



Testimony Regarding H.B. 1372
Eric Schuller
President
Alliance for Responsible Consumer Legal Funding (ARC)

Mr. Chairman and Members of the committee, my name is Eric Schuller, and I am the President of the Alliance for Responsible Consumer Legal Funding, also known as ARC.

ARC is the largest Trade Association in the country that represents companies that offer Consumer Legal Funding.

Consumer Legal Funding is where a company provides financial assistance to a consumer who has a pending legal claim. Most of the time these cases are car accidents. The funds that we provide the consumer are not used to pay for the legal claim, they are used for household needs, such as mortgage, rent, utilities and putting food on the table.

There is another facet to this space called “Litigation Financing”.

Litigation Financing is where funds are provided to an entity to fund the actual litigation. Those funds are used to pay for the attorney, filing fees and deposition cost as an example.

In Consumer Legal Funding the average amount we provide a consumer is \$3,000 to \$5,000. In Litigation Financing the amount of funding typically starts at \$3,000,000.

As drafted, we are in opposition to HB 1372.

However, we feel that the current version of the bill can be clarified as to what the product is that is being regulated and how it is to be regulated.

ARC Highlights of changes to HB 1372:

- Clarifies what “Charges” are
- Clarifies what is “Commercial Litigation Financing”
- Clarifies the 25% guarantee recovery to the consumer to ensure the consumer is treated properly.
- Allows the Consumer Legal Funding Companies to have an honest discussion with the consumers attorney by allowing for privilege communications.
- Assures that Consumer Legal Funding is not a loan in North Dakota
- Clarifies what is covered by any violations



The changes that we are proposing are in line with other legislation that has been enacted across the country regarding the product.

If the changes that we are proposing as an amendment to H.B. 1372 are adopted, we will be supportive of the legislation.

We feel that with these changes it will improve the bill by giving stronger consumer protection to those who use the product in North Dakota.

Attached you will find a red-lined version of the bill with our proposed improvements.

Thank you for your consideration.

Eric Schuller
President

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Sixty-ninth
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1372

Introduced by

Representative Klemin

Senator Larson

1 A BILL for an Act to create and enact a new chapter to title 13 of the North Dakota Century
2 Code, relating to litigation financing; to provide a penalty; and to provide for application.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** A new chapter to title 13 of the North Dakota Century Code is created and
5 enacted as follows:

6 **Definitions.**

7 As used in this chapter:

- 8 1. "Commissioner" means the commissioner of financial institutions.
9 2. "Consumer" means any individual who resides, is present, or is domiciled in this state
10 or who is or may become a plaintiff, claimant, or complainant in a civil action or in
11 pursuit of any claim or cause of action in this state.

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13 "Charges" means the amount of money to be paid to the litigation financier by or
on behalf of the consumer, above the funded amount provided by or on behalf
of the litigation financier to a consumer. Charges include all administrative,
origination, underwriting or other fees, including interest, no matter how
denominated.

14 "Commercial litigation financing" means covering the costs typically incurred in the
cause of civil litigation, including but not limited to filing fees, expert witnesses fees,
transcript fees, court costs, travel expenses and office overhead, but not included funds
intended for use by the party for personal or familial expenses such as food, rent,
mortgage payments, car payments and medical bills.

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116 3. "Entity" means any domestic or foreign corporation, partnership, limited partnership,
117 limited liability company, trust, fund, plan, or any other business, enterprise,
118 association, or organization of any kind or nature.

119 4. "Foreign country or person of concern" includes the following:

120 a. A foreign government or person listed in 15 CFR 791.4.

- 1721 b. A country prohibited from purchasing or otherwise acquiring title to real property
1822 in this state under section 47-01-09.
- 1923 5. "Foreign entity of concern" means a partnership, association, corporation,
2024 organization, or other combination of persons:
- 2125 a. Organized or incorporated in a foreign country of concern;
2226 b. Owned or controlled by the government, a political subdivision, or a political party
2327 of a foreign country of concern;
- 2428 c. That has a principal place of business in a foreign country of concern; or

- 1 d. That is owned, organized, or controlled by or affiliated with a foreign organization
2 that has been:
- 3 (a) Placed on the federal office of foreign assets control specially designated
4 nationals and blocked persons list (SDN list); or
- 5 (b) Designated by the United States secretary of state as a foreign terrorist
6 organization.
- 7 6. "Legal representative" means an attorney, group of attorneys, or law firm duly licensed
8 and authorized to practice law and to represent a consumer in a civil action or claim to
9 recover damages in this state.
- 10 7. "Litigation financier" means any individual or entity engaged in, formed, created, or
11 established for the purpose of engaging in the business of litigation financing or any
12 other business or economic activity in which the individual or entity receives a
13 percentage of an anticipated recovery in a civil legal action brought by a consumer,
14 lawyer, or law firm asserting legal claims on behalf of a consumer, in exchange for
15 providing litigation financing.
- 16 8. "Litigation financing" means the financing, funding, or advancing of money to pay for
17 expenses or any other sums arising from a civil action, claim, or cause of action, if the
18 financing, funding, or advancing of money is provided by any person other than a
19 person that is:
- 20 a. A party to the civil action, claim, or cause of action;
- 21 b. A legal representative engaged, directly or indirectly, through another legal
22 representative, to represent a party in the civil action, claim, or cause of action; or
- 23 c. An entity or insurer with a pre-existing contractual obligation to indemnify or
24 defend a party to the civil action, claim, or cause of action.
- 25 9. a. "Litigation financing contract" means a written contract in which a person agrees
26 to provide litigation financing to any person in conjunction with a civil action or in
27 pursuit of any claim or cause of action in this state in consideration for:
- 28 (1) The payment of fees or other consideration to the person providing the
29 litigation financing; or
- 30 (2) Granting or assigning to the person providing the litigation financing a right
31 to receive payment from the value of any proceeds or other consideration

1 realized from any judgment, award, settlement, verdict, or other form of
2 monetary relief any consumer or other person may receive or recover in
3 relation to the civil action, claim, or cause of action.

4 **b.** The term does not include an agreement, contract, or engagement of a legal
5 representative to render legal services to a consumer on a contingency fee basis,
6 including the advancement of legal costs by the legal representative, in which the
7 services or costs are provided to or on behalf of a consumer by the legal
8 representative representing the consumer in the civil action, claim, or cause of
9 action.

10 **10.** "Nationwide multistate licensing system" means the registry developed by the
11 conference of state bank supervisors and the American association of residential
12 mortgage regulators and owned and operated by the state regulatory register or any
13 successor or affiliated entity, for the licensing and registration of persons in financial
14 services industries.

15 **11.** "Regulated lender" means:

16 **a.** A bank, building and loan association, savings and loan association, trust
17 company, credit union, credit association, consumer loan licensee, money broker,
18 deferred presentment service provider, residential mortgage lender licensee,
19 development corporation, bank holding company, or mutual or stock insurance
20 company organized pursuant to state or federal statutory authority and subject to
21 supervision, control, or regulation by:

22 (1) An agency of the state; or

23 (2) An agency of the federal government;

24 **b.** A subsidiary of an entity described in subdivision a;

25 **c.** A state agency or a federal agency that is authorized to lend money; and

26 **d.** A corporation or other entity established by congress or the state which is owned,
27 in whole or in part, by the United States or the state and is authorized to lend
28 money.

29 **License.**

30 **1.** A person may not engage in litigation financing in this state unless the litigation
31 financer has received a license from the commissioner.

- 1 2. If the licensed litigation financier is an entity, the entity must be active and in good
2 standing with the secretary of state.
- 3 3. The application for a license as a litigation financier must be in writing, under oath, and
4 in the form prescribed by the commissioner. The application must include the following
5 information:
- 6 a. The legal name of the litigation financier;
7 b. The physical street address and mailing address of the litigation financier;
8 c. A telephone number or electronic mail address at which the litigation financier
9 may be contacted;
- 10 d. The physical street address and mailing address of the licensed financier's
11 licensed office and the name of the registered agent at the licensed office who is
12 authorized to accept service of process on behalf of the licensed financier; and
- 13 e. Any other information the commissioner considers necessary.
- 14 4. A litigation financier subject to licensure shall file an amended application within twenty
15 business days whenever the information contained in the most recently filed
16 application changes, becomes inaccurate, or incomplete in any respect.
- 17 5. The commissioner may prescribe forms to carry out this chapter, including the use of
18 the nationwide multistate system.
- 19 6. At the time of making an application, the applicant shall include payment of four
20 hundred dollars, which is not subject to refund, as a fee for investigating the
21 application, and four hundred dollars for the annual license fee. Fees must be
22 deposited in the financial institution's regulatory fund.
- 23 7. All documents and information filed with the commissioner are public records.
- 24 8. The commissioner's duty to file documents under this section is ministerial. The
25 commissioner's filing or refusing to file a document does not create a presumption
26 that:
- 27 a. The document does or does not conform to the requirements of this chapter; or
28 b. The information contained in the document is correct or incorrect.
- 29 9. Additional fees may be assessed to cover costs associated with the use of the
30 nationwide multistate licensing system.

1 **Surety bond required.**

- 2 1. Each licensee shall maintain a surety bond in an amount not less than fifty thousand
3 dollars. The surety bond must be in a form prescribed by the commissioner.
4 2. When an action is commenced on a licensee's bond, the commissioner may require
5 the filing of a new bond.
6 3. Immediately upon recovery upon any action on the bond, the licensee shall file a new
7 bond.

8 **Minimum net worth required.**

- 9 1. A minimum net worth must be maintained continuously by every licensee in
10 accordance with this section.
11 2. Minimum net worth must be maintained in the amount of twenty-five thousand dollars.
12 3. If the net worth of a licensee falls below the minimum net worth set forth in
13 subsection 1, the licensee shall provide a plan, subject to the approval of the
14 commissioner, to increase the licensee's net worth to an amount in conformance with
15 this section. Submission of a plan under this section must be made within twenty
16 business days of a notice from the commissioner which states the licensee is not in
17 compliance with subsection 1. If the licensee does not submit a plan under this
18 section, fails to comply with an approved plan, or has repeated violations of
19 subsection 1, the commissioner may revoke the license.

20 **Expiration of licensure - Renewal.**

- 21 1. Licensure under this chapter expires December thirty-first of each year.
22 2. Licensure may be renewed for the ensuing twelve-month period upon application and
23 the payment to the commissioner of the annual license fee, which is not subject to
24 refund, before December first of each year.
25 3. The form and content of renewal applications must be determined by the department
26 of financial institutions and a renewal application may be denied on the same grounds
27 as would justify denial of an initial application.
28 4. If a licensee has been delinquent in renewing the licensee's license, the department
29 may charge an additional fee of fifty dollars for the renewal of the license.
30 5. The commissioner may deny an application to renew a license if the licensee no
31 longer meets the criteria for licensure or otherwise fails to comply with this chapter.

1 **Response to department requests.**

2 An applicant, licensee, or other person subject to this chapter shall comply with requests for
3 information, documents, or other requests from the department of financial institutions within the
4 time specified in the request, which must be a minimum of ten days, or, if no time is specified,
5 within thirty days of the request by the department of financial institutions. If the request for
6 information is in regard to a new application or renewal of an existing application and is not
7 received within the time specified in the request, the department may deny the application.

8 **Revocation of license - Suspension of license - Surrender of license.**

9 1. The commissioner may issue upon any licensee an order suspending or revoking a
10 licensee's license if the commissioner finds:

11 a. The licensee has failed to pay the annual license fee under this chapter or any
12 examination fee imposed by the commissioner under the authority of this chapter.

13 b. The licensee, either knowingly or without the exercise of due care to prevent the
14 same, has violated any provision of this chapter or any rule or order lawfully
15 made under the authority of this chapter.

16 c. Any fact or condition existing at the time of the original application for the license
17 which clearly would have warranted the department of financial institutions in
18 refusing originally to issue the license.

19 d. The licensee has failed to maintain the required bond.

20 e. The licensee has failed to maintain registration with the secretary of state if so
21 required.

22 2. The order must contain a notice of opportunity for hearing under chapter 28-32.

23 3. If no hearing is requested within twenty days of the date the order is served upon the
24 licensee, the order is final. If a hearing is held and the commissioner finds that the
25 record so warrants, the commissioner may enter a final order. The final order is final
26 suspending or revoking the license.

27 4. If the commissioner finds that probable cause for revocation of any license exists and
28 that enforcement of the chapter requires immediate suspension of the license pending
29 investigation, the commissioner may enter an order suspending the license for a
30 period not exceeding the time required to serve upon the licensee written notice plus
31 sixty days, pending the holding of a hearing as prescribed in this chapter.

1 5. Any licensee may surrender the licensee's license by providing the department of
2 financial institutions with written notice of its surrender, but the surrender does not
3 affect the licensee's civil or criminal liability for acts committed before the surrender of
4 the license.

5 **Suspension and removal of money broker officers and employees.**

6 1. The commissioner of financial institutions may issue upon a current or former litigation
7 financing officer or employee and upon the licensee involved an order stating:

8 a. That the current or former officer or employee is engaging or has engaged in any
9 of the following conduct:

10 (1) Violating a law, rule, order, or written agreement with the commissioner.

11 (2) Engaging in harassment or abuse, the making of false or misleading
12 representations, or engaging in unfair practices involving litigation financing
13 activity.

14 (3) Performing an act of commission or omission or practice that is a breach of
15 trust or a breach of fiduciary duty.

16 b. The term of the suspension or removal from employment and participation within
17 the conduct or the affairs of a financial corporation, financial institution, credit
18 union, or any other entity licensed by the department of financial institutions.

19 2. The order must contain a notice of opportunity for hearing under chapter 28-32.

20 3. If a hearing is not requested within twenty days of the date the order is served, the
21 order is final. If a hearing is held and the commissioner finds that the record so
22 warrants, the commissioner may enter a final order.

23 4. A contested or default suspension or removal order is effective immediately upon
24 issuance on the current or former officer or employee and upon the licensee. A
25 consent order is effective as agreed. Any current or former officer or employee
26 suspended or removed from employment and participation within the conduct or the
27 affairs of a licensee under this section is not eligible, while under suspension or
28 removal, to be employed or otherwise participate in the affairs of any financial
29 corporation, financial institution, credit union, or any other entity licensed by the
30 department of financial institutions.

1 5. When any current or former officer or employee, or other person participating in the
2 conduct of the affairs of a licensee is charged with a felony in state or federal court
3 which involves dishonesty or breach of trust, the commissioner may immediately
4 suspend the individual from office or prohibit the individual from further participation in
5 the affairs of the licensee, or both. The order is effective immediately upon issuance of
6 the order on the licensee and the individual charged, and remains in effect until the
7 criminal charge is finally disposed of or until modified by the commissioner. If a
8 judgment of conviction, federal pretrial diversion, conviction or agreement to plea to
9 lesser charges, or similar state order or judgment is entered, the commissioner may
10 order the suspension or prohibition be made permanent. A finding of not guilty or other
11 disposition of the charge does not preclude the commissioner from pursuing
12 administrative or civil remedies.

13 **Litigation financing protections.**

- 14 1. A litigation financier may not:
- 15 a. Accept any commissions, referral fees, rebates, or other forms of consideration
 - 16 from any person rendering any services to the consumer;
 - 17 b. Receive or recover any payment that exceeds thirty-six percent of the amount of
 - 18 any judgment, award, settlement, verdict, or other form of monetary relief
 - 19 obtained in the civil action, claim, or cause of action that is the subject of the
 - 20 litigation contract;
 - 21 c. Advertise false or misleading information regarding its products or services;
 - 22 d. Refer or require any consumer to hire or engage any person providing any goods
 - 23 or rendering any services to the consumer;
 - 24 e. Fail to promptly deliver a fully completed and signed litigation financing contract
 - 25 to the consumer and the consumer's legal representative;
 - 26 f. Attempt to secure a remedy or obtain a waiver of any remedy, including
 - 27 compensatory, statutory, or exemplary damages, which the consumer may or
 - 28 may not be entitled to pursue or recover otherwise;
 - 29 g. Offer or provide legal advice to the consumer;

(1) h.

(2) Assign a contract in whole or in part to a third party. Provided,

however, if the company retains responsibility for collecting payment.

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administering, and otherwise enforcing the consumer litigation funding
contract, the prohibition in this subdivision (10) shall not apply to an
assignment:

- (A) to a wholly owned subsidiary of the company;
- (B) to an affiliate of the company that is under common control with
- (C) granting a security interest under Article 9 of the Uniform

Commercial Code or as otherwise permitted by law.

the company; or
Assign a litigation financing contract in whole or in part;

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- 1 i. Report a consumer to a credit reporting agency if insufficient funds remain to
2 repay the litigation financier in full from the proceeds received from any judgment,
3 award, settlement, verdict, or other form of monetary relief obtained in the civil
4 action, claim, or cause of action that is the subject of the litigation financing
5 contract; and
- 6 j. Demand, request, receive, or exercise any right to influence, affect, or otherwise
7 make any decision in the handling, conduct, administration, litigation, settlement,
8 or resolution of any civil action, claim, or cause of action in which the litigation
9 financier has provided litigation financing. All rights remain solely with the
10 consumer and the consumer's legal representative.
- 11 k. Knowingly enter an agreement creating a right for anyone, other than the named
12 parties, counsel of record, or law firm of record, to receive or make any payment
13 that is contingent on the outcome of a claim, or cause of action, the terms of
14 which are to be satisfied by funds directly sourced, in whole or in part, from a
15 foreign entity of concern.
- 16 l. A litigation financier may not enter a commercial litigation financing contract
17 directly or indirectly with a foreign entity of concern or a foreign country or person
18 of concern.
- 19 2. A legal representative who renders any services to the consumer may not have a
20 financial interest in litigation financing and may not receive any commissions, referral
21 fees, rebates, or other forms of consideration from any litigation financier or the
22 litigation financier's employees, owners, or affiliates.
- 23 **Litigation financing contract - Disclosures.**
- 24 1. The terms and conditions of a litigation financing contract must be set forth in a fully
25 completed written contract with no terms or conditions omitted.
- 26 2. The litigation financing contract must identify who is responsible for paying the
27 litigation financier, the source the funds, and when the funds are to be paid to the
28 litigation financier.
- 29 3. The litigation financing contract must state the amount of funding to be provided to the
30 consumer and the future amounts owed to the litigation financier or the method of
31 calculating the amounts owed to the litigation financier.

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- 1 4. The litigation financing contract must reflect all costs and fees and must show the
2 maximum amount a litigation financier may own of the consumer's recovery.
- 3 5. On execution of a litigation financing contract, a litigation financier may not amend the
4 terms or conditions of the litigation financing contract without full disclosure to and the
5 prior written consent of all parties to the litigation financing contract.
- 6 6. A litigation financing contract must set forth the name, physical street address, and
7 mailing address of the litigation financier in the litigation financing contract.
- 8 7. A litigation financing contract must contain the following disclosures that constitute
9 material terms and conditions of the litigation financing contract and must be typed in
10 at least fourteen-point boldface type and be placed clearly and conspicuously
11 immediately above the consumer's signature line in the litigation financing contract:
- 12 IMPORTANT DISCLOSURES -- PLEASE READ CAREFULLY
- 13 1. Right to Cancellation: You may cancel this litigation financing contract without
14 penalty or further obligation within five (5) business days from the date you sign
15 this contract or the date you receive financing from the litigation financier,
16 whichever date is later. You may cancel by sending a notice of cancellation to the
17 litigation financier and returning to the litigation financier any funds received from
18 the litigation financier at the litigation financier's address set forth in this contract.
- 19 1. 2. The Upon written request from the by the consumer and/or consumer's attorney, the litigation
20 financier shall reduce Charges to be a maximum of twenty-five percent (25%) of the gross proceeds
21 from the legal claim.
22 (a) Such written request must include an attestation as to the final amount of the gross
23 proceeds from the legal claim.
- 2419 maximum amount the litigation financier may receive or recover from any
2520 contingent payment may not exceed twenty five percent (25%) of the amount of
2621 any judgment, award, settlement, verdict, or other form of monetary relief
2722 obtained in the civil action, claim, or cause of action that is the subject of this
2823 litigation contract.
- 2924 3. The litigation financier agrees that it has no right to, and will not demand, request,
 receive, or exercise any right to, influence, affect, or otherwise make any decision
 in the handling, conduct, administration, litigation, settlement, or resolution of
 your civil action, claim, or cause of action. All of these rights remain solely with
 you and your legal representative.
4. If there is no recovery of any money from your civil action, claim, or cause of

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~~3025~~ 3426 action, or if there is not enough money to satisfy in full the portion assigned to the

litigation financier, you will not owe anything to the litigation financier.

1 5. You are entitled to a fully completed contract with no terms or conditions omitted
2 prior to signing. Before signing this contract, you should read the contract
3 completely and consult an attorney.

4 8. If the consumer is represented by a legal representative in the civil action, claim, or
5 cause of action that is the subject of the litigation financing contract, the consumer
6 must provide the litigation funding contract to the consumer's legal representative.
7 Upon receipt, the legal representative shall acknowledge in the contract that the legal
8 representative and the legal representative's employer and employees have not
9 received or paid a referral fee or any other consideration from or to the litigation
10 financer and have no obligation to do so in the future.

11 **Litigation financing contracts - Service.**

12 1. If a party or party's attorney initiates a civil action and is a party to a litigation financing
13 agreement, the party or party's attorney shall serve a copy of the litigation financing
14 contract with the complaint.

15 2. If a party or party's attorney is served with a litigating financing contract, the person
16 shall serve a copy of any insurance policy relevant to the civil action to the other party
17 within fourteen days.

18 3. If either party in a civil action enters a litigation financing agreement after the
19 commencement of the civil action, the party shall serve a copy of the agreement on
20 the other party within fourteen days.

21 **Exemptions.**

22 This chapter does not apply to the following:

23 1. A nonprofit entity that provides litigation financing, directly or indirectly, for the benefit
24 of the nonprofit or one or more of its members without receiving, in consideration for
25 the litigation financing:

26 a. The payment of interest, fees, or other consideration; or

27 b. Except for in-house counsel of the nonprofit, any right to recovery or payment
28 from the amount of a judgment, award, settlement, verdict, or other form of
29 monetary relief obtained in the civil action, claim, or cause of action;

30 2. A regulated lender that does not receive, in consideration for loaning money to any
31 person, a right to receive payment from the value of any proceeds or other

1 consideration realized from a judgment, award, settlement, verdict, or other form of
2 monetary relief a person may receive or recover in relation to a civil action, claim, or
3 cause of action.

Effect of Communication on Privileges

4 Communications between a consumer's attorney and a litigation financier
to allow the consumer litigation financier to ascertain that status of a legal
claim or a legal claim's expected value shall not be discoverable by a
person against whom the legal claim is asserted or filed.

Not subject to loan statute

6 A litigation financing transaction that complies with this Article is not a loan
and is not subject to any provision of law governing loans or investment
contracts. To the extent that this Article conflicts with any other law, this
Article supersedes that law for purposes of regulating consumer legal
funding transactions in this State.

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48 Class actions.

59 1. This chapter applies to any civil action filed or certified as a class action in which
610 litigation financing is provided.

711 2. In addition to the disclosure requirements set forth in this chapter, the legal
812 representative of the putative class shall disclose to all putative class members, any
913 relationship between the legal representative and the litigation financier.

1014 3. A class member is entitled to receive from the class counsel a true and correct copy of
1115 the litigation financing contract on request.

1216 Regulatory oversight - Rulemaking - Records.

1317 1. The department of financial institutions shall administer and enforce this chapter. The
1418 department may adopt rules reasonably necessary to carry out this chapter, in
1519 accordance with chapter 28-32. Any hearing held and any orders issued under this
1620 chapter must be in accordance with chapter 28-32. In addition to those powers set
1721 forth in chapter 28-32, the department has additional powers as set forth in this
18 chapter.

1922 2 Insofar as consistent with the provisions of law, the department of financial institutions
2023 may:

2124 a. Determine the qualifications of all applicants based on financial responsibility.

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2225 financial condition, business experience, character, and general fitness which
2326 must reasonably warrant the belief that the applicant's business will be conducted
2427 lawfully and fairly. In determining whether this qualification is met, and for the
2528 purpose of investigating compliance with the chapter, the commissioner may
2629 review and consider the relevant business records and capital adequacy of the
2730 applicant and the competence, experience, integrity, and financial ability of an
2831 individual who is a member, partner, director, officer, or twenty-five percent or
2932 more shareholder of the applicant.
3033 b. Establish codes of ethical conduct for licensees.

- 1 3 Every licensee licensed under this chapter shall keep a record of all sums collected by
2 the licensee and of litigation financing completed as a result of the licensee's efforts
3 for six years from the date of last entry. The records of a licensee may be maintained
4 electronically if the records can be reproduced upon request by the department of
5 financial institutions and within the required statutory time period provided in this
6 section. When a licensee ceases operations for any reason, the licensee shall inform
7 the department of the location of the records. In addition, the licensee shall provide the
8 name of the individual responsible for maintenance of the records.
- 9 4 When it appears to the department of financial institutions either upon complaint or
10 otherwise, that any person has engaged in, is engaging in, or is about to engage in
11 any act or practice or transaction prohibited by this chapter, or by any order of the
12 department issued under this chapter or which is declared to be illegal in this chapter,
13 the department may:
- 14 a. Issue any order that is effective upon issuance, including cease and desist, stop,
15 and suspension orders, which the department deems necessary or appropriate in
16 the public interest or for the protection of the public; provided, however, that any
17 person aggrieved by an order issued under this subsection may request a
18 hearing before the department if the request is made within ten days after receipt
19 of the order. The hearing and any appeal of the hearing must be held in
20 accordance with chapter 28-32.
- 21 b. Apply to the district court of Burleigh County, for an injunction restraining the
22 person and the agents, employees, partners, officers, and directors of the person
23 from continuing the act, practice, or transaction and for the other relief the facts
24 may warrant. In any proceeding for an injunction, the department may apply for
25 and on due showing be entitled to have issued the court's subpoena requiring the
26 appearance of any defendants and their agents, employees, partners, officers, or
27 directors, and the production of the documents, books, and records as may
28 appear necessary for the hearing upon the petition for an injunction. Upon proof
29 of any of the offenses described in this section, the court may grant the injunction
30 as the facts may warrant. The court may not require the department to post a
31 bond.

34 5. The department of financial institutions shall not have the authority to set limits on the charges a litigation financier may charge.

1 **Investigations, subpoenas, and examination authority.**

2 In addition to any authority allowed under this chapter, the commissioner may conduct
3 investigations and examinations as follows:

4 1. The department of financial institutions:

5 a. May make the public or private investigation or examination within or outside this
6 state as it deems necessary to determine whether any person has violated or is
7 about to violate any provision of this chapter or any rule or order, or to aid in the
8 enforcement of this chapter or in the prescribing of rules and forms under this
9 chapter. The licensee shall pay an investigation or examination fee and must be
10 charged by the department of financial institutions at an hourly rate to be set by
11 the commissioner, sufficient to cover all reasonable expenses of the department
12 associated with the visitation provided for by this section. Fees must be
13 deposited in the financial institutions regulatory fund.

14 b. May require or permit any person to file a statement in writing, under oath, or
15 otherwise as the department determines, as to all the facts and circumstances
16 concerning the matter to be investigated or examined.

17 c. May publish information concerning any violation of this chapter or any rule or
18 order under the chapter.

19 2. For the purpose of any investigation, examination, or proceeding under this chapter,
20 the department of financial institutions may administer oaths and affirmations,
21 subpoena witnesses, compel the attendance of witnesses, take evidence, and require
22 the production of any books, papers, correspondence, memoranda, agreements, or
23 other documents or records the department deems relevant or material to the inquiry.

24 3. In the case of a failure or refusal to obey a subpoena issued to any person, the district
25 court, upon application by the department of financial institutions, may issue to the
26 person an order requiring the person to appear before the department, to produce
27 documentary evidence if so ordered, or to give evidence touching the matter in
28 question under investigation or examination. Failure to obey the order of the court may
29 be punished by the court as a contempt of court.

30 4. An individual is not excused from attending and testifying or from producing any
31 document or record before the department of financial institutions, or in obedience to

- 1 the subpoena of the department, or in any proceeding instituted by the department, on
2 the grounds that the testimony or evidence, documentary or otherwise, required of the
3 individual may tend to incriminate the individual or subject the individual to a penalty
4 forfeiture; but no individual may be prosecuted or subjected to any penalty or forfeiture
5 for or on account of any transaction, matter, or thing concerning which the individual is
6 compelled, after claiming the privilege against self-incrimination, to testify or produce
7 evidence, documentary or otherwise, except that the individual testifying is not exempt
8 from prosecution and punishment for perjury or contempt committed in testifying.
- 9 5. For purposes of initial licensing, license renewal, license suspension, license
10 conditioning, license revocation or termination, or general or specific inquiry or
11 investigation to determine compliance with this chapter, the commissioner may
12 access, receive, and use any books, accounts, records, files, documents, information,
13 or evidence, including:
- 14 a. Criminal, civil, and administrative history information, including nonconviction
15 data;
- 16 b. Personal history and experience information, including independent credit reports
17 obtained from a consumer reporting agency described under the Fair Credit
18 Reporting Act [15 U.S.C. 1681a]; and
- 19 c. Any other documents, information, or evidence the commissioner deems relevant
20 to the inquiry or investigation regardless of the location, possession, control, or
21 custody of the documents, information, or evidence.
- 22 6. For purposes of investigating violations or complaints arising under this chapter, or for
23 purposes of examination, the commissioner may review, investigate, or examine any
24 licensee or person subject to this chapter, as often as necessary in order to carry out
25 the purposes of this chapter.
- 26 7. Each licensee or person subject to this chapter shall make available to the
27 commissioner upon request the books and records relating to the operations of the
28 licensee or person subject to this chapter. The commissioner shall have access to the
29 books and records and interview the officers, principals, mortgage loan originators,
30 employees, independent contractors, agents, and customers of the licensee or person
31 subject to this chapter concerning their business.

- 1 8. Each licensee or person subject to this chapter shall make or compile reports or
2 prepare other information as directed by the commissioner to carry out the purposes of
3 this section, including:
- 4 a. Accounting compilations;
5 b. Information lists and data concerning litigation financing transactions in a format
6 prescribed by the commissioner; or
7 c. Any other information deemed necessary to carry out the purposes of this
8 section.
- 9 9. In making any investigation or examination authorized by this chapter, the
10 commissioner may control access to any documents and records of the licensee or
11 person under investigation or examination. The commissioner may take possession of
12 the documents and records or place a person in exclusive charge of the documents
13 and records in the place in which the records are usually kept. During the period of
14 control, an individual may not remove or attempt to remove any of the documents and
15 records except pursuant to a court order or with the consent of the commissioner.
16 Unless the commissioner has reasonable grounds to believe the documents or
17 records of the licensee have been, or are at risk of being altered or destroyed for
18 purposes of concealing a violation of this chapter, the licensee or owner of the
19 documents and records may have access to the documents or records as necessary
20 to conduct its ordinary business affairs.
- 21 10. To carry out the purposes of this section, the commissioner may:
- 22 a. Retain accountants or other professionals and specialists as examiners, auditors,
23 or investigators to conduct or assist in the conduct of examinations or
24 investigations;
- 25 b. Enter agreements or relationships with other government officials or regulatory
26 associations to improve efficiencies and reduce regulatory burden by sharing
27 resources, standardized or uniform methods or procedures, and documents,
28 records, information, or evidence obtained under this section;
- 29 c. Use, hire, contract, or employ publicly or privately available analytical systems,
30 methods, or software to examine or investigate the licensee, individual, or person
31 subject to this chapter;

- 1 d. Accept and rely on examination or investigation reports made by other
2 government officials, within or without this state; and
- 3 e. Accept audit reports made by an independent certified public accountant for the
4 licensee or person subject to this chapter in the course of that part of the
5 examination covering the same general subject matter as the audit and may
6 incorporate the audit report in the report of the examination, report of
7 investigation, or other writing of the commissioner.
- 8 11. The authority of this section remains in effect, whether a licensee or person subject to
9 this chapter acts or claims to act under any licensing or registration law of this state or
10 claims to act without the authority.
- 11 12. A licensee or person subject to investigation or examination under this section may not
12 knowingly withhold, abstract, remove, mutilate, destroy, or secrete any books, records,
13 computer records, or other information.
- 14 **Act violation - Unenforceable contract.**
- ~~15~~ Any willful violation of this chapter by the litigation financier renders the litigation financing contract
~~16~~ unenforceable by the litigation financier or any successor-in-interest to the litigation financing
~~17~~ contract.
- ~~18~~ **Penalty.**
- ~~19~~ 1. Any person willfully violating any provision of this chapter or any rule or order of the
~~20~~ department of financial institutions made under this chapter or who engages in any
~~21~~ act, practice, or transaction declared by any provision of this chapter to be unlawful is
~~22~~ guilty of a class C felony.
- ~~23~~ 2. The commissioner may impose a civil money penalty not to exceed one hundred
~~24~~ thousand dollars for each occurrence and one thousand dollars per day for each day
~~25~~ the violation continues after issuance of the order against any person who violates a
~~26~~ law, rule, written agreement, or order under this chapter.
- ~~27~~ 3. An interested party may appeal the assessment of a civil money penalty under the
~~28~~ provisions of chapter 28-32 by filing a written notice of appeal within twenty days after
~~29~~ service of the assessment of civil money penalties.
- ~~30~~ 4. A civil money penalty collected under this section must be paid to the department of
~~31~~ financial institutions and deposited in the financial institution's regulatory fund.

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1 **Confidentiality.**

- 2 1. Except as otherwise provided in Public Law 110-289, section 1512, the requirements
3 under any federal law, chapter 44-04, or section 6-01-07.1, regarding the privacy or
4 confidentiality of any information or material provided to the nationwide multistate
5 licensing system and registry, and any privilege arising under federal or state law,
6 including the rules of any federal or state court, with respect to the information or
7 material, continue to apply to the information or material after the information or
8 material has been disclosed to the nationwide multistate licensing system and registry.
9 Any information and material may be shared with all state and federal regulatory
10 officials with mortgage industry oversight authority without the loss of privilege or the
11 loss of confidentiality protections provided by federal law, chapter 44-04, or section
12 6-01-07.1.
- 13 2. For these purposes, the commissioner may enter agreements or sharing
14 arrangements with other governmental agencies, the conference of state bank
15 supervisors, the American association of residential mortgage regulators, or other
16 associations representing governmental agencies.
- 17 3. Information or material that is subject to a privilege or confidentiality under
18 subsection 1 is not subject to:
- 19 a. Disclosure under any federal or state law governing the disclosure to the public of
20 information held by an officer or an agency of the federal government or the
21 respective state; or
- 22 b. Subpoena or discovery, or admission into evidence, in any administrative
23 process, unless with respect to any privilege held by the nationwide multistate
24 licensing system and registry with respect to the information or material, the
25 person to whom the information or material pertains waives, in whole or in part, in
26 that privilege.
- 27 4. The commissioner shall take all necessary steps, under any applicable law or rule, to
28 protect the disclosure of information or material subject to a privilege or confidentiality
29 under subsection 1. Records subject to a privilege or confidentiality under
30 subsection 1 may be required to be disclosed only pursuant to an order of the court.

- 1 The court ordering the disclosure shall issue a protective order to protect the
2 confidential nature of the records.
- 3 5. Application of chapter 44-04 or section 6-01-07.1, relating to the disclosure of
4 confidential supervisory information or any information or material described in
5 subsection 1 which is inconsistent with subsection 1, is superseded by the
6 requirements of this section.
- 7 6. Except for provisions of chapter 6-08.1 that are inconsistent with this chapter, chapter
8 6-08.1 applies to all money brokers licensed under this chapter.
- 9 **SECTION 2. APPLICATION.** This Act applies to any civil action commenced after the
10 effective date of this Act.