CONSUMER LITIGATION FUNDING:

BALANCING CONSUMER PROTECTION AND ACCESS

RECOMMENDATIONS

WILLIAM H. SORRELL,
VERMONT ATTORNEY GENERAL

SUSAN L. DONEGAN, COMMISSIONER
VERMONT DEPARTMENT OF FINANCIAL REGULATION

DECEMBER 1, 2015

1) **Introduction**

On June 9, 2015, Governor Peter Shumlin signed Act 55 of 2015 titled "An Act Relating to Consumer Protection Laws." Section 5 of this law requires that the Commissioner of Financial Regulation and the Attorney General submit a recommendation or draft legislation to the General Assembly that reflects a balance between providing consumers with access to funds for personal expenses while the consumer is a party to a civil action or legal claim and protecting the consumer from predatory practices by a person who provides consumer litigation funding.

In Act 55, the General Assembly defines consumer litigation funding as:

> a nonrecourse transaction in which a person provides personal expense funds to a consumer to cover personal expenses while the consumer is a party to a civil action or legal claim and, in return, the consumer assigns to such person a contingent right to receive an amount of the proceeds of a settlement or judgment obtained from the consumer's action or claim. If no such proceeds are obtained, the consumer is not required to repay the person the funded amount, any fees or charges, or any other sums.

Typically, the consumer litigation funding industry focuses on personal injury claims where the consumer has retained an attorney on a contingency fee basis. The funded amounts are used to pay personal expenses and are not used to pay for the cost of the litigation itself (unlike in other similar industries in which the expenses of the litigation are paid by a third party). This report focuses on typical personal expense consumer litigation funding transactions and providers. The General Assembly should consider the scope and effect of any potential bill to ensure that it appropriately regulates the intended entities and transactions.

In addition to independent research into consumer litigation funding, representatives of the Department of Financial Regulation (DFR) and the Office of the Attorney General (AGO) reached out to multiple interested parties to aid in gathering information for this report. Consumer litigation funding companies, industry groups, insurance companies, the chamber of commerce, attorneys, and others provided valuable information. We also reviewed consumer litigation funding laws adopted in other states, a draft model law from the National Conference of Insurance Legislators, and recent bills seeking to regulate this area introduced in the General Assembly.

This report provides a basic background on the consumer litigation funding industry and its treatment in other states, then presents information, options and recommendations designed to help the General Assembly create a regulatory framework that strikes the balance articulated in Act 55.

DFR and AGO have produced in this report a range of tools and recommendations that can be used to regulate consumer litigation funding. First, we discuss pre-transaction regulation and recommend a relatively simple registration scheme. Next, we discuss consumer protections common in other industries in Vermont as well as in other state laws regulating consumer litigation funding. We set forth a number of recommended disclosures, contractual requirements and prohibited practices. Finally, we recommend possible reporting requirements for consumer litigation funding companies. Each of these recommendations are intended to strike the balance Act 55 seeks, but they are not the only possible tools that can be employed. We are happy to provide additional information and answer questions on request.

2) <u>Background</u>

Generally, consumer litigation funding occurs after a person is injured and files suit. Lawsuits can take many months or years before being resolved through a judgment or settlement. During the time a lawsuit is ongoing, the injured plaintiff may need money for personal expenses such as housing, food, transportation or medical expenses. In many cases the injury that spurred the lawsuit also prevents the plaintiff from working regularly or otherwise meeting his or her obligations. As a result, traditional banks or other lenders may refuse to extend a loan or credit to the injured plaintiff.

Consumer litigation funding companies provide money to an injured person while his or her lawsuit is pending. The companies do this by purchasing the right to receive a portion of the injured person's settlement or judgment proceeds. The transactions are nonrecourse. As a result, if the injured person's judgment or settlement does not yield enough money to pay the agreed amount to the company (after paying other obligations such as attorney fees), the company has no other recourse to receive the full amount. If the injured person loses the case, the company receives nothing. Consumer litigation funding companies noted that the average amount funded is approximately $1,800 and represents approximately 10 percent of the expected settlement or judgment amount.

Consumer litigation funding has been the subject of increased scrutiny in the media and in state legislatures in recent years. The scrutiny comes in large part because the fees charged by consumer litigation funding companies can be extremely high, resulting in annual percentage rates well above the maximum legal rates established by statute for loans. Consumer litigation funding companies assert that these transactions are not loans and therefore are not subject to state usury laws. They also contend that the nonrecourse nature of the transactions creates a higher risk to the company, which necessitates higher rates. [1]

Currently, at least six states have passed legislation regulating consumer litigation funding[2] and many other states are considering legislation. These laws are not uniform but some are similar and each is instructive. For example, most states that regulate this industry require some sort of registration or licensing of consumer litigation funding companies before those companies can do business in the state. All laws provide certain consumer protections, but some go further than others. Enforcement varies widely. A few states require registered companies to report annually on their activities in the state; most states do not have this requirement. Some states cap the interest that a company can collect, but others do not. Specific provisions of other

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[1] There is a split of legal authority on the question of whether the non-recourse indebtedness created by a litigation funding contract is a loan or an investment. For a case holding that the indebtedness is a loan, see *Oasis Legal Fin. Grp. V. Coffman* , 2015 WL 7177951, No. 13SC497 (Colo. 2015) (unreported). For a case holding that the indebtedness is an investment rather than a loan, see *Anglo-Dutch Petroleum Intern., Inc. v. Haskel,*193 S.W.3d 87 (Tex. Ct. App. 2006).

[2] Arkansas, Maine, Nebraska, Ohio, Oklahoma, Tennessee.

state laws and how they can be adapted to Vermont are discussed in detail throughout this report.

According to the American Legal Funding Association, approximately 14 companies funded a total of 67 consumer litigations in Vermont during 2014. AGO has not received any complaints in 2014 or any other year, while DFR has received one complaint regarding this practice. Conversely, in response to Act 55 an individual wrote in the Bennington Banner of a positive experience she had with a consumer litigation funding transaction. Information regarding the frequency of litigation funding transactions elsewhere is only available for a few states. In Nebraska, from September 1, 2013, to August 31, 2014, two companies were registered in the state and 169 total funding transactions were originated. In Maine, only one company is currently registered and officials described the number of transactions annually as "a handful."

Against this background and the moratorium placed on consumer litigation funding transactions by Act 55, the General Assembly has a series of decisions it can make in determining the best way to regulate this industry. At one end, it can choose to do nothing. Without any action by the General Assembly, the moratorium will be repealed on July 1, 2016. At that time, consumer litigation funding companies can commence business in Vermont, but will be subject to the already-existing general prohibition from engaging in unfair and deceptive acts and practices in commerce.[3] AGO has ample authority to enforce these consumer protection statutes. On the other end of the spectrum, the General Assembly can choose to heavily regulate the industry.

3) <u>Pre-Transaction Regulation</u>

There are three options with respect to pre-transaction regulation of consumer litigation funding companies in Vermont: (1) license consumer litigation funding companies, which would include some type of pre-licensure review of the character and fitness of the company; (2) require companies to register without any pre-registration review; or (3) impose no unique registration or license, which would not exempt companies from the general requirement to register as a foreign corporation if transacting business in Vermont pursuant to 11A V.S.A. § 15.01. The terms "licensing" and "registration" are often used interchangeably in Vermont law. Here, they are used to illustrate the difference between a pre-transaction requirement that includes a review and approval of the character and fitness of the company by the administering agency (licensing) and simply requiring certain documents and information to be filed with the agency but not including any affirmative review or approval (registration). This is not an objective definition of the terms, but a helpful distinction solely for purposes of discussing consumer litigation funding regulation. In addition to the three general pre-transaction options, Vermont may also require that consumer litigation companies post a fidelity bond prior to engaging in transactions in the State. A bonding requirement could be coupled with either a licensure or registration regime.

The following section describes the three pre-transaction options, including a description of the requirements imposed by other states on such companies. Based on the DFR and AGO review of the benefits and costs of these alternatives, we recommend imposing a registration requirement. This allows the State to track companies specifically engaging in consumer litigation funding and enforce the recommended reporting requirement described in Section 5.

[3] 9 V.S.A. Chapter 63.

While a licensing regime would similarly allow for the tracking and reporting, as discussed further below, it may create an unnecessary regulatory burden in light of the limited expected volume of transactions and the nature of the transactions. For reasons discussed below, we also recommend a requirement that consumer litigation funding companies post a fidelity bond in order to transact business.

Licensing

Licensing would require companies to file an application in the manner required by the administering agency.[4] One example of a licensing framework that would provide a model is the licensing of life settlement providers in 8 V.S.A. § 3836. A licensing requirement would allow a rigorous review of companies seeking to engage in consumer litigation funding – it could allow for a review of their history in other states, the background of their officers and directors (including possible criminal convictions), their financial stability, and other aspects of the company's suitability for engaging in this type of business in Vermont.

Many of the other states with laws specifically addressing consumer litigation funding have the equivalent of a licensing regime – requiring affirmative approval by the applicable state agency before a company can engage in consumer litigation funding. Maine and Nebraska, while referring to the process as "registration," require applicants to submit information necessary to allow the administrator "to make an evaluation of the character, fitness and financial responsibility of the applicant."[5] These laws further require that the administrator find, prior to approving the application, that there is evidence sufficient to warrant a belief that the company "will be operated honestly and fairly."[6] Oklahoma similarly requires an application containing adequate information for the administrator to evaluate the character and fitness of the applicant (and the applicant's officers and directors, if applicable),[7] and requires the administrator to make a determination, following investigation, that the character and fitness of the applicant warrants the belief that the business will be operated honestly and fairly.[8]

A licensing requirement would impose an additional burden on the agency to review and essentially sanction companies to engage in consumer litigation funding. The costs of this burden could be recouped through licensing fees, however, it is not clear that such additional burden – on either the agency or consumer litigation companies – is necessary to protect consumers. Generally with banking or insurance products, consumers pay money upfront expecting receipt of funds in the future or incur debt in such a manner that the lender could seek liens on assets or harm consumer credit. In the case of consumer litigation funding the consumer is selling a potential litigation recovery with recourse limited to that recovery, if it arises. Unlike many financial products, the greatest risk to consumers comes from properly understanding the terms of the agreement rather than the financial stability or character of the company with whom it is engaging in the transaction. Consumers receive the money upfront and are only required to pay

[4] A licensing regime likely would not be administered by AGO, which does not have existing capability for such a framework. DFR (which can utilize the National Multistate Licensing System & Registry) or another regulatory agency would be a better candidate to administer a licensing framework.
[5] Me. Stat. tit. 9-A, § 12-106; Ne. Rev. Stat. § 25-3307.
[6] *Id.*
[7] Okla Stat. tit. 14A § 3-809.
[8] *Id.* at § 3-811.

the money back out of proceeds from their litigation. Moreover, so long as consumers can cancel the contract if a company fails to meet the disclosure, contract, and consumer protection requirements of the law, consumers will be adequately protected against rogue or fly-by-night companies.

Registration

A registration requirement can be performed by any agency (DFR, AGO, Secretary of State, etc.), as it is a ministerial procedure. Having such a requirement would suffice to identify all companies engaging in consumer litigation funding in Vermont and would provide a mechanism for such companies to report information for the State's ongoing review of this industry. It would not, however, require administrative review of the character, fitness, or financial stability of these companies.

Tennessee imposes a registration requirement. The registration requires only that the company be in good standing with the Secretary of State and that its charter identify it as a litigation financier.[9] Similarly, many consumer protection laws administered by AGO impose a registration or reporting requirement.[10] Under DFR's jurisdiction, service contract companies are required to register, but have no specific licensing review.[11] A registration requirement, coupled with mandated reporting, could provide for adequate tracking of this industry within the State without additional bureaucratic burdens. We recommend this middle approach in light of the relatively limited risk that arises from the character and soundness of the counter-party (consumer litigation funding company) in such transactions.

No Pre-Transaction Requirement

It is common, particularly in the realm of consumer protection, to impose specific requirements with respect to high-risk transactions, but to not require a pre-registration or licensing for companies engaging in these transactions.[12] Arkansas's law regulating consumer litigation funding appears to take this approach of treating such transactions as high risk consumer transactions; it imposes specific requirements but does not track the participants in the industry. Arkansas has no registration or licensing requirement, but instead imposes certain disclosures and rate caps of 17 percent and treats violations of those requirements as deceptive and unconscionable trade practices under its consumer protection act.[13] Ohio takes a similar approach, placing requirements on the contractual relationship and mandating disclosures, but not requiring an additional licensure or registration of companies.[14]

Requiring registration facilitates reporting by registered entities. Reporting allows for periodic reevaluation of the effectiveness of the consumer protections in the law and allows for a better understanding of the size of the industry both in terms of participating companies and

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[9] Tenn. Code Ann. § 47-51-103.
[10] *See, e.g.*, 9 V.S.A. §§ 2464b (telemarketers); 2473 (paid fundraisers); 18 V.S.A. § 4632 (prescribed products).
[11] *See* 8 V.S.A. § 4248.
[12] *See, e.g.*, 9 V.S.A. §§ 2461a (hearing aid), 2461b (propane), 2461e (prepaid contracts), 2466 (landline cramming); 2470aa-hh (discount membership programs), and 2480aa-gg (structured settlements).
[13] Ark. Code § 4-57-109.
[14] Ohio Rev. Code § 1349.55.

consumers. However, having no pre-transaction regulation generally eliminates the ability to track and reevaluate the industry. This might make it more difficult, if not impossible, to knowledgeably modify any statutory framework to best meet the needs of Vermont consumers.

Bonding

Most of the states that have statutory enactments relating to consumer litigation funding impose a fidelity bond on such companies transacting business within the state. In Nebraska, that bond is double the amount of the largest funding in the previous calendar year or $50,000, whichever is greater.[15] In Maine, the law requires the company to maintain minimum net assets of at least $25,000 and the administrator may require a bond of up to $50,000.[16] Oklahoma also has a bonding requirement of up to $50,000.[17] Tennessee requires each company to submit a bond of $50,000.[18]

Many of the risks that a fidelity bond is designed to protect against – consumers paying money and later not receiving the goods or services that they paid for – are not present in consumer litigation funding transactions. Here, consumers get the money first and there is no direct recourse against the consumer for repayment. Notwithstanding this dynamic, a bond in an appropriate amount may be appropriate to assure payment of civil penalties or restitution if a consumer litigation funding company fails to comply with the extensive consumer protections in a given law. Moreover, the consumer litigation companies and industry groups that we spoke with did not oppose such a bond. Finally, a bonding requirement in some ways mimics the character, fitness and solvency review of a licensing framework – an insurance company will perform its own investigation to protect itself before backing the bond. For these reasons, we would recommend imposing a fidelity bonding requirement in an appropriate amount for all companies seeking to transaction business in Vermont, which will need to be posted at the time of registration.

4) **Statutory Requirements**

Most statutory frameworks reviewed by DFR and AGO for this report can be divided into four parts: required disclosures, required contract provisions, prohibited practices and enforcement. Based on our review, the following provisions are common to most statutory frameworks and are likely to be supported by both consumer advocates and the consumer litigation funding industry. These requirements are intended to strike a balance between consumer protection and ensuring that consumer litigation funding remains available to Vermont consumers.

Required Disclosures

We recommend that the following disclosures be required for each consumer litigation funding transaction. If mandated, we recommend they be displayed prominently and

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[15] Ne. Rev. Stat. § 25-3307.
[16] Me. Stat. tit. 9-A, § 12-106.
[17] Okla Stat. tit. 14A § 3-810.
[18] Tenn. Code Ann. § 47-51-103.

conspicuously on the front page of every consumer litigation funding contract and be made material provisions of the contract.

1. All possible alternatives to a litigation funding contract, including secured or unsecured personal loans, life insurance policy loans, etc.
2. Some or all of the proceeds of the litigation funding transaction may be taxable.
3. The consumer may rescind the litigation funding contract within no less than five business days of execution of the contract or receipt of the funds, whichever is later, by returning the funds in full to the litigation funding company. The disclosure should set forth the procedure for rescinding the contract, including the name and address or the litigation funding company and should contain a notice that the return deadline will be deemed satisfied if the funds are placed in the U.S. mail or in the hands of a commercial delivery service such as Federal Express within the rescission period, regardless of the actual delivery date.
4. The total amount of the litigation funding to be provided to the consumer by the company as part of the litigation funding contract.
5. An itemization of all fees, interest, or other consideration under the contract.
6. The total amount due from the consumer, including all fees, interest, or other consideration under the contract, if repayment is made in any month after the funding transaction is executed.
7. In the event the same consumer seeks more than one transaction, a disclosure providing the cumulative amount due from the consumer for all transactions, including all fees, interest, or other consideration under all contracts, if repayment is made in any month after the funding transactions are executed.
8. The maximum annual percentage rate the consumer may be charged, including fees, interest and other consideration.
9. A statement that if there is no recovery of any money from the consumer’s legal claim the consumer will owe nothing to the legal funding company and that, if the net proceeds of the claim, as defined in the contract, are insufficient to repay the consumer’s indebtedness, then the consumer will owe the litigation funding company no money in excess of the net proceeds.

Required Contract Provisions

In addition to specific disclosures within a contract, we recommend that all consumer litigation funding contracts must be written in a clear and coherent manner. The contracts should use words with common, everyday meanings. The average consumer who makes a reasonable effort to read and understand the contract should be able to do so without having to obtain the assistance of a professional. We also recommend that every contract should be required to contain the following provisions:

1. Definitions of "consumer," "consumer litigation funding," and "consumer litigation funding company."
2. A definition of "net proceeds" designed to limit the consumer litigation funding company's recovery to amounts not needed by the consumer to repay attorney's fees, costs of litigation or medical bills.
3. The rescission right described in the "Required Disclosures" section.
4. A provision that in the event of litigation involving the contract, venue, at the election of the consumer, will lie in the Vermont Superior Court for the county where the consumer resides. This will prevent a consumer litigation funding company from requiring onerous travel by Vermonters in order to pursue a claim against the company.
5. An acknowledgement that the consumer is represented by an attorney in the dispute and has had an opportunity to discuss the consumer litigation funding contract with his or her attorney. Maine and other states require an acknowledgement by the consumer's attorney that he or she has discussed the litigation funding contract with the consumer.
6. A signed acknowledgement by the consumer's attorney that he or she has not received or paid a referral fee or any other consideration from the litigation funding company and will not in the future.

Prohibited Practices

To enhance consumer protection, certain practices by consumer litigation funding companies should be completely prohibited. Many of these recommended prohibited practices can be found in other state laws and a draft model law produced by the National Conference of Insurance Legislators.

We recommend that consumer litigation funding companies must not:

1. Pay or offer to pay commissions, referral fees or other forms of consideration to any attorney, law firm, medical provider, chiropractor or physical therapist or any of their employees for referring a consumer to a company.
2. Accept any commissions, referral fees, rebates, or other forms of consideration from an attorney, law firm, medical provider, chiropractor, or 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 or physical therapist.

5. Delay in supplying copies of all contract documents to the consumer and to any attorney representing the consumer. All such copies must be provided promptly.
6. Attempt to obtain a waiver of any remedy that the consumer might have against the litigation funding company.
7. Offer to provide legal advice to the consumer regarding the litigation funding or the underlying dispute.
8. Make, participate in or influence, or receive the right to make, participate in or influence, any decisions with respect to the conduct, settlement, or resolution of the consumer's legal claim.
9. Pay or offer to pay for court costs, filing fees, or attorney fees in connection with a consumer's legal claim.
10. Assign its rights under a litigation funding contract in whole or in part to a third party.
11. Report a consumer to a credit reporting agency if insufficient funds remain from the net proceeds to repay the litigation funding company.
12. Require binding arbitration in the event of a dispute between the consumer and the litigation funding company. This provision will preserve the consumer's right to a trial in the event of a contractual dispute.

Other states also prohibit certain practices by attorneys who represent consumers involved in consumer litigation funding transactions. We recommend a prohibition along the lines of the following:

13. An attorney or a law firm retained by a consumer must not have a financial interest in the company offering funding to the consumer, nor receive a referral fee or other consideration from the company or its affiliates.

Enforcement and Examination Authority

The agency charged with administering consumer litigation funding laws must have the authority to enforce the requirements and prohibitions required by the law. To create an effective enforcement framework, we recommend that the administering agency be permitted to examine and investigate any person engaged in the business of litigation funding in Vermont. In addition, any violation of the law by a consumer litigation funding company should make the contract voidable and should be punishable by a penalty. Consumer litigation funding companies should also be required to provide restitution to harmed consumers. Finally, the administrator should be authorized to pursue all other administrative and/or civil remedies and penalties available to it under law.

Whichever agency is given responsibility for administering and enforcing the statutory framework established by the General Assembly, it may also be desirable to provide a direct remedy for aggrieved consumers. For example, Vermont law regulating service contract companies permits enforcement by DFR, but also states that failure to comply with the requirements of the act will constitute an unfair or deceptive act in commerce enforceable under

9 V.S.A. ch. 63 (the "Consumer Protection Act").[19] Section 2461 of the Consumer Protection Act gives consumers a private right of action that can result in receipt of attorney's fees and exemplary damages.

Other Potential Statutory Requirements

The statutory requirements discussed to this point appear in consumer litigation funding statutes in other states, are common consumer protections, and have generally been received favorably by interested parties. Based on our conversations with those interested parties, it is possible that some of the measures discussed in this section, especially interest rate caps, will generate opposition from stakeholders. We include the discussions because they could provide significant additional consumer protections, and we isolate them to this section because they may or may not promote the balance the General Assembly is seeking.

Capping Interest Rate. Some states (e.g., Tennessee) have imposed interest rate caps on litigation funding transactions. Limited experience has shown that consumer litigation funding companies may withdraw from a state where interest rates are capped at a level that does not allow a company to recoup its losses. According to a 2010 report from the Maine Department of Professional and Financial Regulation to the state legislature, between 20 percent and 30 percent of all funded cases result in no litigation proceeds to the plaintiff and therefore, no funds to the funding provider.[20] Interest rates need to be high enough to offset these potential losses without being predatory. Currently, very little is known about the consumer litigation funding industry in Vermont, including the loss rate for providers, typical interest rates, etc. Additional information that can inform whether an interest rate cap is appropriate (and if so, at what level) can be garnered through the reporting requirements described below.

Giving Priority to Medical Liens. Proposed legislation in some states (e.g., Illinois) gives all medical liens priority over any lien by the consumer litigation funding company on the claim proceeds. This could result in medical liens that have nothing to do with the litigation underlying the funding transaction still being given priority once a settlement is reached, as well as forcing consumers to disclose their entire medical and consumer history in the application process. An alternative definition of "net proceeds" could reference the amount remaining from a claim settlement or jury verdict after the deduction of attorney's fees, court costs, and medical expenses related to the injury for which the claim has been brought. Requiring a defined term in each contract for "net proceeds," and dictating what that definition must be can bring clarity to this issue.

Capping the total amount of financing. Proposed legislation in Illinois provides that the total amount of financing provided by a consumer litigation funding company cannot exceed $40,000. Placing a cap on the total amount of funding appears to be consistent with the industry's stated goal of providing money to help plaintiffs with short-term living expenses. However, the nonrecourse nature of the litigation funding contract largely eliminates the risk to consumers if the litigation is unsuccessful or yields less than anticipated, and placing a cap on funding may

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[19] 8 V.S.A. §§ 4255.

[20] Cite to Maine's report.

prove unnecessarily restrictive for plaintiffs who are facing large medical bills or expenses such as college tuition.

Capping the period during which interest may accrue. Maine law provides that a litigation funding provider may not assess fees for a period exceeding 42 months from the date the contract is signed.[21] Although a cap of this nature is, in effect, a cap on interest rates, it is less onerous to consumer litigation funding companies because it is only applicable after a certain amount of time. At the same time, it could provide some protection to consumers in the event that the underlying litigation takes longer to complete than expected. Setting a cap will require additional inquiry to ensure that a cap is not placed so far out from the start of funding that it fails to protect consumers.

Capping the percentage of net proceeds available to the company. At the request of DFR and the AGO, one of the industry-leading consumer litigation funding companies prepared draft language that would cap payouts at a percentage of settlement proceeds. This type of language would guarantee that consumers are not left empty-handed at the time of settlement. The draft language reads as follows: "Upon the consumer's written request and provision of evidence of the satisfaction of all related attorney's fees and costs, related medical liens and all statutory liens and taking into account the purchase price previously paid to the consumer, where applicable, the company shall reduce the amount to which it is contractually entitled so that the consumer will receive not less than fifty percent of the proceeds remaining after payment of the foregoing fees, costs, liens and purchase price." A provision capping the consumer litigation funding company's recovery to a percentage of the net settlement proceeds could have the unintended effect, however, of steering companies toward higher value claims and making the companies less likely to contract with plaintiffs whose claims are viewed as being more modest.

5) Reporting Requirements

We recommend the General Assembly require that consumer litigation funding companies operating in Vermont report certain data and information on an annual basis to the administering agency. Although only a few of the states that regulate consumer litigation funding have such requirements, they can serve a number of useful purposes.

A reporting requirement will allow for a better understanding of the consumer litigation funding industry in Vermont, the companies operating in Vermont, and whether the statutory framework in place (if any) is serving the needs of all involved. This information can be used, if necessary, to improve the statutory framework either through changes to statute or through some other means. In addition, as discussed below, the information generated by a reporting requirement could prove useful to consumers who are considering entering into a funding contract.

The interested parties we met with throughout this process did not express any reservations about reporting requirements, and even suggested frameworks put in place by other states to use as a model. Of the states that have passed consumer litigation funding statutes, two have put in place reporting frameworks: Nebraska and Maine. Both frameworks are very similar.

[21] *See* 9-A MRSA § 12-105(1).

No one we spoke with indicated that reporting requirements would place an onerous burden on consumer litigation funding companies.

What Information Should Be Reported

If a reporting requirement is desired, it can be required by statute in very general terms, leaving the details of what information is to be reported, when, in what form, etc. to be dictated by the administering agency. For example, life settlement providers are required to annually report to the Commissioner of Financial Regulation. The applicable statute states only that such companies must file, "an annual statement containing such information as the Commissioner may prescribe by rule or order."[22]

Alternatively, a statute can lay out specifically what information is to be reported. For example, the reporting requirements for consumer litigation funding companies in both Maine and Nebraska require specific information to be reported. A bill to regulate this industry introduced in the Vermont General Assembly in 2014 also has similar requirements:

1. The number of legal fundings;
2. The dollar amount of legal fundings;
3. The number of legal fundings required to be repaid by the consumer;
4. The amount charged to the consumer, including but not limited to the annual percentage fee charged to the consumer and the itemized fees charged to the consumer; and
5. The dollar amount and number of cases in which the realization to the civil litigation funding company was less than contracted.

Maine's statute, in place since 2008, requires consumer litigation funding companies registered in Maine to provide the first four pieces of information above. Nebraska law, effective in 2010, requires all five. A bill introduced to the Vermont General Assembly in 2014 by Reps. Botzow, Koch, and Kupersmith (H.824) would have required the same information as Nebraska. To create flexibility, we recommend any reporting requirement also include a requirement to report any other information as deemed necessary or useful by the administering agency.

As an alternative to collecting basic data, the General Assembly may choose to require reporting on each specific transaction. This can be done instead of or in addition to the reporting described above. For example, the Legislature may require a copy of each executed consumer litigation funding contract to be filed with the appropriate agency. This would allow regulators to review the entire contract for compliance with the law and would also provide the regulators with the information described above.

The information required by other states and in the 2014 Vermont bill would provide the Legislature and regulators with the volume of transactions and their value, the ultimate rates and fees charged to consumers, and how often the transacting companies recover the full contracted-for amount. Requiring copies of each executed contract would provide even more detail, allowing

[22] 8 V.S.A. § 3839(a).

regulators to review all aspects of the contract for compliance. However, reviewing each contract is likely not necessary to effectively regulate the industry, and doing so would create an increased administrative burden on both the regulator and the regulated entities. We recommend that registered companies be required to report the information described above, but not be required to provide copies of each executed contract.

Using Reported Information

After determining whether a reporting requirement will be beneficial and what form that requirement should take, the General Assembly should consider how best to utilize the reported information.

The agency receiving the reported information may be required only to keep that information in the event that it is needed or wanted for some purpose in the future. Or, the agency may be required to use the reported information to produce its own report. For example, the consumer litigation funding laws in Maine and Nebraska, and the 2014 bill in Vermont, required the administrator to prepare an annual report on the status of consumer litigation funding in the state, including aggregate information reported by consumer litigation funding providers.[23] Maine included an additional one-time requirement that the administrator evaluate the annual percentage fee imposed by consumer litigation funding companies and assess whether a cap on such fees was necessary.

Distilling the reported information into a summary for public consumption could also be valuable to Vermont consumers. Not every consumer would take advantage of the information, but it may be helpful to those seeking information or guidance about the effects and implications of these transactions. It would also provide valuable information to the General Assembly, allowing it to better determine whether any changes to the legal framework are warranted. We recommend that the administering agency prepare a report annually to be made public in some form, which contains certain relevant data reported by the companies.

6) Conclusion

Consumer litigation funding has drawn considerable attention in recent years. It can provide needed funds for personal expenses while civil litigation is ongoing, but it can also result in predatory practices and unconscionably high rates and fees. Vermont's General Assembly hopes to protect consumers without cutting off access to this type of funding entirely. The recommendations in this report are culled from legislation in other states, Vermont laws regulating similar industries, conversations with interested parties, and independent research into consumer litigation funding. We believe this information and these recommendations will help the General Assembly achieve its goal of balanced regulation of the consumer litigation funding industry. DFR and AGO are available to provide additional information, answer questions, and further assist in any way we can.

[23] Me. Stat. tit. 9-A, § 12-107(4); Ne. Rev. Stat. § 25-3309(7); H.824, 2013-2014 Gen. Assemb. (Vt. 2014).