WEST VIRGINIA CODE CHAPTER 46A ARTICLE 6N

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§46A-6N-1. Definitions.

For purposes of this article:

(1) "Consumer" means any person who resides, is present, or is domiciled in this state who claims an entitlement to a judgment, award, settlement, or verdict with respect to a legal claim but does not include an attorney representing that person;

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

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

(A) Means a transaction in which financing is provided to a consumer in return for a consumer's assigning to the litigation financier a right to receive payment contingent in any respect on the outcome of the legal claim; and

(B) Does not include:

(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 West Virginia Rules of Professional Conduct;

(ii) A consumer loan, as defined by §46A-1-102 of this code;

(iii) A claim under the Workers' Compensation Law, compiled in §23-1-1 *et seq*. of this code;

(iv) Lending or financing arrangements between an attorney or law firm and a lender, provided such arrangements do not give the lender any particularized interest in the outcome of any legal claim or portfolio of legal claims; or

(v) Nonprofit organizations provided any financing provided to or by the nonprofit organization does not afford the non-party agreeing to pay legal expenses profit from the legal claim beyond repayment of the amount it has contractually agreed to provide, along with reasonable interest not to exceed the Wall Street Journal prime rate at the time the agreement was executed, plus three percent per year.

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§46A-6N-2. Litigation financier; registration; bond; public record; rules.

(a)(1) No litigation financier shall engage in a litigation financing transaction in this state unless it is registered as a litigation financier in this state.

(2) A litigation financier that is a business entity or partnership is registered in this state if:

(A) It is in compliance with the bond requirements of §46A-6N-2(b) of this code;

(B) It has a status of active and is in good standing as reflected in the records of the Secretary of State; and

(C) Its charter, articles of organization, certificate of limited partnership, or other organizational document, or, if a foreign entity, its West Virginia application for a certificate of authority, contains a statement that it shall be designated as a litigation financier pursuant to this article.

(3) A litigation financier that is not a business entity or partnership is registered in this state if:

(A) It is in compliance with the bond requirements of §46A-6N-2(b) of this code; and

(B) It files an application for registration as a litigation financier on a form prescribed by the Secretary of State that contains the following:

(i) Applicant’s full legal name;

(ii) Business name of applicant, if any;

(iii) Physical street address and mailing address of the applicant;

(iv) A telephone number through which the applicant can be reached;

(v) The name, physical street address, mailing address, and telephone number for a West Virginia registered agent appointed to accept service of process on behalf of the applicant;

(vi) A statement that the applicant shall be designated as a litigation financier pursuant to this article; and

(vii) Any other information the Secretary of State deems necessary.

(b)(1) Each litigation financier shall file with the Secretary of State and have approved by the Office of the West Virginia Attorney General a surety bond or irrevocable letter of credit issued and confirmed by a financial institution authorized by law to transact business in the state of West Virginia in an amount not less than $50,000.

(2) Such bond shall be payable to this state for the use of the Attorney General and any

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person who may have a cause of action against the obligor of the bond for any violation of this article. The bond shall continue in effect so long as a litigation financier is designated as a litigation financier in the records of the Secretary of State.

(c) A litigation financier shall amend its registration with the Secretary of State within 30 days whenever the information contained in such record changes or becomes inaccurate or incomplete in any respect.

(d) The Secretary of State, as appropriate, may promulgate rules in implementing this article, including, but not limited to, the adoption of fees to cover any administrative costs relating to administering this article.

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§46A-6N-3. Litigation financier requirements.

A litigation financier shall fulfill each of the following requirements when engaged in litigation financing:

(1) The terms of the litigation financing transaction 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 business days following the consumer's receipt of the funds, or execution of the litigation financing contract, whichever is later, the consumer gives notice of the rescission and returns any money 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 acknowledgment 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) The attorney is representing the consumer with regard to the dispute that is the subject of the litigation financing contract;

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

(D) 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.

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§46A-6N-4. Litigation financier prohibitions.

(a) 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, 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, 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, physical therapist, or any of their employees: *Provided*, That if a consumer does not have legal representation, the provider may refer the consumer to a local or state bar referral service operated by a bar association;

(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 in the litigation for which the litigation financing transaction exists a waiver of any remedy, including, but not limited to, compensatory, statutory, or punitive damages to which the consumer might otherwise be entitled;

(7) Attempt to effect in the litigation for which the litigation financing transaction exists mandatory arbitration or otherwise effect waiver of a consumer's right to a trial by jury;

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

(9) Assign, which includes securitizing, a litigation financing contract between a consumer who is a natural person and a litigation financier, in whole or in part, to a third party: *Provided*, That:

(A) §46A-6N-4(9) of this code does not prevent a litigation financier that retains responsibility for collecting payment, administering, or otherwise enforcing the litigation financing contract from making an assignment that is:

(i) To a wholly owned subsidiary of the litigation financier;

(ii) To an affiliate of the litigation financier that is under common control with the litigation financier; or

(iii) A grant of a security interest that is made pursuant to §46-9-101 *et seq*. of this code or is

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otherwise permitted by law; and

(B) If an assignment is authorized and made pursuant to §46A-6N-4(9) of this code, for purposes of this section, "litigation financier" includes a successor-in-interest to a litigation financing contract;

(10) Report a consumer to a credit reporting agency if insufficient funds remain from the net proceeds to repay the litigation financier; or

(11) Receive any right to direct or make any decisions with respect to the conduct of the consumer's legal claim or any settlement or resolution. The right to make such decisions shall remain solely with the consumer and his or her attorney.

(b) An attorney or law firm retained by a consumer shall not have a financial interest in a company offering litigation financing to consumers and shall not receive a referral fee or other consideration from the company, its employees, or its affiliates.

(c) A personal injury attorney or law firm, practicing in West Virginia, retained by a consumer shall not have a financial interest in a company offering litigation financing to consumers and shall not receive a referral fee or other consideration from the company, its employees, or its affiliates.

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§46A-6N-5. Litigation financing contracts; disclosures.

(a) A litigation financing contract 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 14-point, bold font and be placed clearly and conspicuously within the litigation financing contract, as follows:

(1) Each contract shall include consumer disclosures on the first two pages, to the extent possible. The consumer disclosures shall include:

(A) Notification that some or all of the funded amount may be taxable;

(B) A description of the consumer's right of rescission;

(C) The total funded amount provided to the consumer under the contract;

(D) An itemization of charges;

(E) The total amount due from the consumer, in six-month intervals for 42 months, including all charges and fees;

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

(G) In the event the consumer seeks more than one litigation financing contract, 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;

(H) A statement that if there is no recovery of any money from the consumer's legal claim, the consumer shall owe nothing to the litigation financier;

(I) A statement that if the net proceeds of the claim are insufficient to repay the consumer's indebtedness to the litigation financier, the litigation financier shall accept a reduced sum as full payment of its funded amount and charges; and

(J) 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.

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(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:

THE FUNDED AMOUNT AND AGREED-TO 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 LITIGATION FINANCIER) 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 THE LITIGATION FINANCIER;

(4) Located immediately above the place on the litigation financing contract where the consumer’s signature is required, 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.

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§46A-6N-6. Third-party agreements.

(a) 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 any agreement under which any 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.

(b) For purposes of this section only, the terms "litigation financing" and "litigation financier" also include financing provided to an attorney or law firm where the right to receive repayment is contingent in any respect on the outcome of the consumer's legal claim.

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§46A-6N-7. Violation; enforcement.

(a) Any violation of this article shall make the litigation financing contract unenforceable by the litigation financier, the consumer, law firm, or any successor-in-interest to the litigation financing contract. The court may, in the event that judgment is awarded to the plaintiff, assess costs of the action, including reasonable attorneys' fees, against the defendant.

(b) Nothing in this article shall be construed to limit the exercise of powers or the performance of the duties of the Attorney General, including those provided by the West Virginia Consumer Credit and Protection Act, which the Attorney General is otherwise authorized or required to exercise or perform by law.

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§46A-6N-8. Contingency rights; assignments; priority of lien, subrogation interest, or right of reimbursement.

(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 litigation financing from a litigation financier.

(b) The lien of a litigation financier on a consumer's legal claim has priority over liens that attach and take effect subsequent to the attachment of the litigation financier's lien to the consumer's legal claim, except for the following:

(1) Attorney liens, insurance carrier liens, medical provider liens, or liens based upon subrogation interests or rights of reimbursement related to the consumer's legal claim; and

(2) Child support, Medicare, tax, or any other statutory or governmental lien.

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§46A-6N-9. Fees; terms; incorporation of obligations in agreement.

(a) A litigation financier may not charge a consumer who is a natural person an annual fee of more than 18 percent 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 §46A-6N-9(a) of this code 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) Fees assessed by a litigation financier may compound semiannually but may not compound based on any lesser time period.

(d) In calculating the annual percentage fee or rate of return, a litigation financier must include all charges payable directly or indirectly by the consumer and must compute the rate based only on amounts actually received and retained by the consumer.

(e) A litigation financier may not assess fees for any period exceeding 42 months from the date of the contract with the consumer.

(f) 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.

(g) Litigation financiers shall not knowingly provide financing 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 litigation financier’s entire funded amount and contracted charges unless a lesser amount is otherwise expressly agreed to in writing by the litigation financiers; except multiple litigation financiers may agree to contemporaneously provide financing to a consumer, provided that the consumer and the consumer’s attorney consent to the agreement in writing.

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