Ohio Legislature Seeks to Further Regulate Third Party Litigation Funding Agreements

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Third party litigation funding ("TPLF") refers to the involvement of non-parties, typically sophisticated financial companies, that invest in lawsuits by paying money to plaintiffs or their counsel in exchange for a contingent interest in the proceeds from the litigation. TPLF is big business, with an estimated $15 billion in capital having been invested in U.S. civil litigation seeking to profit on the outcome of someone else's claim. With no consistent national policy governing these agreements,[1] states like Ohio are stepping in to address concerns about the potential for negative impacts on the justice system. Among other reasons, TPLF agreements have come under increased scrutiny due to concerns that they can increase the filing of frivolous lawsuits, obscure potential conflict-of-interest issues, elevate the profit motive of investors over claimants' litigation interests,[2] and subject the U.S. legal system to manipulation by malign foreign interests.

Currently, Ohio law permits only "non-recourse civil litigation advance contracts," which involve cash payments to consumers with a pending civil case in exchange for an amount of the proceeds received in the case. Ohio Rev. Code § 1349.55. This section is an exception to the long-standing rule in Ohio that forbids maintenance and champerty, which are defined as follows:

> "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 v. Interim Settlement Funding Corp., 789 N.E.2nd 217,219 (Ohio 2003) (internal citations omitted).

In *Rancman*, the Ohio Supreme Court held that "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" except as otherwise permitted by legislative enactment or Ohio ethics rules. *Id.* at syllabus. Enacted after *Rancman*, Ohio Rev. Code § 1349.55 is a "limited exception" to the rule against maintenance and champerty in Ohio and it has been strictly interpreted according to its terms. *See Cardinal Minerals, LLC v. Miller*, 246 N.E.3d 71, 81 (Ohio Ct. App. 2024) (rejecting agreements entered into prior to the existence of a "pending civil claim or action").

Earlier this year, the Ohio General Assembly introduced two identical bills (S.B. 10 and H.B. 105) that would amend the regulation of TPLF agreements under the Ohio Consumer Sales Practices Act. S.B. 10 and H.B. 105 would repeal Ohio Rev. Code § 1349.55 and replace it with a number of new sections in Revised Code Chapter 1357. In the proposed leg-

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[1] In October 2024, however, the federal Advisory Committee on Civil Rules formed a subcommittee to examine the role of TPLF in federal courts and whether updates to the civil rules are appropriate to address this issue. In addition, at least one federal district has adopted a local rule regarding TPLF disclosures. *See* D.N.J. L. Civ. R. 7.1.1. 2 For example, in *Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562, 580 (6th Cir. 2019), the Sixth Circuit upheld a district court's conclusion that TPLF agreements were void as against Kentucky public policy, noting that the agreements' provisions could interfere with or discourage settlement "because an injured party may be disinclined to accept a reasonable settlement offer where a large portion of the proceeds would go to the firm providing the loan" [internal quotations omitted].

[2] For example, in *Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562, 580 (6th Cir. 2019), the Sixth Circuit upheld a district court's conclusion that TPLF agreements were void as against Kentucky public policy, noting that the agreements' provisions could interfere with or discourage settlement "because an injured party may be disinclined to accept a reasonable settlement offer where a large portion of the proceeds would go to the firm providing the loan [internal quotations omitted]."

islation, the Ohio General Assembly expresses its intent to preserve Ohio's public policy against maintenance and champerty subject to limited exceptions:

> The general assembly ... hereby declares its intent to adopt regulations concerning a narrow range of consumer and commercial litigation financing agreements as contemplated in the holding of the Ohio Supreme Court in *Rancman v. Interim Settlement Funding Corp.*, ... The general assembly intends to preserve and reinforce the general public policy expressed in that holding against champerty and maintenance.

2025 H.B. No. 105, § 1357.011.

The proposed legislation describes two classes of TPLF agreements: "consumer litigation funding agreements" and "commercial litigation funding agreements." This distinction is important because the proposed legislation imposes different obligations on each type of agreement. Consumer agreements are those that create a contingent right to receive an "amount" of the potential proceeds and involve cash payments of less than $400,000. 2025 H.B. No. 105, § 1357.01(F). In addition to a 10% interest rate cap and specific disclosure requirements for the agreements themselves, the proposed legislation would impose numerous obligations on parties to consumer litigation funding agreements, the most relevant of which in light of concerns about TPLF agreements include:

- Funders cannot pay or offer to pay commissions or referral fees;
- Funders cannot accept commissions or referral fees;
- Funders cannot refer consumers to a specific attorney, law firm, or medical provider;
- Funders cannot make or influence any decision with respect to the conduct, settlement, or resolution of the consumer's legal claim;
- Attorneys for consumers cannot disclose confidential or privileged information to funders without their clients' consent, and they cannot disclose such information if it is prohibited by court rules, a court order, or the rules of professional conduct;
- If requested by defendants, the consumer must disclose the existence of and produce the funding agreement; and
- Funders cannot enter into agreements with persons or entities that are not domiciled in the United States, nor can they enter into agreements related to legal claims that are directly or indirectly financed by persons or entities not domiciled in the United States.

2025 H.B. No. 105, §§ 1357.03, 1357.04.

In contrast to consumer agreements, commercial litigation financing agreements create a direct or collateralized "interest" in any proceeds of the lawsuits. 2025 H.B. No. 105, § 1357.01(D)(1)(b). The proposed legislation would impose fewer obligations on parties to commercial agreements than those imposed on consumer agreements and include the following:

- Similar to consumer litigation funders, financiers cannot enter into agreements with persons or entities that are not domiciled in the United States, nor can they enter into agreements related to legal claims that are directly or indirectly financed by persons or entities not domiciled in the United States;
- Neither claimants nor attorneys can disclose or share documents that are sealed by the court or subject to a protective order;
- Financiers cannot make any decisions or influence any decisions with respect to the course of the legal claim, including the appointment of counsel, choice of expert witnesses, litigation strategy, and settlement or other resolution; and
- At the time a legal claim is asserted or commenced, claimants and their attorneys shall produce any agreement to all named parties and any insurers of the named parties without waiting for a discovery request and at any time thereafter when an agreement is executed or amended.

2025 H.B. No. 105, §§ 1357.06, 1357.07.

If enacted, Revised Code Chapter 1357 will provide increased transparency regarding interested parties to cases filed in Ohio state courts.

While the disclosure requirements would not apply to cases filed in Ohio federal courts, federal practitioners should be aware of the proposed legislation for several reasons. First, the clear public policy underlying Revised Code Chapter 1357 could be relevant to a choice-of-law analysis. *See Boling, supra* at 576 (relying on Kentucky public policy prohibiting champerty to apply Kentucky law over choice-of-law provisions in funding agreements).

Second, Revised Code Chapter 1357 could be cited as persuasive authority in Ohio federal cases to support discovery or other disclosure requirements seeking information regarding TPLF agreements.

Third, practitioners may need to advise clients about the legality of TPLF and similar types of agreements under Ohio law. With some estimates expecting annual growth of 10% or more in litigation funding over the next 10 years, the use of TPLF will continue to become more prevalent across many areas of law. Unless and until there are consistent regulations for these agreements, practitioners will need to be aware of the jurisdictional differences in how they are regulated to avoid potential issues for themselves and their clients.