New York State Bar Association
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Memorandum in Opposition

Committee on the Tort System

Tort System #2

June 5, 2019

S. 4555
A. 6764

By: Senator Kaplan
By: M. of A. Magnarelli
Senate Committee: Consumer Protection
Assembly Committee: Consumer Affairs and Protection
Effective Date: 180th day after it shall have become a law

AN ACT to amend the general business law, in relation to consumer litigation funding.

LAW & SECTION REFERED TO: New article 39-h of the the general business law.

The New York State Bar Association Committee on the Tort System **OPPOSES** the enactment of this legislation , solely for the reasons set forth herein.

This bill would amend Article 5 of the General Business Law by adding a provision that would regulate non-recourse civil litigation advance contracts. Non-recourse civil litigation advance contracts (contract), sometimes called lawsuit loans, are offered to plaintiffs by cash advance companies and are required to be paid back only if the plaintiff is successful at trial or favorably settles the law suit.

While the Committee on the Tort System takes no position with respect to the advisability of the use of non-recourse civil litigation advances, the Committee members recognize that the Courts have upheld the constitutionality of such contracts and the annual percentage rate that can be charged, as long as it is not usurious.

We are still troubled, as we have pointed out in our previous Memoranda of Opposition to the proposed regulation of these contracts, by the requirement that the attorney retained to prosecute the personal injury action must certify that he/she has reviewed the contract with the client. The proposed bill reads:

> 2. The contract shall contain a written acknowledgment by the attorney retained by the consumer in the legal claim that attests to the following:

(a) the attorney has reviewed the mandatory disclosures in section eight hundred ninety-nine-ggg of this article with the consumer;

(b) the attorney is being paid on a contingency basis pursuant to a written fee agreement;

(c) all proceeds of the legal claim will be disbursed via either the trust account of the attorney or a settlement fund established to receive the proceeds of the legal claim on behalf of the consumer;

(d) the attorney is obligated to disburse funds from the legal claim and take any other steps to ensure that the terms of the litigation funding contract are fulfilled.

If, as the bill reads, the contract is to be "written in a clear and coherent manner using words with common, everyday meanings to enable the average consumer who makes a reasonable effort under ordinary circumstances to read and understand the terms of the contract without having to obtain the assistance of a professional", there should be no need for the personal injury attorney to clarify that the attorney has reviewed the mandatory disclosures with the consumer. In other words, we object to any requirement that the attorney act as an advocate for or representative of the funding company.

We also oppose the requirement that the attorney would be obligated to disburse funds for the legal claim and take any other steps to ensure that the terms of the litigation funding contact are fulfilled. The concern here concerns the priority of liens. Although the bill addresses attorney liens and Medicare, it does not address the priority of other liens, for example, Medicaid, Worker's Compensation or ERISA. If one of these lien holders pays medical bills before and after the funding contact date, what is the priority of the liens? The attorney should not be obligated to determine the priority of the liens and be held responsible if another lien holder's lien is paid prior to payment to the funding company. We do not want to see a situation where the funding company disagrees with the payment to lien holders and makes a claim against the attorney for failing to meet his or her obligations under Paragraph 2(d).

Additionally, the bill provides that the contract desired and entered into by the client shall become null and void if this acknowledgment is not completed by the attorney.

In short, the provisions pertaining to the lawyer acknowledgment still places the plaintiff's attorney in the middle of the lending transaction between the plaintiff and the lender. This is a position that opens up plaintiffs' attorneys to potential liability. In the view of the Committee, this is an unwelcome and unworkable arrangement.

Based upon the foregoing, the NYSBA's Committee on the Tort System **OPPOSES** the enactment of this legislation.