Senate Standing Committee on Consumer Protection
Public Hearing on Lawsuit Lending
Sponsors Senator Chris Jacobs and Senator Robert Ortt

Van Buren Hearing Room A, Legislative Office Building, 2nd Floor
Albany, New York 12210

May 16, 2018

I. **Introduction**
12:00 – 12:30

II. **Schedule of Guest Speakers**
12:30 – 3:30

a. **Tom Stebbins**, Executive Director & **Adam Morey**, Manager of Public Affairs, Lawsuit Reform Alliance of New York

b. **Kelly Gilroy**, Executive Director, American Legal Finance Association

c. **Maya Steinitz**, Professor of Law, University of Iowa College of Law and Visiting Professor of Law, Harvard Law School

d. **Anthony J. Sebok**, Professor of Law Benjamin N. Cardozo School of Law and Visiting Professor, Cornell Law School

e. **Honorable Anthony L. Coehlo**, Retired Member of U.S. House of Representatives; Member, Board of Directors, Epilepsy Foundation

f. **Lev Ginsburg,** Director of Government Affairs, The Business Council of New York State, Inc.

g. **James R. Copland,** Senior Fellow Director, Legal Policy, The Manhattan Institute

III. **Closing Remarks**
3:30 – 4:00

LRANY | Lawsuit Reform Alliance of New York
Justice. Fairness. Common Sense.

TESTIMONY TO THE SENATE STANDING COMMITTEE ON CONSUMER PROTECTION

Chairman Jacobs, and members of the committee:

Thank you for the opportunity to provide testimony regarding third party lawsuit financing.

Lawsuit cash advance companies currently operate in New York unchecked and without meaningful consumer protections. This is an obvious disservice to some of the state's most vulnerable citizens – those who have allegedly already fallen victim to the actions of negligent party. This industry targets New Yorkers when they are at their most desperate – when they are injured and may be unable to work or afford their rent.

A quick internet search for lawsuit loans turns up hundreds-of-thousands of results from companies that offer cash advances for pending lawsuits and claims. Many funders promise "cash-now," often offering approval in just one day.

Interest is often compounded monthly, with annual rates that can exceed 100%. An individual who has entered into one of these lending contracts may ultimately settle or win a lawsuit only to take home a tiny fraction of their award – or in some cases, none at all. The New York Post recently covered the story of Theresa Guss, a woman who borrowed $21,300 from two cash advance firms, LawBuck$ and MFL Case Funding. She passed away before she ever saw a cent of the $2.1 million settlement she received from a slip-and-fall case against the city because the companies had put liens on the total amount – nearly 100 times the original principal on the loan.

Lawsuit lending companies claim that because the advances are contingent on the borrower winning the case, the product they offer is risky and should be classified as an investment, not a loan. This mischaracterization allows them to charge interest rates that are well beyond New York's civil and criminal usury rates. The level of risk that actually exists here is questionable, and nowhere near anything that could justify interest rates over 100%. There is no evidence to suggest that the rate of default on lawsuit loans is any higher than it is for other financial products. As LawCash executives told Crain's New York Business, the company "uses strict underwriting screening rules that ensure only about 4% of the cases it advances money on are lost in court."

In one illustrative example, Brooklyn resident Joseph Gill borrowed $4,000 from LawBuck$ in order to cover medical expenses while his lawsuit was pending in court. By the time Gill's lawsuit settled five years later, LawBuck$ demanded repayment to the tune of $116,000—29 times the original amount he was advanced. The judge who presided over the case in Brooklyn Supreme Court was incredulous and ordered LawBuck$ to explain its loan agreement. In court papers, the judge presiding over the case called the interest rate "usurious, and if not usurious, then unconscionable."

In another case, Carolyn Williams, a former nurse in the midst of a disability lawsuit with her former employer, borrowed $5,000 against her case to pay medical bills. The lender, US Claims, did not inform Williams or her lawyer of the rate of interest to be charged on the loan, and it was not until nearly a year later that she discovered the annual rate was 76 percent. Williams told the New York Times that she was "definitely misled" and "never expected that high of a rate." After three years, Williams' case remained unresolved and her loan debt had ballooned to nearly $19,000.

Due to the many the legal and ethical considerations surrounding consumer lawsuit financing, state officials around the country have begun to look into and investigate the legitimacy of the industry. Colorado's attorney general recently announced that she will be sending out restitution checks from a $2.3 million settlement her office reached with LawCash and Oasis Legal Finance. Here in New York, the Office of the Attorney General joined with the Consumer Finance Protection Bureau to file a complaint last year against RD Legal Funding, a New Jersey-based lawsuit cash advance firm, for allegedly taking advantage of 9/11 first responders and NFL players with concussion related complications by offering high interest advances on expected payouts from legal settlements and compensation funds.

The court filings for this enforcement action highlight the case of an unnamed 9/11 first responder who fell victim to this scheme when she was advanced $18,000 while awaiting a payout from the Ground Zero compensation fund, after six months she owed $33,000—an 83% increase in less than a year.

Sadly, as the media outlets continue to reveal, the abuse is more widespread than just the stories mentioned here. A New York Times investigation has uncovered lenders advertising directly to women with claims in the #MeToo movement. Another report uncovered a scheme in which lawyers and lenders convince women to get often unnecessary and potentially dangerous surgeries in order to increase the value of litigation. This controversial practice is allowed to continue because lawsuit lending and surgical funding are not adequately regulated under New York law.

This is why the Lawsuit Reform Alliance of New York supports S3911A, a bill introduced by Senator Rob Ortt (R-Lockport) and Assemblyman William Magnarelli (D-Syracuse) that would protect consumers from usurious interest rates by requiring the lawsuit lenders and financers to comply with existing lending laws that cap consumer interest rates.

To further reduce harm to individuals and protect the integrity of the civil justice system, the bill also ensures that lawyers do not have overlapping financial interest in lending outfits, or arrangements to collect lucrative referral fees. Such partnerships can encourage frivolous filings and prolong litigation that should have settled sooner. According to the New York Times, federal prosecutors are currently investigating whether some of the existing relationships that lawyers have with lenders constitute illegal kickback schemes.

For the above reasons, we urge members of this committee to swiftly discharge S3911A for consideration by the full Senate. We also urge the Assembly and the Governor's office to pass this legislation and sign it into law.

Thank you for your consideration.

Sincerely,

Tom Stebbins

Executive Director
Lawsuit Reform Alliance of New York

Adam Morey

Public Affairs Manager
Lawsuit Reform Alliance of New York

ALFA
AMERICAN LEGAL
FINANCE ASSOCIATION

May 16, 2018

Testimony

Of

The American Legal Finance Association ("ALFA")

Presented by

Kelly Gilroy

Executive Director

Before

The New York State Senate Committee

on Consumer Protection

818 Connecticut Avenue NW, STE 1100, Washington, DC 20006 / www.americanlegalfin.com

Chairman Jacobs and members of the committee, I would like to thank you for the opportunity to appear before you today in your examination of consumer legal funding.

My name is Kelly Gilroy. I am the Executive Director of the American Legal Finance Association (ALFA). ALFA is a national trade association that represents the leading companies that provide funding to consumers involved in personal injury litigation. ALFA was formed in 2004 and is dedicated to ensuring fair, ethical, and transparent funding standards within the legal funding industry. Since its inception, ALFA has worked successfully with legislators and regulators to develop sound public policy addressing this service.

By way of background, consumer legal funding helps consumers who have a pending legal claim access funds to help them make ends meet while they wait for a fair settlement in a case. This money is used for life needs like buying groceries and paying rent and does not fund the litigation. In fact, all legislation that we have supported, including the bill introduced by Assemblyman Dilan, prohibits any funds obtained through this product being used to pay for legal cost such as attorney fees or other expense related to pursuing the case.

To be clear, ALFA is supportive of strong regulation and has worked with several state legislatures to properly regulate the industry. Specifically, ALFA has worked with legislators in Oklahoma, Tennessee, Indiana and Vermont in developing law, regulation and oversight of consumer legal funding. We are fully committed to protecting consumers while preserving access to this financial alternative. We support laws that require licensure, assessment of character and fitness, financial soundness of the company, and transparency and clarity in contracts, with oversight by and reporting transactions to a government regulator. That is why ALFA supports Assemblyman Erik Dilan's bill which does all of these things while also requiring notices and disclosures to consumers and prohibiting companies from paying referral fees or funding litigation.

It's important to remember that our members are engaged in non-recourse transactions, which means that companies can only be paid back from the proceeds of a settlement. In the event that there are no proceeds or insufficient proceeds, the consumer owes the company nothing. Our members don't garnish wages, impact credit, or repossess cars or homes. If you receive no proceeds, you pay nothing back. It's completely non-recourse.

While well intentioned, Senator Ortt's legislation is not the right solution to address this process, because in its current form the Ortt bill would effectively eliminate legal funding as an option for consumers in New York.

Legal funding is not for every person and certainly not for every case, but under certain circumstances it can be an important tool to help navigate the financial challenges that victims in search of justice need. Without it, victims facing financial pressure in their daily lives – often due to the harm at issue in their lawsuit – are more likely to accept unfair settlement offers out of immediate financial necessity. For this reason, appropriately regulated legal funding should be preserved as an option for those New Yorkers who are seeking justice.

Thank you.

HARVARD LAW SCHOOL

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May 14, 2018

Testimony on Third Party Financing of Lawsuits

Greetings. I thank the committee for giving me the opportunity to provide feedback on bills S. 3911 and A. 8966. My name is Maya Steinitz, and I am a Professor of Law at the University of Iowa College of Law and a Visiting Professor at Harvard Law School for both Spring and Fall of 2018. Third party litigation financing is one of my main fields of expertise as an academic.

I have published papers regarding Third Party financing of both domestic and international disputes, and have written extensively regarding the set up and design of litigation financing contracts.[1] I and a co-author have designed a model litigation financing contract, the development and unveiling of which is detailed on the website litigationfinancecontract.com. In this website, we examined issues such as state regulation of litigation financing, as well as the appropriate and optimal provisions which should enter into a litigation finance agreement. At Harvard Law School this past semester, I taught a course titled "Litigation and Law Firm Finance and the Future of the Legal Profession" which examined the growth of third party litigation financing and its potential implications.

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[1] *See*, Maya Steinitz, *Incorporating Legal Claims*, 90 Notre Dame L. Rev. 1155, 1155-1210 (2015); Maya Steinitz & Abigail C. Field, *A Model Litigation Contract*, 99 Iowa L. Rev. 711, 711-772 (2014); Maya Steinitz, *How Much is that Lawsuit in the Window? Pricing Legal Claims*, 66 Vand. L. Rev. 1890, 1890-1924 (2013); Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 455-518 (2012); Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 Minn. L. Rev. 1269, 1269-1338 (2011); Maya Steinitz & Joseph Matthews, *Contingent Fees and Third Party Funding in Investment Arbitration Disputes*, 4 Transnat'l Disp. Mgmt. J. (2011).

Third party litigation financing is a service with great potential. If harnessed in the correct way, litigation financing can help indigent plaintiffs access justice and receive remediation for harms. For many potential plaintiffs with strong cases, legal costs serve as a barrier to the full achievement of justice in their particular circumstance. Third party litigation funders could help plaintiffs to overcome this financial barrier, thus improving access to justice for those in need of it. The potential for market competition between existing contingency fee lawyers and third party litigation funders also has the potential to lower prices for consumers of legal services across the board. Litigation finance, then, has the potential to positively impact the legal market for consumers and civil justice more broadly.

However, like all financing, litigation financing is open to abuse. Everyday consumers are particularly vulnerable, and an appropriate consumer protection regime needs to be put in place for consumer litigation financing.[2] The pending bills, therefore, are to be commended. My comments will seek to highlight arrangements that can be put in place to ensure that litigation finance is not only economically viable but that consumers receive the full benefit of this new form of financing.

Financing Scenarios

Before discussing the legislation, I would like to clarify the distinction between two different kinds of litigation financing: commercial litigation finance and consumer litigation finance. Commercial litigation finance deals with litigation financing provided to corporations for commercial disputes, whereas consumer litigation finance deals with litigation financing provided to individual consumers, often in the context of torts.[3] The reason why I note this distinction is to highlight the greater

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[2] Examples of scholarship discussing the types of available consumer litigation finance options and their effects on consumers as well as on the civil justice system include: Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again*, 61 UCLA L. Rev. Disc. 110 (2013) (describing the evolution of funding available to plaintiff-side personal injury firms and identifying the ways in which third party funders in this space may alter the American litigation landscape); Paige Marta Skiba & Jean Xiao, *Consumer Litigation Funding: Just Another Form of Payday Lending?*, 80 L. & Contemp. Probs. 117 (2017) (comparing and contrasting consumer litigation with payday lending); and David R. Glickman, *Embracing Third Party Litigation Finance*, 43 Fla. St. U. L. Rev. 1043 (2017) (detailing concerns that consumer litigation finance will lead to exploitation of unsophisticated consumers and that such financiers will seek to take control of litigation decisions).

[3] Additional contexts include workers compensation claims and divorce. With regards to workers compensation claims, *see*, *Get Pre-settlement Funding for your Worker's Comp Claim*, LAWCASH (2017) https://www.lawcash.net/get-pre-settlement-funding-for-your-workers-comp-claim/; *Workers Compensation Facts*, LAWCAPITAL (Mar. 15, 2014), https://lawcapital.com/types-of-cases-considered/workers-compensation (both websites of litigation

importance of regulation surrounding consumer finance, which often deals with less sophisticated litigants who, unlike business litigants, are not represented in their dealings with finance providers. In particular, many corporations have extensive in-house legal teams which can examine the provisions of any litigation financing contract to ensure fairness and assess competitiveness. This is often not the case with individuals, many of whom have little understanding of finance and of the litigation process, let alone the interactions between the two; who may have little or no bargaining power; and who may bring legal action (especially in torts) during times of personal crisis. The regulatory issues raised in the commercial litigation financing context are, therefore, very different than those raised in the consumer litigation finance context. Given the scope of the bills, only the latter are addressed herein.

The two bills are at the same time similar and quite different. The Assembly bill does not, strictly speaking, seek to regulate *litigation* finance; rather it would regulate financing the consumer's costs while the litigation is pending. Specifically, the bill forbids litigation finance companies from paying court costs or attorneys' fees, and requires the borrower to have a contingency fee arrangement with the attorney.[4] Presumably that attorney is also covering the costs of court reporters, transcripts, and experts as needed. That is, the costs of litigation. The Senate bill lacks this prohibition and would allow the financing of the actual litigation. Indeed, some funders in the marketplace already finance attorneys' costs as well as plaintiffs' costs. Such financing, if allowed, can create competition for financing vis-à-vis contingency fees and may, therefore, reduce the cost of litigation finance for consumers. It is therefore, in my view, preferable to permit it.[5] And if it is permitted, it should be covered by the protections contemplated by the bills.

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funding companies offering funding for worker's compensation claims). With respect to divorce finance, *see*, *Litigation Funding for High Value Divorce*, WOODSFORD LITIGATION FUNDING (2018), https://woodsfordlitigationfunding.com/case-studies/litigation-funding-for-high-value-divorce/ (litigation funding company offering funding for divorce proceedings); Jeff Landers, *Can't Afford Your Divorce? New Firms Specialize in Divorce Funding*, FORBES (Jan. 15, 2015, 03:24 PM), https://www.forbes.com/sites/jefflanders/2015/01/15/cant-afford-your-divorce-new-firms-specialize-in-divorce-funding/#29b3d2457715 (detailing other companies that offer litigation funding for divorce proceedings).

[4] *See*, A. 08966 §899-ccc(1)(g), 201st State Assemb., (N.Y.).

[5] The following states' statutes regulating consumer litigation finance implicitly permit consumer litigation financing of legal fees and costs: Maine, *see* Me. Rev. Stat. tit. 9-A, § 12-101 (2008); Nebraska, *see* Neb. Rev. Stat. Ann. § 25-3301 (2010); Ohio, *see* Ohio Rev. Code Ann. § 1349.55 (2008) and; Tennessee, *see* Tenn. Code Ann. § 47-16-102 (2014).

The bills do not contemplate, and therefore my comments do not address, another, new, development in the marketplace: portfolio financing. In this form of financing, law firms 'pool' a number of cases together and contract directly with a financier to receive law firm financing tied to the performance of the entire pool.[6] These arrangements also bring up their own set of issues (for example, whether or not the clients are aware that their cases are being financed in whole or in part by a third party rather than by the law firm and/or whether they are aware of the terms of the financing and how such terms might affect case strategy).

Finally, the bills do not contemplate and therefore my comments do not address crowdfunding of litigation, which has also emerged in recent years.[7]

Defining the Scope of Protection by Focusing on the Characteristics of the Plaintiff Rather than the Amount of the Financing

The Senate version of the bill exempts contracts offering non-recourse financing of more than $500,000 from its scope, while the Assembly version provides no such exemption. In my opinion, the Senate version of the bill represents the correct direction, in the sense that the Senate bill attempts to focus its protection on those individuals who are less sophisticated litigants by exempting high dollar litigation financing contracts from its application, thereby focusing on the types of smaller scale and more vulnerable litigants who can both benefit the most from the access to justice facilitated by litigation financing, but also have the greatest risk of being exploited due to lack of sophistication with respect to finance and/or litigation. Nonetheless, it would seem that a dollar amount is an imperfect way to capture the difference between different kinds of litigation finance consumers. One can envision, for example, an indigent plaintiff with a large wrongful death claim that costs more than $500,000 to pursue. One can similarly envision an entrepreneur, with competent counsel, seeking $250,000 for a commercial claim.

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[6] For articles discussing the pooling of cases for consumer litigation finance, *see generally* Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance*, 21 Stan. J. L. Bus. & Fin. 98 (2015) and Jonathan T. Molot, *A Market In Litigation Risk*, 76 U. Chi. L. Rev. 367 (2009).

[7] Regarding the crowdfunding of litigation, *see generally* Manuel A. Gomez, *Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Tool*, 49 U.S.F.L. Rev. 307 (2015) (general overview of costs and benefits); Michael Elliott, *Trial by Social Media: The Rise of Litigation Crowdfunding*, 84 U. Cin. L. Rev. 529 (2016) (describing Lexshares, a litigation crowdfunding company).

I therefore suggest *protecting 'unsophisticated plaintiffs.'* In making this suggestion, I am drawing from the field of securities regulations wherein the law distinguishes between "sophisticated investors" and "unsophisticated investors."[8] Specifically, I would suggest that the legislature consider amending sections 2 and 3 of the Senate bill to read as follows: "'Consumer litigation funding company' shall mean a person or entity that enters into a consumer litigation funding contract to provide non-recourse funding to an unsophisticated plaintiff" and "'Consumer litigation funding contract' shall mean a contract to provide non-recourse funding to an unsophisticated plaintiff." These definitions would more accurately capture the intention and spirit of the $500,000 restriction, which is to, in fact, ensure that the bill is focused on protecting unsophisticated, vulnerable plaintiffs in the marketplace.

Ensuring Appropriate Plaintiff Recovery: A Statutory "Minimal Recovery" Approach

It is critically important that third party litigation does not lead to a drastic reduction in plaintiffs' recovery in lawsuits since its entire rationale is access to justice, namely, ensuring that individuals of limited means can seek and receive remediation for harms. Particularly in the cases of vulnerable populations, and of personal injuries and claims, it is important that a significant portion of the recovery would be used to remediate the harm to the plaintiff. The concern is that the combination of the compensation of the third party litigation funders and the attorneys' contingency fees would, separately or combined, leave the wronged or injured plaintiffs without meaningful recovery and remediation.[9] To achieve this goal, the bills focus on the methodology through which the funders' return is calculated; the Senate's bill sets a limit on the percentage of the return and the Assembly bill

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[8] *See* 17 CFR §230.501. In that context, there has developed a rich jurisprudence and literature on how to assess financial sophistication which courts considering consumer litigation finance arrangements could draw upon. For a description and analysis of the "sophisticated investor" concept, *see, e.g.,* C. Edward Fletcher III, *Sophisticated Investors Under the Federal Securities Laws*, 1988 Duke L. J. 1081, 1081-1154 (1988).

[9] An example of this can be found in the so-called Lago Agrio litigation between Chevron and a group of Ecuadorian plaintiffs, in which Burford Capital, a litigation finance company, entered into an agreement to fund the post-judgment phase of this transnational mass tort litigation. The potential for *de minimis* recovery for the plaintiffs under the arrangement has been summarized as follows: "What if the case settles for less than a [billion]? Then Burford gets 98.25% of "Net Recoveries" after paying $2.5 million to another outside investor… and certain expenses of other lawyers. But it doesn't stop there. Should the Ecuadorean villagers decide to accept less than $1 billion from Chevron, another clause two pages away reveals that the "Net Recovery" is deemed to be the "Settlement Amount." In other words, if the outside funder isn't happy with the amount the villagers accept, it gets $55.5 million — a 270% return on its money — before the villagers get a dime." *See* Daniel Fisher, *Litigation Finance Contract Reveals How Investors Back Lawsuits* FORBES, July 6, 2011.

requires a flat rate. I propose that, rather than focusing on the financiers' return formula, the statute directly guaranty *a minimum return to the plaintiff*.

If the suggestion above to allow funders to fund the legal fees and costs is accepted, then in order to guarantee this minimum return for the plaintiff, the focus will need to broaden to include both the contingency fees of attorneys and the litigation funders' returns, and ensure that the returns of both lawyer-financiers and third party-financiers *combined* do not exceed the plaintiff's minimum recovery.

Currently, return on lawyers' litigation financing – the contingency fee – are capped in New York at a third of the total recovery, barring extraordinary circumstances.[10] If funders are allowed, as the bills currently envision, funding living expenses and similar expenses which lawyers are prohibited from advancing their clients, the combined maximum return to all financiers (lawyers and funders) should be somewhat higher than a third but, to keep the spirit of the current limitations on returns on litigation finance, should probably not exceed half of the recovery.

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[10] More precisely, New York's rules capping contingency fees have been summarized as follows:

> "In New York [] each of the intermediate appellate courts... adopted the fee caps... The fee caps apply to "any claim or action for personal injury or wrongful death, other than one alleging medical, dental or podiatric malpractice." All of the New York rules provide that a contingency fee will be "deemed to be fair and reasonable" if it satisfies one of two schedules. One schedule, Schedule B, applies if the original agreement set a contingency fee "not exceeding 331/3 percent of the sum recovered." ... The other schedule, Schedule A, applies when there is no contract providing for a flat fee less than or equal to one-third. Schedule A requires a contingency fee to be less than or equal to the following tiered standard: "(i) 50 percent on the first $1,000 of the sum recovered, (ii) 40 percent on the next $2,000 of the sum recovered, (iii) 35 percent on the next $22,000 of the sum recovered, (iv) 25 percent on any amount over $25,000 of the sum recovered." Contingency fees that meet neither of these two schedules "constitute the exaction of unreasonable and unconscionable compensation." Like the New Jersey rule, all of the New York rules also allow the attorney to apply for higher fees. But in New York, attorneys can only seek higher fees in "extraordinary circumstances." Notably, an attorney cannot claim extraordinary circumstances if she originally agreed to a flat fee equal to or less than one-third. "

See Monica Hughes, *Applying State Contingency Fee Caps in Multidistrict Litigation (MDL) Settlements*, 91 Tx. L. Rev. 961, 964-965 (2013).

By comparison, the CEO of the commercial litigation financier Bantham IMF, one of the world's oldest and largest litigation financiers, has stated that ""We won't do a case [] where we don't think the client will get 50% of their recovery." He went on to report (with deserved pride) that during its thirteen-year tenure in Australia, Bentham has seen its clients receive at least 65% of their settlements." *See*, Dylan Beynon, *From the Words of Litigation Funding Company Bentham IMF*, MIGHTY (July 10, 2015), https://www.mighty.com/blog/words-litigation-funding-company-bentham-imf.

Therefore, if my suggested approach is adopted, the statute should ensure a minimum recovery of no less than 50%, barring extraordinary circumstances, to the plaintiff. This can be achieved by including the following provision: "Barring extraordinary circumstances, the consumer shall receive no less than 50% of the Net Recovery."

Such a guarantee would necessitate a definition of "Net Recovery." A suggested definition is: "The "Net Recovery" is the total amount awarded to the consumer less the disbursements of the litigation--including filing fees, transcript costs, expert witness fees, and similar expenses--advanced by the attorney. The charges of the consumer litigation finance company and any attorneys' fees shall not be included in the calculation of the Net Recovery."

The minimum recovery protection can stand on its own because it is the most direct way to protect the plaintiff's recovery. But, it may be beneficial to add, alongside it, a cap based on either a flat fee or an interest rate. That would help ensure that the minimum does not become a *de facto* maximum.

Financial Advice by Lawyers: Narrow Exceptions to Allow Plaintiffs the Benefit of Conflict-free Input on Pricing

The prohibition by the Assembly bill on attorneys providing financial advice is advisable. Attorneys are not necessarily qualified to give such advice and taking on such advising may create conflicts given that attorneys are likely to have repeat relationships with certain funders. However, although the exception itself is generally prudent, the legislature should consider making two exceptions to this broad rule.

One exception would be for advice relating to the rates available by different litigation finance companies. The other, would be for advice on the payment formula that may be most advantageous to the plaintiff. For example, if the final statute does not mandate a flat rate or a percentage return, an attorney may be well positioned to advise the client on which of the two would be best for her individual case. The reason this is so is because the expected duration of the litigation will likely be the most important factor to consider and the attorney will be in the best position to assess what that duration might be.

Jurisdiction

The Assembly bill defines "Consumer," ensuring this law would apply only to natural persons residing in or domiciled in New York with a pending claim. Having such a definition is wise, as is the limitation of the protection to natural persons; however, I encourage you to consider expanding the definition to protect New Yorkers with claims *and* citizens of other states who are financing a claim pending in New York state courts. Further, depending on New York's general approach to the regulation of its corporate citizens when it comes to consumer protection, it may also be advisable to extend the obligations to all New York-based funders.

Prohibition of Prepayment Penalties, Registration Requirements and Right of Rescission

Pre-payment fees are harmful to consumers, and therefore prohibiting them is advisable in a bill aimed at protecting consumers.

Registration in the model of the Assembly bill would, similarly, be very useful. The required transparency would not only deter bad acting, but would also allow ongoing research into litigation finance which, in turn, will enhance both market efficiency and informed decision-making by consumers and their advisors.

Right of rescission is a protection afforded by almost every state that has legislated on this topic,[11] and is advisable in the context of consumer litigation finance, where a plaintiff is likely injured and unable to work and is therefore in a particularly difficult bargaining position.

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[11] States which offer the protection include Nebraska, *see* Neb. Rev. Stat. Ann. § 25-3303 (2010); Maine, *see* Me. Rev. Stat. tit. 9-A, § 12-101 (2008); Ohio, *see* Ohio Rev. Code Ann. § 1349.55 (2008); Oklahoma, *see* Okla. Stat. Ann. tit. 14A, § 3-806 (2013); Tennessee, *see* Tenn. Code Ann. § 47-16-104 (2014); Vermont, *see* Vt. Stat. Ann. tit. 8, § 2253 (2016). Every statute requires the consumer to give 5 business days notice for rescission.

Conclusion

Litigation financing has the potential to expand access to justice for plaintiffs who need it the most. Indigent and middle class plaintiffs are the ones who stand to gain the most from a properly regulated litigation finance system. By encouraging the right mix of regulation, competition, information, and reputational markets in this sphere, the legislature can help promote access to justice while curbing the worst forms of abuse. My comments have focused on the need to protect the class of indigent and middle income plaintiffs, or, as I call them, the "unsophisticated plaintiffs." These are the plaintiffs who both need access to litigation finance, as well as protection from predatory practices.

Thank you for affording me this opportunity to comment on bills S. 3911 and A. 8966.

Respectfully,

Prof. Maya Steinitz

Visiting Professor of Law
Harvard Law School

Professor and Bouma Family Fellow in Law
The University of Iowa College of Law

Testimony

Of

Anthony Sebok

Before

The New York State Senate Committee

on Consumer Protection

May 16, 2018

Thank you for giving me the opportunity to testify before the Senate Standing Committee on Consumer Protection. My name is Anthony Sebok. I am currently a visiting professor for law at Cornell Law School. I am a tenured professor of law the Benjamin N. Cardozo School of Law at Yeshiva University in New York City, as well as the co-director of the Jacob Burns Center for Ethics in the Practice of Law. I have been a visiting professor or have taught at the law schools of Columbia and Fordham Universities, as well as at the school of public policy at Princeton University.

I have studied litigation finance for over a decade; I was there at the birth of the modern litigation finance industry. That means, and I say this with pride, that I have served as a consultant for many stakeholders, including commercial litigation finance companies, trade associations like ALFA, and the American Bar Association. I know a lot about this area of law – and because I know a lot about this area of law, I have opinions which, I think, are based on years of experience, expertise, and judgment. Here is my bottom line. Litigation finance makes sense for Americans. It is working for American companies, big and small. It is working for American consumers. But, it is a new thing. The markets have grown very fast – certainly faster than our ability to study and regulate them. But that is changing. We have studies and know how to protect consumers.

Ronen Avraham, of the University of Texas School of Law, and I conducted the first large scale study of consumer litigation finance in the United States. We reviewed over 200,000 individual transactions between one of the largest consumer litigation finance companies in the country and individual litigants with lawsuits. Our study is being published by the Cornell Law Review this fall, and has been already presented at academic conferences around the world.

I think we can all agree that the debate over protecting consumers in litigation finance is not about whether they should be protected, but how. What is being overlooked in the debate is that consumers face different dangers in the marketplace and there is no "one size fits all" solution for every danger consumers face. The solution proposed by many critics of litigation finance is, to put it bluntly, a price control. Price controls aren't working very well in Venezuela today for consumers, and if they are adopted as proposed in S. 3911, they will not work well for New York consumers either, for the same reason – because the product won't be offered for sale at all.

There is a lot of confusion about what label to use when talking about consumer litigation finance. Words matter, but the reality behind the words matters even more. As a lawyer, I know that right now, in New York, there are many judicial opinions that make it clear that consumer litigation finance is not a form of lending. But the point is not that the courts said something; the point should be to understand why they said it. What courts have understood, and what is being lost in the current discussion over litigation finance, is that there is a huge difference between consumer indebtedness, which is a problem New York addresses with one set of laws, and consumer protection, which New York addresses with another set of laws.

When a consumer promises to pay back money, she becomes vulnerable to a cycle of increasing indebtedness, where she can be much worse off tomorrow than she is today because she owes more tomorrow than she has today. On the other hand, when a consumer enters the marketplace, she becomes vulnerable to being ripped off (that's a term we law professors use, too). She might pay more for something than she should have, or she might sell something for less than its fair price. We have – and should have – tools that protect consumers when they buy and sell. But they are not the same tools that protect against consumer indebtedness.

One of the most important tools to regulate consumer debt are price controls – caps on interest rates, etc. You don't see price controls used to protect consumers when they buy and sell. It is obvious why. If New York discovered that some car dealers were taking advantage of some consumers by offering them too little at trade-in when they purchased a new car, I doubt anyone would think that the best way to protect consumers would be to legislate a price that car dealer had to offer for cars at trade-in.

The reasons against setting prices to protect consumers are easy to see. If the problem is that some commercial actors are lying to consumers, go after the liars. If the problem is that some commercial actors are exploiting the fact that consumers don't shop around, then help the consumer shop around. But if consumers have something they want to sell – in this case, part of their future settlement – it seems utterly inconsistent with our current views that the government should tell them at what price they have to sell, and at what price the buyer has to buy.

Of course, in reality, setting a price for a consumer's litigation asset at 16% per annum is not about ensuring that the consumer gets the best price. It is really about telling the consumer that she can't sell her asset at all. This kind of price control in S. 3911 has been tried before in Arkansas, and the result is that there is no market for pre-settlement consumer litigation finance in that state. Consumers are worse off as a result. If the goal is to stop consumers from selling a piece of their litigation – something which corporations will still be able to do – then the supporters of S. 3911 should come out and say that is their goal, and I hope, explain why that goal does anything more than help insurance companies (which it might do, but less then they imagine).

There is no crisis in frivolous litigation that would be addressed by barring consumer litigation finance in New York. My research shows that consumers, on average, wait about ten months after they have suffered an accident to contact a funder, and then, the funder is more likely than not to say no. And to be clear: only people who have established legal cases can be considered for legal funding. For someone to believe that eliminating funding will reduce frivolous lawsuits, he would have to make the following assumptions. First, that plaintiffs with bogus lawsuits are clever enough to wait almost a year after the occurrence of the bogus event to apply for funding, and, second, that they are willing to do all this for a 50% chance of receiving a check of, on average, $2250.

I would suggest, per Occam's Razor, a much simpler explanation for the motivation of the typical consumer seeking funding: she suffers a genuine, not bogus, accident; she gets a lawyer who tells her to be patient, because insurance companies sometimes take a long time to settle and trials take even longer; she realizes that she can't afford to be patient, because (for example) she doesn't have a lot of savings; and so she sells a portion of her so that she can continue litigating until it does settle or go to trial. If my account is correct, then getting rid of consumer litigation finance will not reduce frivolous litigation – it will just force average New Yorkers to settle on the cheap.

Finally, I am happy to address the question that concerns anyone who genuinely cares about the consumer in consumer litigation finance: price. But again, I will address it in a way that cuts through the confusion. The question should be: "What price should funders pay for a portion of a consumer's litigation asset?" My answer? A fair *market* price – which is the same answer I'd give you if you asked me what price a dealer should pay for a consumer's car at trade-in.

I know what consumers are being paid now for their asset. The funder buys a chance to get $1.50 in 14 months in exchange for a dollar every time they make a deal with the median consumer. Could the funder pay more for that chance? Yes. Is the funder paying only $.67, as some critics have alleged (equal to 100% per annum interest)? No – not according my research. What is the correct amount the funder should pay? This is where smart regulation can play a role in protecting consumers. We could have regulations that require a transparent market with clear, simple terms. We could have regulations that demand that every consumer litigation finance contract be reported in terms of the actual price paid for the consumer's asset. We could have regulations that help the consumer see all the prices funders have really been offering in the past. The best way to help consumers? Given them a marketplace that allows them to offer their product at the best price for them.

Consumers want to be able to sell their litigation assets at a fair price. The goal of consumer protection should be to help them do that. A price control – which is what S. 3911 is, plain and simple – is not the way to help consumers. It is a way to take something away from consumers that they want and need.

Testimony

Of

Anthony Coelho

Before

The New York State Senate Committee

on Consumer Protection

May 16, 2018

My name is Tony Coelho and I am pleased to present my testimony to the Senate Consumer Protection Committee. I would like to thank the Committee for their decision to hold this hearing, and for the opportunity to testify in support of consumer litigation funding.

I served in the United States Congress, representing California's 15th district, for 10 years, including three as Majority Whip of the House. During that time, I consistently advocated for the rights of disabled Americans. Most notably, I was the author of the Americans with Disabilities Act of 1990, better known as the ADA. Over the past 28 years, it has been extraordinarily gratifying to see this law help disabled Americans enter the workforce, access public spaces, and fight back against discrimination.

According to the U.S. Census, one in five Americans suffers from a disability. That includes me. I've had epilepsy for most of my life, a disease that causes unpredictable seizures and other health problems. I'm sure many of you have friends and relatives who have experienced or are currently living with a disability.

Imagine, if you will, that you are confined to a wheelchair, sitting in front of a door that you cannot open. Others can pass through the door freely, but you cannot. Also imagine that there is a federal law in place that says you should have the same ability to open that door as anyone else. What can you do? Your only recourse is through the court system. But bringing a lawsuit can be a long and difficult process that can involve significant financial pressure for the individuals who take it upon themselves to enforce the law through the courts.

That is why I am here today.

As the Senators in the room today understand, the passage of legislation is only the beginning of a long process leading to public acceptance and widespread compliance with a law. That has certainly been the case with the ADA, which was just the first step in establishing rights for disabled Americans. Since then, disabled Americans have had to turn to the courts to enforce and find justice under the ADA.

That's where legal funding comes in. Pre-settlement advances can provide immediate financial relief to plaintiffs who are struggling with day-to-day expenses and enable them to stay the course in cases that are critical to enforcing compliance with the law. While most individuals with disabilities are capable of much more than people understand in the workplace, some are unable to work as a result of injuries they have sustained because of someone else's negligence or malice. Legal funding is critical to these victims as they seek an appropriate outcome of their ordeal.

Disabled or not, plaintiffs in complex litigation can be vulnerable, and some in the marketplace employ deceptive and abusive practices. That is why New York needs strong protections for legal funding consumers. Legal funders should be licensed by the state, for example, and transparency for the consumer regarding the terms of the advance should be mandated by law—it must be clear exactly how much the recipient will owe.

However well intentioned, approaches that rely on interest rate caps instead of robust regulation are misguided. Interest rate caps threaten to make pre-settlement advances unsustainable for funders and therefore reduce or eliminate access for plaintiffs. To someone like me, who cares deeply about the disabled and the enforcement of the ADA, this is highly concerning. ADA violations are serious and widespread, and the pushback that these suits continue to receive is dangerous. Access to legal funding will help disabled Americans defend themselves and uphold the law of the land.

Yet, interest rate caps are the preferred solution of insurance companies and other corporate interests driving the "tort reform" movement. They would like to eliminate legal funding for the simple reason that it reduces their ability to extract lowball settlements from plaintiffs who, often because of the harm they have experienced, lack the financial resources to get by in their daily lives during the long pendency of a case.

Legal funding is not a panacea for the challenges that disabled Americans face, but it's one tool that is available, and it works. It ensures individuals have the chance to seek justice when they have been harmed, regardless of financial circumstance. With strong regulations mandating transparency, clear contracts for consumers, and robust oversight of funders, legal funding will be a safe alternative for victims who need financial support while they see their cases through.

Legal funding is important to the cause of disabled Americans, who still need the courts to enforce their equality under the law. In closing, I want to reiterate my hope that the Senate will embrace effective regulation of the industry and preserve legal funding for their constituents.

Thank you for your time and attention.

The Business Council

Testimony to

New York State Senate Committee on Consumer Protection

Third Party Financing of Lawsuits

Submitted by
Lev Ginsburg, Esq.
Director of Government Affairs

May 16, 2018

On behalf of The Business Council of New York State, Inc. and our more than 2,300 members – businesses large and small all across the state – I wish to submit these comments into the record as part of this committee's hearing on third-party lawsuit lending in the State of New York.

As the state's largest statewide employer advocacy organization, we often address issues impacting the state's economic competitiveness, including business costs driven by state policy actions and New York's profoundly litigious environment. By many measures, New York's business climate lags far behind that of many other states. New York has higher taxes, higher labor costs, higher energy costs and more regulations than most states. New York also has a vast array of laws making it advantageous to be a plaintiff and a plaintiff's attorney at the expense of defendants. Since businesses are so often the defendants in lawsuits, this paradigm leads to higher risks and higher costs of doing business in New York.

One cause of the ever-growing litigation docket in New York's courts is the proliferation of third-party lawsuit lenders in the state. While many of us are familiar with banks and firms that provide bridge money to bankroll long-running, complex commercial litigation, many of us are less familiar with the cottage industry that has developed offering non-recourse lawsuit loans, loaned at exorbitant interest rates for common tort claims. These loans, which are becoming more documented, thanks to investigations around the country, charge as much as two hundred percent and often leave a consumer plaintiff with little or no money at the completion or settlement of their lawsuit.

Lawsuit lending outfits have been able to circumvent regulation and usury laws because the loans are contingent on the plaintiff winning or successfully settling a case. It's also difficult to fully quantify the impact and pervasiveness of the problem because such pre-settlement loans need not be filed in court and as a result -- no public record of these loans exist. That said, these loans have a profound negative impact on our legal system and on the very plaintiffs that they purport to help.

Much of the industry, founded by personal-injury lawyers, but now heavily financed by hedge funds and other investors, relies on plaintiff's lawyers to send them business. Often, these same lawyers receive a finder's or referral fee for these loans. Prosecutors in New York and beyond have been investigating the business relationships between the lenders and the trial lawyers as to whether these financial arrangements between the parties constitute illegal kickbacks. Whether these financial arrangements are technically legal or not, they demean the legal profession and have a serious appearance of impropriety while inserting a third-party's interests into the important attorney-client relationship.

Instead of truly helping plaintiffs in need, these third party lenders prey on the most vulnerable people with aggressive advertising on television and the internet, much like other "get rich schemes," psychic readers and class action lawsuits. The advertising offers quick cash with no mention of triple digit interest rates. Many plaintiffs are left with almost nothing of their awards or settlements after paying back these usurious loans. Such a reality, once realized by a plaintiff, also has repercussions on the outcome of the lawsuits themselves.

As plaintiffs become aware of the massive amounts of money owed to these lenders, the plaintiffs, in an effort to salvage any chance of substantial monetary awards reaching their pockets, are forced to reject reasonable settlement offers and instead, "swing for the fences" and go to trial to reach an amount high enough to repay their loans and have a little left over for themselves.

This shift away from reasonable settlements greatly and needlessly increases litigation costs for businesses across New York. As a direct result of this lending, settlement discussions are often upended. This push toward litigation further crowds already stressed court dockets and slows down the process for all cases, taking up valuable court time and judicial resources.

Sadly, this reality doesn't help defendants and it does not help plaintiffs. Once plaintiff attorneys are paid and after lawsuit loans get repaid with their exorbitant interest rate, there is often little left of the settlement or judgment for a plaintiff to make them whole. The lawyers and the lenders are the only winners in this new reality.

While my primary concern in this arena is the interest of my members, I am also deeply concerned as an attorney and as a citizen of New York. As a representative for employers in our state, I am concerned that third-party lawsuit lending leads to evermore baseless litigation against employers and stymies reasonable settlements, one of the cornerstones of our legal system. As an attorney, I am deeply troubled by what these loans and the inappropriate relationships between plaintiff's lawyers and the lenders do to the reputation of a good, necessary and honorable profession. These actions diminish our collective professionalism and trustworthiness. Finally, as a New Yorker, it is abundantly clear that these lenders prey on the weakest among us. There is no consideration for fairness or decency and just an unbridled grab at easy money, leaving the vulnerable with no money and no recourse.

It isn't often that I testify in favor of more legislation and regulation. While it's rare, when there is a clear injustice that needs correction through law, the business community and The Business Council do not shy away from calling for the appropriate action. In this case, at very least, these lawsuits must be made subject to usury laws to limit the outrageous rates that they charge. Beyond that, further transparency, licensing and reporting are definitely in order.

I appreciate the opportunity to share my thoughts on this important issue and on behalf of The Business Council and our members, I thank the committee for investigating this important subject on behalf of New York's consumers.

Senate Standing Committee on Consumer Protection
Public Hearing on Lawsuit Lending
Sponsors Senator Chris Jacobs and Senator Robert Ortt

Van Buren Hearing Room A, Legislative Office Building, 2nd Floor
Albany, New York 12210

Contingent Fees, Lawsuit Lending, and Consumer Protection: Considering Senate Bill 3911

Statement of James R. Copland

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May 16, 2018

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Chairman Jacobs, Ranking Member Alcantara, Senator Ortt, and other members of the committee, I would like to thank you for the invitation to speak to you today on Senate Bill 3911.

Personal Statement

I am a senior fellow with the Manhattan Institute for Policy Research. Since 2003, I have directed the Institute's legal policy efforts. I have testified before Congress on multiple occasions, discussing litigation, legal enforcement, and securities regulation; as well as before state and municipal legislatures and international bodies. I have authored many policy briefs; book chapters; articles in scholarly publications such as the *Harvard Business Law Review* and the *Yale Journal on Regulation*; and opinion pieces in periodicals including the *Wall Street Journal*, *National Law Journal*, and *USA Today*. I am frequently cited in news articles in outlets including the *New York Times*, the *Washington Post*, *The Economist*, and *Forbes*.

Before joining the Manhattan Institute, I served as a consultant for McKinsey and Company in its New York office and clerked on the U.S. Court of Appeals for the Second Circuit. I received a BA in economics from the University of North Carolina; an MSc in politics of the world economy from the London School of Economics, and a JD and an MBA from Yale.

I want to emphasize that my comments today reflect my own views and do not necessarily reflect the views of any of my colleagues. The Manhattan Institute does not take any institutional views on any proposed legislation.

Summary of Analysis

Senate Bill 3911 is a modest effort to add transparency and a layer of regulation governing third-party litigation financing, exclusively in the context of small lawsuits brought on behalf of individual consumers. This legislation is broadly consistent with historical common-law norms governing third-party support for litigation, as well as other existing New York consumer protection law. It also meets a regulatory need. Given that civil litigation rests on the application of the government's monopoly on the legitimate use of force, prophylactic regulation in this area is warranted. Outside funding of litigation severs the ties that bind attorneys and clients, thus vitiating legal ethics rules. Moreover, consumer litigation regularly involves emotionally charged plaintiffs and a significant information gap between plaintiffs and sophisticated parties, enabling consumer plaintiffs' exploitation.

Maintenance and Champerty

The common law forebade maintenance and champerty. As described by a modern British jurist, Lord Justice Steyn: "In modern idiom maintenance is the support of litigation by a stranger without just cause. Champerty is an aggravated form of maintenance. The distinguishing feature of champerty is the support of litigation by a stranger in return for a share of the proceeds." The Supreme Court of Ohio describes these doctrines thus: "The doctrines of champerty and maintenance were developed at common law to prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law." *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d. 217, 219-220 (Ohio 2003). The prohibition on champerty dates to at least 1275 Britain, when local barons used the courts as a sort of peaceable warfare device; the prohibition "stemmed from a view that litigation was a vice and a threat to the king's peace."[1]

On their face, lawsuit lending arrangements that pay out fees to litigants to be recovered only upon a verdict violate longstanding prohibitions against champerty. That said, the application of these longstanding rules to such arrangements is ambiguous under New York law, as well as that of most jurisdictions; and such lawsuit lending to consumers has become commonplace. The case for regulating such arrangements is strong.

Contingent Fees

Over time, in America, longstanding rules against maintenance and champerty have eroded. The most obvious and longstanding erosion comes through the principal means by which consumer civil suits are financed in the United States—the contingent fee. The contingent fee, in which plaintiffs' lawyers assume all costs of litigation in exchange for a share of the proceeds of a successful lawsuit, has emerged as the normal form of financing plaintiffs' litigation on behalf of ordinary consumers. The contingent fee is far less common and far more circumscribed in foreign jurisdictions. Unlike in most other developed countries, however, the common rule in U.S.,[2] which emerged somewhat by accident in the nineteenth century, does not allow the winners in a lawsuit to recoup the losers' legal costs. Common "loser pays" rules in foreign jurisdictions enable attorneys to pursue claims on behalf of poor plaintiffs in part due to the expectation of fee recovery, without having recourse to a percentage share of any verdict—a mechanism foreclosed under the "American rule" barring such fee shifts. As such, the contingent fee emerged to permit less-heeled individuals to have access to lawyers to pursue valid claims.

[1] Lester Brickman, *Lawyer Barons: What Their Contingency Fees Really Cost America* (Cambirdge Univ. Press 2011), at 20.
[2] Alaska does allow for limited cost shifting of attorneys' fees.

Contingent fees are not without their merits. For one, they ameliorate somewhat the likelihood that a lawyer will bilk a plaintiff of cash in pursuit of a meritless claim: a contingent fee lawyer will not sign up for a lawsuit unless he views its expected recovery exceeds his likely costs.[3] Moreover, a contingent-fee lawyer has an incentive to conserve costs—unlike attorneys billing clients in standard hourly fee arrangements, who have an incentive to do extra work, as long as someone else is paying the bills. Finally, in at least some regards, contingent fees reduce what economists call *agency costs* between clients and their attorneys: a lawyer has every incentive to pursue a plaintiff's claim zealously when he shares in the lawsuit's proceeds.[4]

That said, contingent fees are far from perfect in aligning lawyers' incentives with their plaintiffs', even in the context of individual rather than aggregated claims.[5] There is a significant information gap between attorneys and clients—when plaintiffs are ordinary consumers, the lawyer but not his client has a good understanding about the probability of a lawsuit's success, including the likelihood that a defendant will settle for insurance policy limits. This information imbalance depresses plaintiffs' ability to shop cases based on fees—allowing a "standard" fee level akin to that we see in other contexts, such as real-estate agency. And it means that plaintiffs' lawyers have an incentive to profit from minimal effort on highly likely claims—pulling in a standard 33% retainer—obtaining a windfall without adding significant value to recovery efforts.[6]

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[3] While this feature of contingent fees aligns lawyers' and plaintiffs' incentives, it is in many cases not *socially* useful. The absence of attorney-cost fee shifting permits low-probability lawsuits to proceed due to significant positive expected returns, owing to the costs necessarily imposed on a corporate defendant (nuisance suits) or the upside risk of an unlikely but large recovery (nuisance suits). Conversely, plaintiffs with high-probability but low-dollar claims will not obtain representation because there is no prospect for the attorney to recoup costs. *See* Marie Gryphon, *Greater Justice, Lower Cost: How a "Loser Pays" Rule Would Improve the American Legal System* (Manhattan Institute 2008), *available at* http://www.manhattan-institute.org/pdf/cjr_11.pdf.

[4] Mitigating such agency costs is a principal rationale for profit-sharing and stock-option compensation for corporate executives. Though the social merits of such arrangements is less obvious for civil litigation—as the potential for abusive nuisance and lottery suits, discussed in footnote 3, would suggest. Corporate contracting between executives and shareholders (through fiduciary boards) is a private arrangement between willing parties. In contrast, civil litigation is definitionally an appeal to the government's monopoly on the use of force to distribute money to a plaintiff to an unwilling defendant. Allowing IRS agents to recover a share of the proceeds from a successful audit would undoubtedly ameliorate agency costs between the government and its agent; whether such an arrangement would redound to the public benefit is more doubtful.

[5] In aggregative litigation, the disconnects between contingent-fee-compensated lawyers and their clients are sizable. In class action litigation, in which corporate defendants are looking for a minimal "settlement price" and there are significant difficulties in locating and distributing settlement shares to members of the plaintiff class, plaintiffs' lawyers face incentives to trade off both class monetary relief and consumer-aiding injunctive relief for counsel fees. In mass tort litigation, in which plaintiffs' lawyers recruit and bundle claims too dissimilar to join into class-action suits, the attorneys have an incentive to maximize total returns, after legal expenses, through global settlements that shortchange plaintiffs with strong claims and overpay those with weak ones. Examples of these phenomena are legion.

[6] The Manhattan Institute has long studied these phenomena and developed reforms designed to ameliorate it, including significant studies from legal ethics scholars Lester Brickman and Richard Painter. These can be provided upon request.

Consumer Lawsuit Lending

Whatever the merits and demerits of relaxing champerty rules for large-scale litigation between sophisticated commercial parties, lawsuit loans to consumers generate the same potential for abuse as does the contingent fee—plus others. Like lawyers, lawsuit-lending companies have significantly more capacity to evaluate the expected value of a prospective lawsuit than does the average consumer claimant. But *unlike* lawyers, such lenders are *not* subject to legal ethics rules. Contingent-fee lawyers do get away with taking advantage of their clients, but they are at least constrained in the most extreme cases by potential disbarment and legal-malpractice claims. Moreover, if a claimant is permitted to assign control of a claim to a third party, the prospect for abusive litigation is amplified—as business entities, unlike individuals and most plaintiffs' lawyers, would be able to assemble diversified portfolios of low-probability claims in pursuit of lottery lawsuit profits. Finally, if lawsuit lenders are permitted to enter into formal or informal arrangements with plaintiffs' attorneys, they could abet the evasion of legal ethics rules, such as the prohibition on solicitation, that exist even in an era when attorney advertising is protected under the First Amendment.[7]

Existing New York Law

New York has a version of an anti-champerty rule in section 489 of the Judicial Laws, punishable as a misdemeanor: "No person or co-partnership, . . . and no corporation or association, directly or indirectly . . . shall solicit, buy or take an assignment of . . . any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon . . . ." But its applicability to the types of lawsuit lending covered in Senate Bill 3911 is not clear:

- A 2005 Nassau County superior court decision involving a $25,000 cash advance by the lawsuit-lending firm Law Cash to a day laborer pursuing an injury claim, *Echeverria v. Estate of Lindner*, 801 N.Y.S.2d 233 (N.Y. Sup.Ct. 2005), determined that the cash advance did not constitute champerty under § 489, though "obviously usurious."

- In 2010, on a certification question from the U.S. Court of Appeals for the Second Circuit in a case involving the assignment of a debt-collection interest, *see Trust v. Love Funding Corp.*, 591 F.3d 116 (2010), the New York Court of Appeals clarified that "a corporation or association that takes an assignment of a claim does not violate Judiciary Law §489(1) if its purpose is to collect damages, by means of a lawsuit, for losses on a debt instrument in which it holds a pre-existing proprietary interest."

- But in an October 2016 decision, *Justinian Capital SPC v. WestLB AG*, No. 155 (N.Y. 2016), the New York Court of Appeals held that a German bank's transfer of notes to a Cayman Islands company (intended to evade German regulators) was champertous under

[7] *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

§ 489, notwithstanding that the original economic transaction exceeded $500,000 and was thus within the champerty law's "safe harbor" provision for large-scale litigation.

Thus, at least one superior court case has refused to apply New York's champerty laws against consumer-lawsuit lending that is below § 489's safe harbor threshold. Moreover, it is not clear that an open-ended—and not particularly clear—general champerty law is the best way to protect consumers (or the broader public) from the sort of abuses that consumer lawsuit lending can engender.

Senate Bill 3911

Senate Bill 3911 would add significant new consumer protections in the lawsuit-lending space. It applies only to lending of $500,000 or less—thus below the safe harbor in § 489, and limited to the sorts of lawsuits typical for consumers, rather than high-dollar complex commercial litigation. Such lawsuits are when the consumer risk from information imbalance between claimants and attorneys—or sophisticated third parties—is at its apex.

The bill has the following features to promote transparency and deter the defrauding of consumer plaintiffs:

- **Contractual terms.** The bill would require several standard contractual terms to facilitate transparency and protect consumers. Contracts would have to have clearly specified fee structures to facilitate clarity. Attorneys would have to attest that they have not engaged in referral arrangements with funding companies, to ameliorate the legal ethics problems inherent in such arrangements. And plaintiffs would receive rights of (early) rescission and prepayment—allowing them to exit an arrangement viewed as unfair after acquisition of additional information. These rescission and prepayment provisions would not only protect plaintiffs against unscrupulous sales tactics but also deter lottery lawsuit abuses.[8]

- **Prohibitions.** The bill would prohibit collusive arrangements between a plaintiffs' lawyer and a lending company, in an effort to protect the legally required ethical relationship between lawyer and client. The law would also cap lending rates according to state usury laws in other contexts.[9]

- **Registration.** Consumer lawsuit companies would have various registration requirements with the state, to facilitate compliance.

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[8] A plaintiff may wish to pursue a (no cost) contingent-fee lawsuit with a low probability of a high payout. But it would be very risky for a plaintiff to take out a high-interest loan on such a speculative venture. A lending company, on the other hand, could bankroll a portfolio of such lawsuits for a sizable profit—even though imposing exorbitant borrowing costs on the vast majority of (less informed) claimants to whom it lends.

[9] The wisdom of such usury laws in the broader market is debatable. In the lawsuit-lending context, however, the prohibition on usurious rates deters the filing of abusive lottery suits, as described in footnote 8.

- **Penalties.** The failure to comply with the requirements of Bill 3911 would vitiate a lending company's contractual entitlement to fees with any given plaintiff.

Senate Bill 3911 is a modest effort to add transparency and a layer of regulation governing third-party litigation financing, exclusively in the context of small lawsuits brought on behalf of individual consumers. This legislation is broadly consistent with historical common-law norms governing third-party support for litigation, as well as other existing New York consumer protection law. It fills an important regulatory need, and it should be carefully debated and considered.

NYIA
New York Insurance Association

SENATE STANDING COMMITTEE ON CONSUMER PROTECTION

PUBLIC HEARING TESTIMONY

REGARDING LAWSUIT LENDING

ON

WEDNESDAY, MAY 16, 2018

AT

VAN BUREN HEARING ROOM A
LEGISLATIVE OFFICE BUILDING 2ND FLOOR

ALBANY, NEW YORK

WRITTEN TESTIMONY OFFERED BY:

ELLEN MELCHIONNI
PRESIDENT
NEW YORK INSURANCE ASSOCIATION, INC.

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Senators Jacobs and Ortt and members of the Senate Consumer Protection Committee, thank you for the opportunity to weight in on behalf of the New York Insurance Association (NYIA) about the egregious practices occurring with lawsuit lending. NYIA is the state trade association that has represented the property and casualty insurance industry in New York for more than 130 years. NYIA's membership is broad and diverse, consisting of stock, mutual and cooperative insurance companies writing in every county of New York State. We are writing to express our support, on the record, for the regulation of the lawsuit lending industry in New York as outlined in S3911A(Ortt)/A8653(Magnarelli). Briefly, these bills would regulate the lawsuit lending industry in New York by, *inter alia*, requiring them to register with the Department of Financial Services. Regulating this industry will bring much needed protection to consumers who are currently exposed to these schemes, some of which, as has been reported by *The New York Times*, are designed to generate the very litigation that lawsuit lenders take advantage of.[1]

As you are no doubt well aware, New York is home to one of the worst litigation climates in the nation. There are many factors that contribute to this, and lawsuit lending is one of them. Lawsuit lending is a term which refers to transactions where a third party unrelated to the underlying lawsuit gives money to a litigant (usually the plaintiff) in exchange for a portion of the future proceeds that the plaintiff might receive in a judgment resulting from the litigation (i.e. via settlement or verdict). The money that is given to the plaintiff to help fund their litigation is done so at, oftentimes exorbitant, interest rates. For example, *The New York Times* has reported on cases where plaintiffs were assessed interest

[1] https://mobile.nytimes.com/2018/04/14/business/vaginal-mesh-surgery-lawsuits-financing.html

rates of over 100% by lawsuit lending firms, often resulting in significantly diminished recoveries for plaintiff's who maybe injured and in a vulnerable state.[2]

Loans, and their rate of interest, in New York are typically governed by N.Y. Gen. Oblig. Law §5-501(1), which sets the civil usury rate in New York at 16% per annum,[3] and N.Y. Penal Law §190.40 which set the criminal usury rate in New York at 25% per annum. These transactions avoid New York's usury statutes in part because they are unregulated and not considered loans on the grounds that they are non-recourse, meaning that the plaintiff is not required to pay back the monies advanced to fund the litigation if the plaintiff does not prevail in the underlying litigation. Accordingly, proponents of these transactions refer to them as investments rather than loans. The judicial system, however, exists to do justice for the litigants involved not to provide a roulette wheel for speculators. Furthermore, because proponents of these transactions screen cases, favoring those that have a high likelihood of settling before trial, they effectively nullify the oversight of the courts over these matters. As one lawsuit lender stated, "[e]verything that might have to go before a judge, you stay away…[w]e don't want judges to shine a light on us."[4]

For all their power, courts are limited in their ability to oversee matters that settle outside of the courtroom. The legislature does not have that limitation. Accordingly, NYIA supports passage of S3911A/A8653 and bringing lawsuit lending, a financial service, under the regulatory oversight of the Department of Financial Services.

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[2] *See*, https://www.nytimes.com/2011/01/17/business/17lawsuit.html?mtrref=www.google.com; *and*, https://www.nytimes.com/2018/05/11/business/dealbook/how-a-web-of-slip-and-fall-cases-puts-a-new-spin-on-an-old-fashioned-scheme.html?rref=collection%2Fsectioncollection%2Fbusiness&action=click&contentCollection=business&region=stream&module=stream_unit&version=latest&contentPlacement=9&pgtype=sectionfront

[3] *See also*, N.Y. Banking Law §14-a(1).

[4] *See supra*, n.2.

Third-Party litigation financing in New York

Academy of Trial Lawyers
May 16, 2018

I would like to thank Senator Ortt and Senator Jacobs for taking the time to host and participate in this hearing in order to examine this important topic. My name is Andrew Smiley, and I am the President of the New York State Academy of Trial Lawyers.

The New York State Academy of Trial Lawyers is composed of plaintiff and defense attorneys, members of the judiciary, non-judicial government employees, law professors, law clerks, law secretaries, paralegals and law students dedicated to protecting, preserving and enhancing the civil justice system in New York State.

While much has been made recently about third-party litigation financing, I think that it is important to note that these type of services are utilized in a very small portion of cases. Generally, litigation financing comes in two primary forms. The first is third party litigation funding, or TPLF. That is the practice of hedge funds investing money in lawsuits in exchange for a percentage of the settlement or judgment. This type of funding is vital to balance the playing field in expensive large-scale litigation, including business litigation. Because this type of lending generally occurs between mutually sophisticated parties, we don't believe that any regulation of this type of third-party lending is necessary other than to protect the independent judgement of the lawyers handling the case.

The second form of third party litigation finance is that of non-recourse loans to litigants who are borrowing against prospective recoveries. This is where the plaintiff borrows $20,000 to pay his bills while his case is pending. If the plaintiff is successful, the lender is repaid the loan plus interest. Because the loan is non-recourse, the interest rate is often high, but the lender does not have a percentage interest in the litigation beyond the amount loaned. Because this type of financing affects individuals, the academy supports some limitation on the interest rate that can be charged as well as some form of consumer protection regulation to ensure that plaintiffs are given clear information and disclosures.

While we support some limitation on the interest rate that can be charged, we do not agree with critics that these products do a disservice to our clients. Contrary to the claims of opponents that think that third party financing encourages frivolous litigation, in our experience, such funding provides plaintiffs with money to pay their mortgage and bills so that they aren't forced to settle quickly and for less than they would otherwise recover.

As an example, if someone is seriously hurt in a car accident, they are likely to be unable to work. This means that if someone is in a hospital or rehabilitation facility, their ability to earn money is placed on hold, but none of their expenses are similarly put on hold, and so despite being an injured victim, a person could quickly face the very real prospect of losing their home, making the pressure to settle quickly very great.

Unfortunately, insurance companies are highly aware of the pressures that injured victims face, and use these pressures to try and settle for less than a claim would otherwise be worth. Insurers will offer less knowing that if the plaintiff rejects the offer, they risk losing their house or being unable to provide for their family.

It is as part of this environment that third-party litigation financing firms operate. They don't create the injuries or the cause of action, they don't control or operate the cases, and they don't recoup any of their money if the case isn't successful. They help people to continue to pursue a meritorious action that might otherwise have to be settled for less than it should simply because of external financial pressures.

With the foregoing as background, I would like to provide some comments on S3911/A8956. While we welcome common-sense regulation of third-party litigation financing, this bill is not that. This bill would simply entirely destroy the third-party litigation industry overnight. This bill is similar to legislation being pushed all over the country by The US Chamber of Commerce's Institute for Legal Reform as part of "tort reform" efforts, and third-party litigation financing has been tweeted about by New York's Lawsuit Reform Alliance nearly twenty times in just the past month.

It is important to note that third-party litigation financing is non-recourse, and so companies bear a large risk when deciding to invest in a case, but the bill as drafted would ensure that the industry would be unable to profitably operate. The bill would require that the amount financed could be paid off prior to the verdict with no charges, and it would limit the interest rate to 25%, less than the interest rate on many credit cards.

While there may be a few examples of bad behavior in the third-party litigation financing industry, setting up rules that entirely precludes the operation of an entire industry is not the solution. We fully support efforts to increase disclosure requirements and limit interest to reasonable amounts, but we would also like to note that for every person unhappy with their experience working with the third-party litigation financing industry, there are many more satisfied customers that would have been forced into a worse settlement without it. In fact, the opposition to third-party litigation finance doesn't seem to spring from constituent complaints so much as it is driven by insurance companies that are finding it more difficult to pressure people into accepting a low settlement.

In sum, thank you again for the opportunity to speak today, and we truly appreciate the support of our home state in allowing for our continued success. I'm happy to answer any further questions. Thank you for your time.

Inside The Ethics and Implications of Third Party Litigation Funding

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Biographical Information

Attorney Thurbert Baker is currently a partner in the Atlanta law office of Dentons US LLP. His practice focuses on corporate compliance and investigations, public policy and regulatory affairs, multi-state litigation, public sector procurements and regulatory matters. He served as Attorney General for the State of Georgia for thirteen years (1997-2011), and as the President of the National Association of Attorneys General ("NAAG") from 2006-2007.

I. Introduction

My thanks to the Chairman and members of this distinguished Committee for the opportunity to provide testimony on the practice of lawsuit lending, also referred to as third-party litigation funding. From the United Kingdom and Australia to North America, the emergence of third-party litigation funding companies is dramatically changing the legal landscape for companies and consumers alike. The practice of funding companies taking stakes in litigation outcomes is very quickly becoming of particular concern to defendants in mass tort and class action lawsuits. As outlined below, states and attorney regulating organizations are currently evaluating the impact of alternative litigation funding models on public policy, the American judicial system, and the ethical implications of such arrangements. Given that laws in this regard are quickly developing across the United States, lawyers and legislators would be well advised to tread carefully.

II. Background

Third-party litigation funding is a financial product which allows a party unaffiliated with the lawsuit to pay a plaintiff's - or a class of plaintiffs" - upfront costs. The third parties are mainly specialist funding companies or hedge funds that finance the costs of litigation in exchange for a portion of any award or settlement. The percentage a funding company collects varies depending on the level of risk incurred as well as the terms of lending agreed to with the client. It is becoming increasingly common in such litigation arrangements for a plaintiff to recover only a small portion of his or her award. While this is a very significant problem created by lawsuit lending, it is but one among several reasons to discourage efforts to expand this practice in American courts.

The practice of litigation funding is not new in jurisdictions such as Australia and the United Kingdom. Indeed, third party funding companies have been profiting in those jurisdictions with healthy returns on their investments in lawsuits. However, the practice has begun to develop in the United States - and at an alarming rate. This is partly a result of a move in many states away from the historic prohibition on maintenance and champerty. Third party litigation financing was forbidden at common law under the historic doctrines of maintenance and champerty, which generally proscribed involvement by third parties in lawsuits. Maintenance prohibited supporting the prosecution of another's action while Champerty - a form of maintenance - proscribed supporting a litigant in exchange for a portion of any judgment recovered.

III. Widespread Worry

Not surprisingly and given the potential financial opportunities, litigation funding companies have been busy in the past few years trying to expand their business practices across the United States. However, one of the significant dangers of lawsuit loans is that lenders charge sky-high interest rates, sometimes more than 150% annually. In response, an unusual collection of people and groups have raised questions about lawsuit lending.

The business community is concerned that the practice will reduce the opportunity for fair and efficient settlements of disputes. Plaintiffs' attorneys are worried about the effect on attorney client privilege and interference in critical case decisions, including the decision on whether and when to settle. Consumer groups recognize that the litigation funding industry preys upon the vulnerable, such as the injured tort victim who is pressed for time and unaware of the true cost of these financial products.

State Attorneys General have also joined the discussion. They are naturally concerned for all of the reasons outlined, and most importantly because they are tasked with enforcing consumer protections. Lawsuit lending bears many of the hallmarks of predatory lending – needy consumers paying charges far in excess of market interest rates and companies providing the funding interested primarily in the value of the collateral securing the advance rather than in the consumers ability to repay the advance.

IV. The Legality of Litigation Lending

There are many questions about whether third-party litigation financing is legal, or ethical. The ethical implications will be explored in the next section, but as outlined above, there is plenty of room for debate about whether the practice is - or should be - prohibited by state laws restricting maintenance and champerty.

In addition, there is room for debate about whether the so-called 'non-recourse' contemporary nature of the litigation financing practice renders it exempt from state consumer lending laws. As contingent and non-recourse funding, litigation loans are generally crafted to pre-determine the financing company's percentage of the plaintiff's award. This means that the plaintiff is not held to repay the loan if there is no recovery - hence the industry's argument that these financial products are something other than loans.

Indeed, the lawsuit lending industry is fond of professing that its products are not loans, all without hesitating in employing the word 'loan' for marketing and other purposes. Any simple internet search for the words 'lawsuit loan' will expose hundreds of paid advertisements by the industry. Moreover, many of these financing companies willingly identify themselves as lenders to obtain licenses to operate as businesses within states. There are numerous examples of such ads by companies currently operating in the State of New York.

Not surprisingly given the financial incentives involved, the third-party litigation financing industry has been doing more than just advertising. The industry has lobbied determinedly to introduce bills in a number of states that would exempt the practice of funding lawsuits from consumer lending laws. New York rejected such an effort as far back as 2011.

V. The Financing Companies Are Not The Only Risk-Takers

Betting on the outcome of lawsuits is risky for more than simply litigation funding companies. Much of the discussion about this emerging practice has focused on the ethical implications for lawyers. The American Bar Association has sought input on the ethics of third-party litigation funding and a number of state bars have examined the issue. Outcomes have varied. The New York City bar opined on the issue and reasoned that while a lawyer may ethically represent a client who obtains a lawsuit loan, that lawyer must advise the client of the potential ethical issues that may arise, such as the waiver of the attorney-client privilege and the potential impact on the exercise of independent judgment. Formal Opinion 2011-2: *Third Party Litigation Financing*, June 2011, Association of the Bar of the City of New York Committee on Professional and Judicial Ethics.

Specifically, the New York City Bar Ethics decision stated that "[the growing use of non-recourse litigation financing recently has attracted increased attention, both within and outside the legal profession, in part because the arrangements are largely unregulated, and, in the view of some critics, may require the payment of relatively exorbitant financing fees that appear usurious, create the potential for expanding the volume of litigation, and raise the spectre of reviving the historically reviled practice of champerty, defined broadly as the support of litigation by a stranger in return for a share of the proceeds." *Id.* The U.S. Chamber Institute for Legal Reform has called attention to additional practical concerns introduced by lawsuit lending, such as whether and how a representative plaintiff in a purported class action obtains permission from all potential class members before executing a lending agreement, and whether a party in litigation may challenge the opposing party's funding arrangement via disqualification motion or other procedure (such as abuse of process).

While the opinion of the New York City bar does not go so far as to avow that litigation financing is unethical per se in all its iterations, it surely makes clear that engaging in litigation financing is an ethical morass. Indeed, there are many stages where a funded matter could run afoul of ethical rules. In particular, third-party investment in a case transfers control or influence over the litigation and undermines a lawyer's obligation to act as directed by his or her client.

Many state bars have acknowledged the multiplicity of ethical concerns associated with third-party litigation financing and are gradually addressing the issue. Florida was one the first to formally consider it and issued an opinion actively discouraging the practice. Opinion 00-3, March 15, 2002, Professional Ethics Of The Florida Bar. In its words:

> "The Florida Bar discourages the use of non-recourse advance funding companies. The terms of the funding agreements offered to clients may not serve the client's best interests in many instances. The Committee continues to have concerns, „of the problems that can arise when a client obtains financial assistance from a third party, such as the client's lack of incentive to cooperate. This Committee can conceive of only limited circumstances under which it would be in a client's best interests for an attorney to provide clients with information about funding companies that offer non-recourse advance funding or other financial assistance to clients in exchange for an assignment of an interest in the case."

Given the vast — and increasingly obvious — concerns about the legality and ethical implications of lawsuit lending, it is not surprising that opponents of the practice have been successful across the country in preventing the passage of legislation that is designed to legitimize this nascent industry.

VI. The Public Interest — This Is About More Than Lawyers And Lawsuit Lenders

Setting aside questions about legality and ethics, a question remains as to whether any role at all remains for the practice of lawsuit lending. Supporters of the practice call attention to the very real and pressing financial burdens faced by injured litigants. In fact, consumers who turn to litigation funding companies are vulnerable and have very few options available to them.

In early 2011, the New York Times published an article about a Georgia man who was debilitated by a stroke while using a medication. New York Times, January 16, 2011, *Lawsuit Loans Add New Risk for the Injured*, by Binyamin Appelbaum. Legally blind and in need of regular dialysis, his wife stopped working to care for him. As the family's savings diminished, they faced eviction and could not wait for the impending settlement of a class-action lawsuit against the drug-maker, so he borrowed $9,150 from a lawsuit lender. By the time he received his initial settlement payment 18 months later in the amount of $27,000, he owed the finance company nearly the entirety of the amount: $23,588.

Consumers such as the Georgia couple are the very type of customers targeted by predatory lending and the very reason the community of Attorneys General is applying such exacting scrutiny to the practice of lawsuit lending. There are many questions to be addressed: How much interest is too much in lawsuit lending? If a plaintiff gets a loan for 20% of any award or settlement and owes his or her attorney a 35% contingency fee, can the lawsuit lender take everything that remains if interest has been accumulating?

As it stands now in many jurisdictions in the United States, third-party litigation funding companies can do just that. A different New York Times story offers another instructive case in point. New York Times, November 14, 2010, *Investors Put Money on Lawsuits to Get Payouts,* by Binyamin Appelbaum. It chronicled the situation of a Philadelphia woman who was injured in a car accident. Both she and her lawyer borrowed money for a lawsuit, and by the time she recovered $169,000, she was indebted to the lawsuit lender in the amount of $221,000.

These stories are compelling and clearly indicate that any rush to pass laws exempting the third-party litigation financing industry from vital consumer lending protections should be highly scrutinized. If these products are not loans and the practices are not predatory, why is there such a effort underway by this growing industry to legitimize the practice?

Indeed, the public policy debate has resulted in renewed focus on whether there is any public interest served by the practice of third parties taking stakes in plaintiffs' lawsuits.

VII. Conclusion

The risks associated with incentivizing third-party litigation funding are real. To the extent state legislatures wish to permit and regulate lawsuit lending, lenders should — at the very least — be subject to state usury, truth-in-lending, and other consumer protection laws. Unless this practice is regulated in this country, financial incentives (which are necessarily what entice lawsuit lenders into this business) will lead to an increase in abusive lawsuits in an already overburdened court system, with very little corresponding public policy benefit. The proliferation of this practice is a slippery slope that eventually re-victimizes the most vulnerable among us and does more harm that good to America's system of jurisprudence. Thank you for the opportunity to present on this very important subject.

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May 16, 2018

TESTIMONY TO THE SENATE COMMITTEE ON CONSUMER PROTECTION REGARDING LITIGATION FINANCING

The New York State Trial Lawyers Association (NYSTLA) supports efforts to protect victims as they attempt to bring wrongdoers to justice in the court system. Recent news articles have detailed the pre-settlement and litigation financing industry and alleged predatory business practices by some bad actors. NYSTLA finds this alleged conduct inexcusable and does not support any business practices that attempt to take advantage of injured victims during their most vulnerable times.

However, NYSTLA recognizes the valuable service this industry provides. Injured plaintiffs are often left unable to work to support their family while their case proceeds through the civil justice system. The process often takes years, and all the while the victim has no way to earn income or put food on the table. Pre-settlement and litigation financing companies, with the appropriate regulation, can play an important role in this system, by providing financial assistance to plaintiffs at a time when no one else will.

It is important to note that pre-settlement and litigation financing companies do not offer loans to consumers. The financial assistance provided by these companies must only be repaid if the plaintiff reaches a successful outcome in their case. If not, the claimant is not required to repay the financial assistance given during the litigation. With appropriate interest rates that do not exceed the federal rate for non-recourse lending, and reasonable regulations that protect consumers, litigation financing can play a critical role in helping an injured victim see their case through.

Plaintiffs are often harmed by unreasonable delays or a refusal to negotiate by a defendant or an insurance company. The Office of Court Administration has taken meaningful steps forward to ensure timely resolution of cases, however there is more that can be done by the legislature to help victim's resolve their cases earlier, resulting in less of a need for the financing provided by litigation funding companies.

NYSTLA is committed to working with stakeholders and lawmakers on this subject to ensure consumers are protected, while also assisting victims in bringing wrongdoers to justice.

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