action by anyone other than the parties to the claim or action themselves, their counsel, or entities with a preexisting contractual indemnitor or a liability insurer relationship with one of the parties.
    c) "litigation financing transaction" means a nonrecourse transaction in which litigation financing is provided to a consumer or legal representative in return for assigning to the litigation financer a contingent right to receive an amount out of the proceeds of any realized judgment, award, settlement, or verdict the consumer may receive on the underlying claim or action, or agreeing to pay the litigation financer interest, fees, or other consideration for the financing provided. This does not include legal representation services or legal costs advanced by a legal representative, as provided.

6) Prohibits a legal representative or a medical provider for a consumer, or any of their employees, from having a financial interest in litigation financing and from receiving a referral fee or other consideration from any litigation financer, its employees, owners, or its affiliates. The legal representative must acknowledge in any financing contract that they have not received or given any form of consideration in connection with the financing.

7) Places certain requirements on litigation financing agreements. It requires each agreement to include the following disclosures:

    a) the consumer's right to cancel the contract without penalty or further obligation within five business days;
    b) the maximum amount of fees to be charged;
    c) that the litigation financer agrees that it has no right to and will not make any decisions about the conduct of the lawsuit or dispute and that the right to make those decisions remains solely with the consumer and their legal representative;
    d) the fact that the consumer will not owe anything if they do not recover any money and that they will not owe anything in excess of any recovery; and

e) the consumer's rights regarding the contract elements.

8) Caps the annual fee that a litigation financer can charge a consumer at 36 percent of the original amount provided. This fee can only be charged once each year and can not compound more frequently than annually. Fees can not be assessed for any period exceeding 42 months from the date of the contract with the consumer.

9) Provides that a litigation financer shall not knowingly provide financing to a consumer who has previously assigned or sold a portion of the consumer's right to proceeds from their legal claim without first making payment to or purchasing a prior unsatisfied litigation financer's entire funded amount and contracted charges unless a lesser amount is otherwise expressly agreed to in writing by the litigation financers; except multiple litigation financers may agree to contemporaneously provide financing to a consumer, if the consumer and the consumer's attorney consent to the agreement in writing.

10) Requires a consumer's legal representative, if the legal representative is a party to a litigation financing agreement related to the consumer's legal proceeding, to share with the consumer the agreement between the legal representative and the litigation financer. The agreement shall be accompanied by specified disclosures, and the consumer shall sign both an acknowledgment that the agreement has been read and the required disclosure.

11) Requires a consumer, within 30 calendar days of receipt of a written request, to disclose to any party to a legal claim whether the consumer has entered into a litigation financing transaction. If a consumer enters into a litigation financing transaction after responding to a request, the consumer shall disclose this fact to the requesting person within 30 calendar days after the consumer entered into the transaction.

12) Provides that litigation financing contracts shall be rebuttably presumed to be discoverable in a civil action notwithstanding any agreement or provision with respect to confidentiality. Litigation financing transactions disclosed or discovered pursuant to this section shall be rebuttably presumed to be inadmissible as evidence.

13) Provides that communications between a consumer's attorney and a litigation financier necessary to ascertain the status of a legal claim or a legal claim's expected value shall not be discoverable by a party with whom the claim is filed or against whom the claim is asserted. This does 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.

14) Makes a litigation financer jointly liable for costs assessed or any monetary sanction imposed, on the consumer whose claim or action the litigation financer is funding pursuant to a litigation financing transaction.

15) Renders a litigation financing contract unenforceable if there are any violations of the bill.

16) Authorizes SOS to do any of the following if SOS determines that a litigation financer intentionally violated this title:
    a) order a litigation financer to cease and desist from entering into any additional consumer legal funding transactions;
    b) assess an administrative penalty of not more than $10,000 for each violation; and
    c) order the litigation financer to make restitution to an injured consumer.

17) Provides that these powers vested in SOS do not limit the ability of SOS or any other officer, employee, or agent of the state to take enforcement action that is authorized under any other provision of law.

18) Includes a severability clause.

COMMENTS

1. Stated intent of the bill

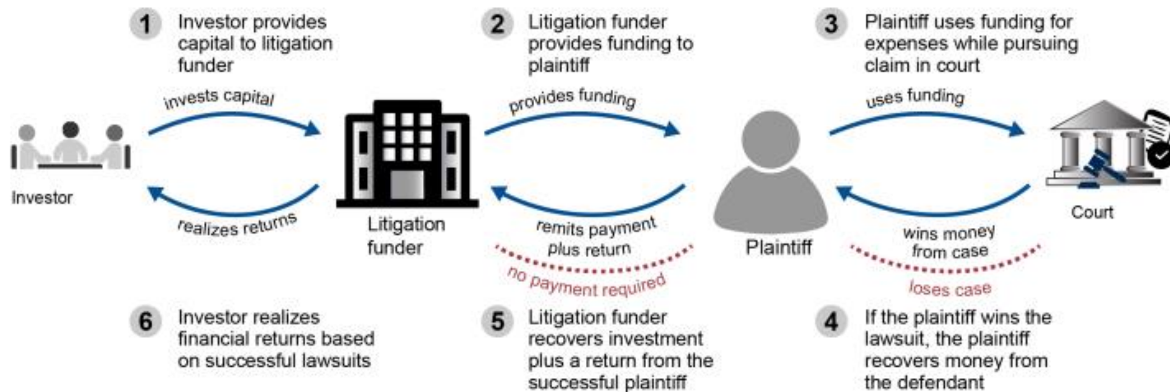
According to the author:

> Without regulation and transparency, people who are victims of injustices or mistreatment get victimized again. Litigation financing is the practice in which a third party, unrelated to a lawsuit, provides funds to a plaintiff in return for a portion of any financial recovery resulting from the case. There are two types of funding: (1) consumer lawsuit lending, which is the legal equivalent of the payday loan where a lender offers immediate cash to plaintiffs in personal injury lawsuits for a percentage of the potential judgment or settlement and (2) commercial lawsuit lending in which businesses or individuals invest in big-ticket litigation for an agreed return on any settlement or money judgment that results from the lawsuit. If Third Party Litigation Financing is to be part of our legal system, its use should be regulated and transparent. SB 581 will provide oversight in the third party litigation financing process to protect consumers from those seeking to profit from the plaintiff's injuries.

2. Concerns in the litigation financing industry

While litigation financing has been around in some countries for much longer, it has gained increased prominence in the United States in the last decade or so. A report from the United States Government Accountability Office (GAO) on third-party litigation financing provides a useful primer:

> Third-party litigation financing is an arrangement where a funder that is not a party to a lawsuit agrees to provide funding to a litigant (typically a plaintiff) or law firm in exchange for an interest in the potential recovery in a lawsuit (see figure). Plaintiffs do not have to repay the funding if their lawsuit is not successful. This funding generally falls into two categories: commercial and consumer funding. Commercial arrangements are between funders and corporate litigants or law firms. For example, a funder agrees to provide funding for legal or business expenses in exchange for a portion of the court award if the plaintiff wins. The funding is typically in the millions of dollars. Consumer arrangements are between a funder and an individual, such as the plaintiff in a personal injury case. The funder provides a relatively small amount (typically under $10,000) to the plaintiff, who uses it for living expenses.



[1]

Like other types of financing and consumer loans, there are upsides and drawbacks from this type of service. Especially in the consumer context, where a consumer is injured and out of work, money may be extremely tight until a settlement or judgment is awarded. Given the timelines for civil litigation, especially cases making it to trial, some consumers just cannot make ends meet without tapping into this potential award. The attractiveness from their perspective is clear. They can get money now to pay off piling debts with no risk should the case ultimately prove to be unsuccessful. However,

[1] *Third-Party Litigation Financing Market Characteristics, Data, and Trends* (Dec. 2022) GAO, https://www.gao.gov/assets/gao-23-105210.pdf.

as noted by the author and supporters the ultimate price can be much steeper than many initially realize.

An investigate segment on 60 Minutes put a spotlight on the largely opaque and under-regulated industry.[2] As it summarizes: "Litigation funding can help in cases where otherwise the little guy who's suing would just get crushed or lowballed by defendants with deep pockets. Problem is – this market is exploding with nearly no rules or oversight." The report highlighted a case brought by a farmer suing for breach of contract. He had won a massive settlement but when the defendant appealed he found himself unable to keep his business running until he contracted with one of the bigger players in this market, Burford Capital. While the financing helped bridge the gap, he ended up having to pay 100 percent of his financing back, in addition to the amount financed.

This type of rate would be unlawful in other consumer lending contexts, but because this non-recourse financing does not fall within existing regulatory structures, there are no rules. The CEO of Burford admits that in some cases his company walks away with more money than the funded plaintiff. They justify the excessive return by pointing to the risk they take should the case end up unsuccessful and they are unable to collect. However, critics point out that these companies have teams of lawyers that investigate cases before financing. In fact, as the Wall Street Journal puts it, litigation finance has become "the new hot law job."[3]

Additional concerns are raised when such financing companies attempt to interfere with the litigation or pressure clients into early settlement or costly trial. The potential conflict with the attorney-client relationship is apparent. The Standing Committee on Professional Responsibility and Conduct of the State Bar of California issued a formal opinion on alternative litigation funding and these potentially thorny issues:

> Litigation funding, like a third-party payor, introduces a third party with its own interests into the lawyer-client relationship, posing risks to the lawyer's independent professional judgment and the relationship of confidence between the lawyer and client. The duty of loyalty and independent professional judgment require the lawyer to act in the client's interest at all times and particularly where the client's interest might depart from the funder's.
>
> The lawyer's independent professional judgment may also be impaired if the funding arrangement imposes limitations on the how the case is

[2] Lesley Stahl, *Litigation Funding: A multibillion-dollar industry for investments in lawsuits with little oversight* (December 18, 2022) CBS News 60 Minutes, https://www.cbsnews.com/news/litigation-funding-60-minutes-2022-12-18/.

[3] Sara Randazzo, *The New Hot Law Job: Litigation Finance* (July 5, 2018) The Wall Street Journal, https://www.wsj.com/articles/the-new-hot-law-job-litigation-finance-1530783000.

> litigated. Some ethics committees have suggested that there could be circumstances in which a funding agreement imposes such limitations on the attorney's judgment that the lawyer might not be able to competently represent the client. ABA Commission on Ethics 20/20, Informational Report to the House of Delegates 23 (2012); Ohio Sup. Ct. Ethics Opn. No. 2012-3 (lawyer must ensure the alternative litigation funding company providing nonrecourse loan to client "does not attempt to dictate the lawyer's representation of the client"). Others have suggested that such arrangements are permissible with client consent. Assn. of the Bar of the City of N.Y. Com. on Prof. and Jud. Ethics, Formal Opn. No. 2011-02 (client may "agree to permit a financing company to direct strategy or other aspects of a lawsuit" and the lawyer is not prohibited from acceding to the funder's direction as long as the client consents); cf. ABA Formal Opn. No. 01-421 (lawyer hired by insurer to represent insureds may not comply with insurer's guidelines or directives relating to representation if these would "impair materially the lawyer's independent professional judgment").
>
> COPRAC does not reach a general conclusion that any particular degree of control is per se unethical. However, it is clear that where the funder has some degree of control of the litigation, the lawyer has an obligation to advise the client about the impact of such limitations on the lawyer's representation. Rule 1.4; see also ABA Formal Opn. No. 01-421 (where lawyer represents insured and the insurer imposes limitations on the representation, lawyer must communicate limitations to the client early in the representation).
>
> A lawyer's duties are not dictated by the funding contract but by the lawyer's ethical duties.[4]

This bill attempts to place clear guardrails around this industry to rein in the most egregious conduct while allowing the often critical tool to remain available to consumers in need without interfering with the consumer's legal representation.

3. The Third Party Litigation Financing Consumer Protection Act

This bill establishes the Third Party Litigation Financing Consumer Protection Act. The bill delegates regulatory authority over litigation financers operating in the state and prescribes a thorough set of legal guidelines for the world of litigation financing.

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[4] *Formal Opinion Interim No. 14-0002 Alternative Litigation Funding* (2020) COPRAC, https://www.calbar.ca.gov/Portals/0/documents/publicComment/2019/14-0002-Alternative-Litigation-Funding.pdf?ver=2019-10-11-111840-073.

a. The Secretary of State as the regulatory body

It establishes the Secretary of State (SOS) as the regulatory body charged with regulating the practice of litigation financing. Litigation financers are prohibited from engaging in litigation financing unless they meet certain qualifications and register with SOS . Financers must file a surety bond with SOS of not less than $50,000. These funds may be used to reimburse the Attorney General for costs incurred in enforcing the Act, upon appropriation by the Legislature. There were concerns that the amount of this bond is too low to ensure adequate assurances. The author has agreed to adjust this amount to $250,000.

SOS is required to adopt regulations consistent with the Act and its authority under law. Concerns have been raised about whether SOS is the appropriate entity to oversee this industry. SOS is primarily a filing agency with limited investigative and enforcement powers. The tracking and regulation proposed by this bill is ill-fitted with the purpose and capabilities of SOS. The author has committed to continuing to work with stakeholders and relevant state agencies to determine a more appropriate regulatory entity.

b. Transparency, conflicts of interest, and consumer autonomy

The bill lays out a series of prohibited activities that seek to address the issues identified above. Litigation financers are restricted from:

- paying or offering commissions, referral fees, or other forms of consideration to, or accepting any from, any legal representative, medical provider, or any of their employees for referring a consumer to a litigation financer;
- advertising false or misleading information regarding its products or services;
- referring a consumer or potential consumer to a specific legal representative, medical provider, or any of their employees;
- failing to promptly supply copies of any complete litigation financing contracts to the consumer and the consumer's legal representative;
- attempting to secure a remedy or obtain a waiver of any remedy, including, but not limited to, compensatory, statutory, or punitive damages, that the consumer might otherwise be entitled to pursue;
- offering or providing legal advice to the consumer regarding the litigation financing or the underlying dispute;
- assigning, which includes securitizing, a litigation financing contract;
- reporting a consumer to a credit reporting agency if insufficient funds remain from the net proceeds to repay the litigation financer; and
- receiving or exercising any right to direct, control, or otherwise influence the conduct of the consumer's legal claim or action.

These prohibitions ensure that conflicts of interest between consumers and their attorneys and medical providers are not created. The bill makes that explicit: "A legal representative retained by a consumer, or a medical provider for a consumer, or any of their employees shall not have a financial interest in litigation financing and shall not receive a referral fee or other consideration from any litigation financer, its employees, owners, or its affiliates." Furthermore, it limits the influence that litigation financers can play in the underlying litigation, creating a firewall of sorts. In fact, the bill specifically provides: "The right to make any decision relating to the claim or action shall remain *solely* with the consumer and their legal representative."

These protections also provide greater transparency for consumers about what they are getting into. The bill also provides affirmative obligations in this regard. Litigation financing agreements must be written and complete and contain specified disclosures placed clearly and conspicuously above the signature line. This includes disclosures about the above prohibitions as well as consumers' affirmative rights, including the right to cancellation within five days without penalty and the nonrecourse nature of the financing. The agreement must also disclose the maximum fees that can be charged to the consumer. If the consumer is represented, the legal representative must acknowledge that they have not received or provided any consideration in connection with the agreement.

In addition, if the legal representative is the party to a litigation financing agreement related to the consumer's legal proceeding, they must disclose this to the client in the underlying action and provide specified disclosures.

c. *Controlling usurious fees and costs*

The bill also directly tackles the issue of exorbitant rates and fees. It caps the annual fee that consumers can be charged at 36 percent of the original amount, which can only be charged once each year with regard to any single claim. The bill allows for compounding at most annually. No fees can be charged beyond 42 months from the date of the litigation financing contract. The bill also places additional limitations where other litigation financing transactions are involved. The bill also provides that litigation financers are jointly liable for any costs assessed to consumers or sanctions imposed.

The Alliance for Responsible Consumer Legal Funding (ARC), an industry group for litigation financers, requested various amendments to ensure the business model can continue to operate. The author has agreed to two amendments to assuage their concerns. The first moves the fee limitation from 42 months to 48 months. The other amendment removes the provision that restricts a litigation financer from entering into an agreement with a consumer that has the effect of incorporating the consumer's obligations to the litigation financer that are contained in the original litigation financing transaction into a subsequent litigation financing transaction. ARC argues this will allow for contract buyouts, a common practice in the industry.

d. Oversight and reporting

The bill also effectuates a more systematic oversight by requiring annual reporting to SOS. The report must include detailed information on those that own or control the litigation financer. The report also requires detailed information on all proceeds collected by litigation financers from litigation financing transactions in the previous year. This ensures the regulating body is made aware of exactly who the invested players are in the industry and the scope of their involvement.

Also required in the reporting is detailed information on each litigation financing transaction, including personal information on the consumers receiving the financing. This raises issues with regard to consumers' constitutional right to privacy and the impact on consumers should such information be accessed by adverse parties that may use this information to leverage consumers in the relevant litigation.

One policy option contemplated in the GAO report discussed above dealt with this reporting option and emphasized these concerns:

> **State regulators could collect data.** States could require funders to obtain licenses and report consumer TPLF data as part of licensure requirements. However, an expert noted that it could be difficult to get various states to enact legislation imposing those requirements. A litigation funding association we spoke with also expressed concerns that, depending on what data are collected, this option could result in defendants receiving information about plaintiffs that they would not ordinarily receive. Experts suggested that the funders could report the data on an aggregated, anonymized, or confidential basis.

SOS is then required to annually report this information to the Legislature with a summary. The attendant dates and records are to be kept confidential and the report is exempt from disclosure pursuant to the California Public Records Act. SOS is then required to publicly release a version of the report with all personally identifiable confidential information of consumers removed or redacted. The author may wish to consider whether this transparency component needs to include the sharing of consumers' personal financial information.

Writing in support, a coalition of community groups, including the Madera Coalition for Community Justice, argue these protections are critical:

> SB 581 puts common-sense and necessary guardrails in place to protect California consumers without killing the industry altogether. These protections include:
>
> 1. Requiring lenders to register with the state of California.
> 2. Prohibiting attorneys from offering these types of loans.

3. Limiting the interest rates lenders can charge their customers.

> We cannot have a truly equitable and just state as long as this practice is allowed to continue unchecked. We respectfully ask that you offer full support for SB 581.

e. Disclosing financial information of consumers to adverse parties

Distinct from the consumer protections above, the bill also requires consumers to disclose, within 30 calendar days of receipt of a written request, to any party to a legal claim whether the consumer has entered into a litigation financing transaction. Regardless of any agreement or provision with respect to confidentiality, litigation financing contracts themselves are rebuttably presumed discoverable and while they are presumed to be inadmissible, that presumption can be rebutted by an opposing party.

Whereas the preceding provisions protect the consumer from unsavory practices, this provision could negatively impact a consumer in a variety of ways. First, should evidence of the litigation financing be revealed to the fact finder in the litigation, it could improperly disadvantage the consumer's case. Second, the existence of litigation financing at all, and certainly its terms, could provide adverse parties with sensitive information that can be used against the consumer. This issue was highlighted in the GAO report, which identified concerns that defendants wanted access to these agreements "to gain a tactical advantage over plaintiffs (for example, by learning about the plaintiff's litigation budget)."

The Center for Justice and Democracy at New York Law School issued a publication that specifically called attention to this issue:

> **Corporate lobbyists are pushing legislation and rules to allow corporate defendants to routinely get access to detailed, private [Third-Party Litigation Financing (TPLF)] information in every case. Why?**
>
> The Chamber has developed a series of talking points about why corporate wrongdoers should have access to private, sensitive TPLF information, feigning concern about protecting plaintiffs, preventing conflicts and ensuring fair settlements. . . .
>
> Rather, corporate defendants would like access to TPLF information to give them a strategic advantage during litigation. Disclosure of sensitive details like "the funder's investment commitment, investment to date, and investment budget" would allow a defendant to "employ tactics designed to exhaust that budget and leverage an uneven playing field through litigation and settlement strategy." By extension, corporate lawyers can

clearly "draw an adverse inference about the value of a case from the absence of external financing." As one expert explained,

> Generally speaking, the last thing a party wants an adversary to know is that it cannot afford to prosecute or defend its case or that its case is not strong enough to attract much if any external funding. Adversaries who know this information can try to use it to win not on the merits, as the legal system intends, but instead through a battle of attrition.

In other words, "preserving financial privacy for litigants protects not only parties whose cases attract external litigation finance, but also (and perhaps even more importantly) those whose cases do not."

Moreover, a rule allowing a defendant to seek private TPLF information from the plaintiff gives defendants new opportunities to delay and drag out cases. As the New York City Bar put it, "Disclosure could open the door to unnecessary, lengthy, and costly motion practice and sideshow litigation concerning the details of litigation funding arrangements and communications between funded parties and funding sources," all of which are "unnecessary and irrelevant.… The result is added expense and delay to litigation, as well as increasing the burden on judicial resources."[5]

It is hard to see how these financing agreements would ever be relevant to the merits of a consumer's legal claims, and given that this financing is generally sought by lower income consumers, it provides another hurdle for their access to justice. Existing procedural and evidentiary law already states that all relevant evidence is admissible (Evid. Code § 351) and it allows for the discovery of *any matter* that is relevant to the case:

> Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence,

[5] *Backgrounder: Forced Invasions Of Privacy; The Attack on Third-Party Litigation Financing* (Mar. 7, 2023) Center for Justice and Democracy, https://centerjd.org/content/backgrounder-forced-invasions-privacy-attack-third-party-litigation-financing-2#_edn26.

description, nature, custody, condition, and location of any document, electronically stored information, tangible thing, or land or other property.

(Civ. Proc. Code § 2017.010.) These laws already properly guide what can be discovered in any civil litigation and admitted into evidence. This provision disrupts this balance and requires, as a matter of course, that such information be disclosed regardless of its relevance.

In response, the author agrees that litigation financing contracts should not be disclosed to opposing parties in litigation, but continues to seek greater transparency into these transactions, especially where violations of this law be suspected. Therefore, the author has agreed to remove Section 1788.316, which requires these disclosures and lays out the rebuttable presumptions, and instead authorize the court to seek in camera review of any litigation financing transactions where violations are suspected:

> Amendment
>
> Replace existing Section 1788.316 with the following:
>
> (a) Where the court has good cause to believe that a litigation financing transaction involving litigation before the court is being conducted in violation of this title, the court may order a consumer and the consumer's legal representative to disclose to the court, in an in camera proceeding, a litigation financing contract involving the litigation before the court. If there is a reasonable basis to believe a violation has occurred, the court may, in its discretion, refer the matter to the Secretary of State for appropriate administrative enforcement.
>
> (b) In no circumstance shall the court disclose the existence or nonexistence of a litigation financing contract to any other party to the legal claim before the court.

f. Scope of the financing covered by the bill

Recent amendments limit this bill to only nonrecourse financing and specifically exempt medical liens. However, the bill continues to include non-consumer financing, and applies the provisions of this bill to financing between businesses. The above provisions therefore also apply to financing provided to consumer's legal representatives. The Consumer Attorneys of California oppose this aspect of the bill.

Given the main intent of the bill is to protect consumers from predatory and unfair practices in the litigation financing world, the author has agreed to amendments that limit application of the bill to litigation financing provided to consumers:

<u>Amendments</u>

Amend Section 1788.311(b) as follows:
"Consumer" means a person ~~or entity~~ residing or domiciled in this state with a civil claim or action in this state ~~or any legal representative of that person or entity~~.

Amend Section 1788.311(f)(1) as follows:

"Litigation financing transaction" means a nonrecourse transaction in which litigation financing is provided to a consumer ~~or legal representative~~ in return for assigning to the litigation financer a contingent right to receive an amount out of the proceeds of any realized judgment, award, settlement, or verdict the consumer may receive on the underlying claim or action, or agreeing to pay the litigation financer interest, fees, or other consideration for the financing provided.

The author has also agreed to amendments that make clear that financing provided by a family member to a party or financing provided by a bank or lender to a litigation financer are not covered by the bill. For greater clarity, the author has also agreed to include a definition of "litigation financing contract," a term that is used throughout the bill.

4. <u>Stakeholder positions</u>

Writing in support, a large coalition of insurance company associations and business groups focus less on the consumers hurt by the industry and argue financing fuels frivolous lawsuits:

> Lawsuit lending fuels frivolous lawsuits and drives up payouts, disproportionately hurting small businesses, which operate on thin margins and can be bankrupted by one big settlement.
>
> In fact, the average household pays a $3,300 "tort tax" annually due to unnecessary and abusive lawsuits. This means less money for businesses to grow and for consumers to spend. Lawsuit lending erodes profit margins, as businesses must set aside money for injury funds rather than invest in growth.

Two consumer legal funding businesses, CaseAdvance and Rockpoint, write in opposition to the bill, highlighting specific provisions, including the mandatory disclosures provision, the cap on rates, and the reporting requirements. They also state concerns with the non-assignability clause:

> [M]any legal funders rely upon assignment and/or securitization after they originate a consumer lawsuit loan to operate and grow their business. Inclusion of a non-assignability clause would have a major effect on the cash flow of these consumer legal funding businesses, and in some instances, it could result in the cancellation of their borrowing or credit relationships with their commercial lenders and/or investors.

The National Federation of the Blind writes with concerns that the bill will "have the unintended consequence of prohibiting organizations like the National Federation of the Blind from providing . . . financial assistance to its members who are victims of discrimination." They request a clarifying amendment that exempts nonprofit charity organizations.

SUPPORT

American Property Casualty Insurance Association
Anahuak Youth Sports Association
Bell Chamber of Commerce
Binational of Central California
Boyle Heights Chamber of Commerce
California Business Properties Association
California Business Roundtable
California Chamber of Commerce
California Hispanic Chambers of Commerce
California Retailers Association
Carlsbad Chamber of Commerce
Casa 0101
Centro Community Hispanic Association
Civil Justice Association of California
Coalition of Labor Union Women - California Capital Chapter
Community Foundation of San Benito County
Eastmont Community Center
Fair Chance Project
Huntington Beach Chamber of Commerce
InnerCity Struggle
Latino Equality Center
Long Beach Chamber of Commerce
Madera Coalition for Community Justice
Merced Hispanic Chamber of Commerce
National Federation of Independent Businesses
National Pacific Islander Education Network
NorCal Resist
Orange County Business Council
Orange County Taxpayers Association

Personal Insurance Federation of California
Prevention at the Intersections
Restorative Justice for Oakland Youth
Safe Return Project
San Diego Original Black Panther Party for Community Empowerment
South Gate Chamber of Commerce
Strategic Actions for a Just Economy
Strength Based Community Change
Thai Community Development Center
The Arc of Justice
Tia Chucha's Centro Cultural
Torrance Area Chamber of Commerce
Western Electrical Contractors Association

OPPOSITION

ACTS Law Firm
CaseAdvance
Consumer Attorneys of California
Consumer Federation of California
Consumers for Auto Reliability & Safety
Easton & Easton
The Impact Fund
National Federation of the Blind
Rockpoint

RELATED LEGISLATION

Pending Legislation:

SB 33 (Glazer, 2023) removes the sunset on the requirement that disclosures relating to small commercial financing offers include the total cost of financing as expressed in an annualized rate, in the form determined by the DFPI. SB 33 is currently in the Senate Appropriations Committee.

SB 869 (Glazer, 2023) requires a person who provides commercial brokerage services to a borrower in a commercial loan transaction by soliciting lenders or otherwise negotiating a commercial loan, to be licensed by the DFPI Commissioner. SB 869 is currently in the Senate Banking and Financial Institutions Committee.

Prior Legislation: None known.

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