Ohio Insurance Institute
Representing Ohio's property/casualty insurance industry

Our mission
To act as the Ohio property and casualty insurance industry's voice on matters affecting or involving the industry.

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Proponent Testimony—SB 19 Third Party Litigation Funding (Wilson)

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Chair Manning, Vice Chair Reynolds, Ranking Member Hicks-Hudson and members of the Senate Judiciary Committee, thank you for allowing me to come before this Committee to discuss the importance of Senate Bill 19. I am Michael Farley and I have the distinct honor to serve as the Vice President, Government Affairs and General Counsel for the Ohio Insurance Institute ("OII"). The OII is a trade and information association of more than 55 Ohio-based property and casualty insurance companies and related affiliate organizations. OII members write approximately 87% of auto insurance in Ohio and 81% of home insurance. And OII members write about two-thirds of the commercial insurance in the state.

You have heard much today about the components of third-party litigation funding ("TPLF"). I endeavor to bring to you some of the mechanics of TPLF—particularly as it relates to actual litigation. As previously explained, there are generally two different types of third party litigation funding arrangements: commercial and consumer. Today, my comments are limited to consumer third party litigation arrangements.

SB 19 Does Not Limit Access to Courts

One of the baseless arguments against third party litigation funding transparency is that such reforms will somehow limit access to courts. Such a statement belies the actual nature of how a substantial number of plaintiffs pay for their attorneys in the current state of play. The vast majority of plaintiff's attorneys are paid on a contingency fee basis. That is to say that the attorney is compensated on an agreed-upon percentage of the final settlement or recovery.

The attorney will often cover litigation expenses, to the extent permitted under the Code of Professional Conduct. Such expenses are paid from the settlement or judgment—if the plaintiff is successful—in addition to the attorney's contingent fee.

Nothing in SB 19 changes this arrangement. Under contingency fee agreements, attorneys will still provide services to plaintiffs that believe they have been injured or harmed. Attorneys maintain access to credit and funding to cover litigation costs during settlement or trial—this is not changed by SB 19.

Insurers Have a Duty to Defend Claims

Insurers have a general duty to defend their insureds. This duty arises when there is a possibility that the allegations against an insured may lead to a covered claim. There are nuances in this duty, but this is the general position. This is one of the most important pieces of coverage insureds have under their policies. The duty to defend is broader than the duty to indemnify.

As more plaintiffs utilize third party litigation funding arrangements, the contours of insurance-involved litigation are rapidly changing. Traditionally, most cases will be settled prior to filing a suit or going to trial. This means that funds are provided to plaintiffs in a much quicker and more efficient manner. When the information is equally distributed, proper and fair settlements can be reached. Here, only the plaintiff's side is provided with all the information. Insurers are required to provide copies of the insurance policy, including the limits of the policy, to the plaintiff. Currently, plaintiffs are not required to provide information regarding the presence of a TPLF arrangement to the defense or their legal counsel.

Ohio Civil Rule of Procedure 26(B)(3) Requires Insurers to Disclose Policy Information

Under Ohio Civ.R. 26(B)(2), a plaintiff is entitled to learn "the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment." SB 19 is seeking to place the same requirement on parties that are involved with third party litigation funding. This simple act of transparency will level the information playing field.

The insurance defense bar is experienced and well-known. Attorneys know that when a given law firm is hired to represent a defendant, the defendant has insurance. This simple information allows the plaintiff's attorney to plan negotiation strategies with this in mind. On the other hand, ANY plaintiff's attorney could represent a client who has engaged in a third party litigation funding arrangement.

SB 19 seeks to put both sides of the case on a level informational playing field.

Additionally, during discovery, a process heavily regulated by the trial judge after the filing of a lawsuit, insurance policy information is available under Civ.R. 26(B)(2). SB 19 seeks to place a similar requirement with proper judicial supervision on those who are engaged in third party litigation funding arrangements.

I find it telling that the drafters of the Federal Rules analogue and the Ohio Civ.R. 26(B)(2) discussed the rationale of adopting the Rule in the early 1970's. The rationale stated as an argument for transparency is: "***The rule adopts the philosophy that before trial discovery of the existence and contents of insurance will aid in realistic evaluation and settlement."***

The overarching purpose of SB 19 is to promote this transparency, place parties in equal bargaining positions, and protect consumers.

Rancman v. Interim Settlement Funding Corp.—Champerty and Maintenance

In 2003, in *Rancman,* the Supreme Court of Ohio unanimously held that such third party litigation funding advances violated Ohio common law doctrines of champerty and maintenance. According to the decision, "**maintenance** is assistance to a litigant in pursuing or defending a lawsuit provided by someone who does not have a bona fide interest in the case. **Champerty** is a form of maintenance in which a nonparty undertakes to further another's interest in a suit in exchange for a part of the litigated matter if a favorable result ensues."

Rancman was involved in litigation with an insurer over a car accident. During the pendency of the case, Rancman contacted Interim Settlement Funding Corp ("Interim").

Rancman entered into an agreement with Interim on the following terms:

$6,000 advanced to Rancman, in exchange for—

The first $16,800 if the case was resolved in first 12 months;

$22,200 if the case was resolved within 18 months;

$27,600 if the case was resolved within 24 months.

If the case was resolved after 24 months, Rancman had no obligations under the contract.

Rancman settled her case against the insurers for $100,000 in the first 12 months. Rancman refused to pay under the terms of the contract and instead repaid the amount advanced with eight percent interest per annum. Rancman filed suit against Interim to void the contract. Lower courts ruled for Rancman under the Small Loans Act. The Supreme Court of Ohio did not reach the issue of the Small Loans Act. The Court reached their decision on the common law doctrines of champerty and maintenance.

Interestingly, the Supreme Court discussed why champerty and maintenance and these advances/TPLF agreements were problematic. Two specific grounds were discussed. The first was that such agreements "can prolong litigation and reduce settlement incentives—an evil that prohibitions against maintenance seek to eliminate." The second point is that the Supreme Court emphasized that "a lawsuit is not an investment vehicle. Speculating in lawsuits is prohibited by Ohio law. An intermeddler is not permitted to gorge upon the fruits of litigation."

The Supreme Court explained that further action would be needed to legalize these transactions. "Except as otherwise permitted by legislative enactment or the Code of Professional Responsibility, a contract making the repayment of funds advanced to a party

to a pending case contingent upon the outcome of that case is void as champerty and maintenance. Such an advance constitutes champerty and maintenance because it gives a nonparty an impermissible interest in a suit, impedes the settlement of the underlying case, and promotes speculation in lawsuits."

The Ohio General Assembly passed HB 248 in 2008. Passage of this law arguably allowed for third party litigation funding advances to commence in Ohio. Today, some 15-years later, SB 19 simply seeks to codify transparency and consumer protections into the law for consumer third party litigation funding advances.

Mr. Chairman, thank you for this opportunity. I am happy to answer any questions.