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Bill Analysis

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Primary Sponsors: Sens. Wilson and Lang

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SUMMARY

General overview

- Repeals the law governing non-recourse civil litigation advance contracts and replaces it with two subsets of regulations for commercial litigation financing agreements (“commercial agreements”) and consumer litigation funding agreements (“consumer agreements”).

Contract requirements

- Retains the majority of the contract-related requirements under current law, but limits application of those requirements to consumer agreements, i.e., contracts with an individual or estate for \$400,000 or less.
- Adds several new contract requirements for consumer agreements, including that the contract be clear and coherent, include an explanation of how charges accrue, and specify that the consumer owes nothing if there are no proceeds from the civil claim.
- Requires a consumer agreement to allow the consumer to cancel, without penalty, within ten business days after receiving payment.
- Requires both consumer agreements and commercial agreements to prohibit the consumer litigation agreement finance company (“company”) or commercial litigation financier (“financier”) from interfering with decisions about the civil claim.
- Prohibits companies and financiers from contracting with persons or entities not domiciled in the U.S. or contracting for the proceeds of a claim that is financed by such a person or entity.

Attorney requirements

- Requires attorneys that represent a consumer with respect to a consumer agreement to execute an acknowledgment, similar to the one required by current law, stating that the

attorney has reviewed the agreement, is working on a contingency basis, and will disburse proceeds of the litigation through a trust or settlement fund.

- Prohibits such an attorney from doing any of the following:
 - Accepting a referral fee or other consideration from the company;
 - Providing tax, public or private benefit planning, or financial advice regarding the consumer agreement;
 - Disclosing confidential or privileged information to the company without the consumer's written consent.
- Prohibits an attorney involved in a commercial agreement from sharing documents or information subject to a protective or sealing order from a court with the financier.

Company requirements

- Prohibits a company from paying a referral fee to an attorney, law firm, medical provider, chiropractor, physical therapist, or an employee or agent of the foregoing.
- Prohibits a company from accepting a commission, referral fee, rebate, or other form of payment from the professionals described above.
- Prohibits a company from engaging in false or misleading advertising.
- Requires a company to promptly provide copies of the consumer agreement to the consumer and the attorney representing the consumer.
- Prohibits a company from attempting to obtain a waiver of any remedy allowed by the bill.
- Prohibits a company from knowingly entering into a consumer agreement respecting a legal claim the proceeds of which are already pledged under a previous agreement.
- Prohibits a company from charging annual fees in excess of 10% of the funded amount disbursed under the consumer agreement.
- Prohibits a company from entering into a consumer agreement if the attorney or law firm retained by the consumer has a financial or ownership interest in the company.

Lien

- Provides that a consumer agreement places a lien on the proceeds of the consumer's legal claim superseding subsequently perfected liens, with exceptions.

Court process

- Requires the disclosure of consumer agreements and commercial agreements to other parties to a legal action.

Enforcement and penalties

- Subjects violations of the consumer litigation funding law to the Ohio Consumer Sales Practices Act (CSPA), permitting enforcement by the Attorney General and providing a private right of action.

- Specifies that a violation of the contract requirements under the consumer litigation funding agreement law makes the contract legally unenforceable by the company, the consumer, or the successor in interest to the contract.
- Allows the Attorney General to file a complaint and seek a remedy against a financier that is found by a court to have violated the commercial litigation financing agreement law.

Legislative intent

- States that the bill's provisions prohibiting consumer and commercial agreements with foreign persons and respecting lawsuits financed by foreign persons are intended to protect due process rights for all litigants in Ohio courts.
- Specifies that the General Assembly intends to preserve the common law doctrine against champerty and maintenance with respect to agreements other than those directly addressed by the bill.

DETAILED ANALYSIS

General overview

Courts have generally declined to enforce agreements in which a noninterested third party speculates in litigation unless the agreement is authorized by law or, when it involves an attorney, the Rules of Professional Conduct. The Ohio Consumer Sales Practices Act (CSPA) authorizes nonrecourse civil litigation advance contracts in which a third party provides funds to the plaintiff in a lawsuit (referred to as the “consumer”) in exchange for the right to a portion of the proceeds obtained in the settlement or judgment of the case. The CSPA also addresses the form and content of those contracts. The bill repeals those CSPA provisions and enacts a new series of regulations split into two categories: “commercial litigation financing agreements” and “consumer litigation funding agreements.”

Under the bill, consumer litigation funding agreements (hereafter, “consumer agreements”) are contracts wherein a consumer litigation funding company (hereafter, “company”) purchases the contingent right to receive an amount of the potential proceeds obtained in a consumer’s legal claim. The term includes only agreements with individuals or estates. It excludes any agreement involving a cash payment to the consumer of \$400,000 or more.¹

Commercial litigation financing agreements (hereafter, “commercial agreements”) are written contracts wherein a commercial litigation financier (hereafter, “financier”) provides funds to a party in a civil action or a law firm that represents a party in a civil action in exchange for an interest in any proceeds from the action. The term does not include agreements by attorneys to work on a contingency basis, obligations to pay under a health insurance plan, loans provided to the consumer that are not contingent upon the outcome of a case, or preexisting contractual obligations to indemnify or defend a party to a case.²

¹ R.C. 1357.01(E) and (F).

² R.C. 1357.01(D).

Contract requirements

The bill repeals CSPA provisions concerning the form and content of nonrecourse civil litigation advance contracts, which appear to include most consumer agreements and commercial agreements addressed by the bill. The bill largely replicates the CSPA provisions with respect to consumer agreements and establishes several supplemental contract-related requirements for those agreements. However, the bill is mostly silent with respect to the form and content of commercial agreements. The table below compares the contract requirements under current law and those that apply under the bill.

Contract Requirements		
Nonrecourse Civil Litigation Advance Contracts (R.C. 1349.55, repealed)	Consumer Agreements (R.C. 1357.02 and 1357.06)	Commercial Agreements (R.C. 1357.06 and 1357.07)
Requires the contract to be completely filled-in, include the consumer's initials on each page, and advise the consumer to consult an attorney.	Same as nonrecourse civil litigation advanced contracts under current law.	No provision.
No provision.	Requires the contract to be written in a clear and coherent manner in language that is understandable to the average consumer.	No provision.
Requires the contract to disclose the total amount advanced to the consumer.	Same as nonrecourse civil litigation advanced contracts under current law, but the amount advanced to the consumer is referred to as the "funded amount."	No provision.
Requires the contract to include an itemization of one-time fees.	Similar to nonrecourse civil litigation advanced contracts under current law but requires the list to include both one-time and recurring charges and an explanation of how those charges accrue.	No provision.
Requires the contract to disclose the total amount to be repaid by the consumer, in six-month intervals, for 36 months, including all fees.	Requires the contract to disclose the maximum amount that may be assigned by the consumer to the company under the contract, including all charges, but excluding penalties	No provision.

Contract Requirements		
Nonrecourse Civil Litigation Advance Contracts (R.C. 1349.55, repealed)	Consumer Agreements (R.C. 1357.02 and 1357.06)	Commercial Agreements (R.C. 1357.06 and 1357.07)
	that may apply in the case of breach, fraud, or misrepresentation. Requires, if the consumer seeks to enter into more than one contract, the contract to disclose the cumulative amounts under all such contracts.	
Requires the contract to disclose the annual percentage rate of return, calculated as of the last day of each six-month interval, including frequency of compounding.	No provision.	No provision.
Permits the consumer to cancel the contract, without penalty, within five business days after receiving funds.	Similar to nonrecourse civil litigation advanced contracts under current law but extends the cancelation period to 10 business days after the "funding date."	No provision.
Requires the contract to specify that the company has no right to make decisions respecting the civil claim or the resolution of the civil claim.	Similar to nonrecourse civil litigation advanced contracts under current law, but modifies the language required to be included in the contract.	Similar to nonrecourse civil litigation advanced contracts under current law, but does not specify the language required to be included in the contract.
No provision.	Requires the contract to specify that the consumer will not owe anything if there are no proceeds from the civil claim.	No provision.
Requires the contract to be offered translated for English, French, and Spanish-speaking consumers.	No provision.	No provision.

Contract Requirements		
Nonrecourse Civil Litigation Advance Contracts (R.C. 1349.55, repealed)	Consumer Agreements (R.C. 1357.02 and 1357.06)	Commercial Agreements (R.C. 1357.06 and 1357.07)
No provision.	Prohibits contracts with a foreign person or entity or respecting a legal claim that is financed by a foreign person or entity.	Same as consumer agreements.

Attorney requirements

Current law

Existing law requires an attorney retained by a consumer with respect to a nonrecourse litigation advance contract to provide a written acknowledgement stating that the attorney has reviewed the agreement, is working on contingency, that all proceeds from the litigation will be disbursed via a trust or settlement fund to the consumer, and that the attorney is following the instructions of the consumer. Nonrecourse litigation advance companies are prohibited from imposing a greater duty on an attorney representing a consumer in the underlying civil claim than the duties that apply to the attorney under the Rules of Professional Conduct.³

Consumer agreements

The bill requires the same written acknowledgements for an attorney retained by a consumer with respect to a consumer agreement. The bill adds that the attorney must not accept a referral fee or other consideration from the company and must not provide tax, public or private benefit planning, or financial advice regarding the agreement. The bill prohibits attorneys retained by a consumer from disclosing confidential or privileged information to the company without the written consent of the consumer.⁴

Unlike current law, the bill does not include a provision limiting the duties that may be imposed on an attorney by a consumer agreement.

Commercial litigation financing agreements

The bill prohibits any person, including attorneys and law firms representing a client with respect to a commercial agreement, from sharing documents or information with a financier that are subject to a protective or sealing order from a court.⁵

³ R.C. 1349.55(B)(6) and (C), repealed.

⁴ R.C. 1357.02(A)(7) and 1357.04(A).

⁵ R.C. 1357.07(A).

Company requirements

The bill defines “consumer litigation funding company” as a person or entity that enters into a consumer litigation funding agreement with a consumer. Banks, lenders, and other entities that provide financing to a company are excluded from the definition. The definition also excludes attorneys and accountants who provide services to a consumer and the immediate family members of the consumer.⁶

The bill prohibits a company from doing any of the following:

- Paying or offering to pay a referral fee to any attorney, law firm, medical provider, chiropractor, or physical therapist, or to any of their employees or agents;
- Accepting a commission, referral fee, rebate, or any other form of consideration from any of the preceding persons and entities;
- Purposefully “advertising,” i.e., publishing, disseminating, circulating, or placing before the public any written, oral, electronic, or printed communication for the purpose of inducing a consumer to enter into a consumer agreement, false or misleading information regarding the company’s products or services;
- Referring a consumer or potential consumer to a specific attorney, law firm, medical provider, chiropractor, or physical therapist or to any of their employees or agents (but if a consumer does not have legal representation, the company may refer the consumer to a local or state attorney referral service operated by a bar association or nonprofit organization, or to a legal aid society);
- Failing to promptly supply copies of all complete consumer agreements to the consumer and the attorney representing the consumer;
- Attempting to obtain a waiver of any remedy, including damages, that the consumer might otherwise have;
- Knowingly enter into a consumer agreement for a legal claim to which the consumer previously sold or assigned part or all of their rights to the proceeds, unless the company or consumer extinguishes the prior agreement;
- Make or influence any decision with respect to the conduct of the consumer’s legal claim or settlement;
- Knowingly pay or offer to pay for court costs, filing fees, or attorney’s fees before, during, or after the resolution of the legal claim;
- Charge or collect from the consumer in connection with the following:
 - A prepayment penalty or fee; or
 - Charges in excess of 10% of the funded amount per year.

⁶ R.C. 1357.01(G).

- Entering into a consumer agreement if an attorney or a law firm retained by a consumer in a civil claim or action on which the consumer agreement is based has any financial interest or ownership in the company.⁷

Financier requirements

The bill defines “commercial litigation financier” as a person engaged in the business of entering into commercial litigation financing agreements with claimants, or with lawyers or law firms representing claimants. The term excludes nonprofit organizations and persons that fund nonprofit organizations, so long as the nonprofit organization represents the claimant for free.⁸

The bill prohibits a financier from making any decision or otherwise having any influence on the legal case, such as changing or appointing counsel, the choice or use of expert witnesses, litigation strategy, or a settlement of the case. As discussed above under “**Attorney requirements**,” no party may share documents or information with a financier that are subject to a protective or sealing order from a court.⁹

Lien placed by consumer agreements

The bill provides that a consumer agreement places a lien on the proceeds of the consumer’s legal claim that supersedes all subsequently perfected liens on the proceeds other than liens directly related to the legal claim and authorized by state or federal law. This includes a lien for attorney’s fees, a lien by the Department of Medicaid for the cost of medical assistance, a Medicare lien, or a workers’ compensation lien.¹⁰

Court process

Consumer agreements

The bill requires the consumer to disclose, within 30 days after receiving a written request from any party to the legal claim or an insurer of a party to the legal claim, whether the consumer has entered into a consumer agreement. If the consumer enters into a consumer agreement after responding to the request, the consumer must disclose that fact within 30 days after entering into the agreement. Agreements disclosed or discovered through this process are presumed to be inadmissible as evidence in a civil proceeding.¹¹

The bill specifies that consumer agreements and their parties are presumed to be subject to discovery in any civil proceeding, regardless of any contrary provision in the agreement. However, communications between a consumer’s attorney and a company to allow the company to ascertain the status or expected value of a legal claim are not subject to discovery in any civil proceeding.¹²

⁷ R.C. 1357.01 and 1357.03.

⁸ R.C. 1357.01(C).

⁹ R.C. 1357.07.

¹⁰ R.C. 1357.05; R.C. 5160.37 and 4123.931, not in the bill.

¹¹ R.C. 1357.04(B) and (D)

¹² R.C. 1357.04(C) and (E).

Commercial agreements

Consumers in a commercial agreement must, without waiting for a discovery request, provide the agreement to all parties named in the legal action and to all insurers that may have a potential duty to defend or indemnify a named party.¹³

Enforcement and penalties

Consumer agreements

The bill establishes that a violation of the consumer litigation funding agreement law constitutes an unfair or deceptive act or practice in violation of the CSPA.¹⁴ Under existing law, the Ohio Attorney General has broad authority to enforce the CSPA, including suing for injunctive relief and civil penalties. Additionally, the consumer has a private right of action and can sue the company to rescind the agreement or to recover the consumer's actual economic damages plus up to \$5,000 in noneconomic damages. If the company's violation is an act or practice that has already been declared deceptive or unconscionable by the Attorney General or by a court, then the consumer may sue to rescind the transaction or recover three times the amount of the consumer's actual economic damages.¹⁵

In addition, the bill specifies that a violation of the consumer litigation funding agreement law makes the agreement legally unenforceable by the company, the consumer, or the successor in interest to the agreement.¹⁶

Commercial agreements

If a financier is found by a court to have violated the consumer litigation financing agreement law, the bill authorizes the attorney general to file a complaint seeking any equitable remedy. Such remedy may include barring the financier from doing business in Ohio.¹⁷

Legislative intent

The bill specifies that, by prohibiting consumer and commercial agreements with foreign persons or entities and respecting civil actions that are financed by foreign persons or entities, the General Assembly intends to protect due process rights for all litigants in Ohio courts. The bill states that the prohibitions address "the grave risk posed by foreign actors that seek to interfere with those courts by supporting meritless cases, overwhelming dockets, and profiting from litigation."¹⁸

More broadly, the bill states that the General Assembly intends to address a narrow range of consumer and commercial agreements while "preserving and reinforcing the general policy . . . against champerty and maintenance" set forth in *Rancman v. Interim Settlement*

¹³ R.C. 1357.07(C).

¹⁴ R.C. 1357.02(B) and 1345.02, not in the bill.

¹⁵ R.C. 1345.09(A) and (B), not in the bill.

¹⁶ R.C. 1357.02(C).

¹⁷ R.C. 1357.08.

¹⁸ R.C. 1357.06(C).

Funding Corp. In *Rancman*, the Ohio Supreme Court held that a civil litigation advance contract resembling the consumer contracts addressed under the bill was void as champerty and maintenance because it gave a nonparty an impermissible interest in the suit, impeded the settlement of the underlying case, and promoted speculation in lawsuits. The holding states that “maintenance” is providing assistance to a party in a lawsuit despite not having a bona fide interest in the case. “Champerty” is a form of maintenance in which a person without a bona fide interest in the case acquires an interest in a portion of the proceeds derived from settlement or judgment.

The opinion provides that a legislative enactment or the Code of Professional Responsibility may override the common law doctrine against champerty and maintenance. The legislative intent language in the bill indicates that the General Assembly does not intend to overturn the doctrine, but only to authorize and regulate certain types of agreements.¹⁹

HISTORY

Action	Date
Introduced	01-22-25

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¹⁹ R.C. 1357.011; *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d 121 (2003).