David Nocenti

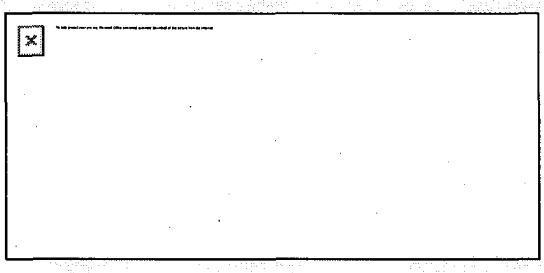
From: James P. Fitzgerald <jfitzgerald@lawfitz.com>
Sent: Thursday, April 18, 2024 4:02 PM
To: rulecomments
Cc: 'info@trialacademy.org'
Subject: FW: Request for Public Comment on Proposed Amendments to the Uniform Rules for the Supreme Court and County Court

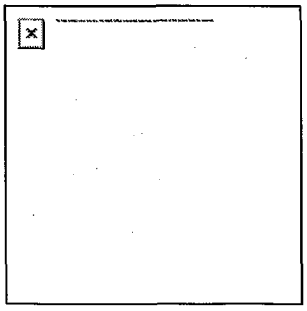
Categories: Blue category

The Fitzgerald Law Firm, P.C. supports the proposed amendments.

James P. Fitzgerald
Managing Partner
The Fitzgerald Law Firm, P.C.
(914) 378-1010

From: New York State Academy of Trial Lawyers <noreply@m.nysa.membercentral.org>
Sent: Thursday, April 18, 2024 10:02 AM
To: James P. Fitzgerald <jfitzgerald@lawfitz.com>
Subject: Request for Public Comment on Proposed Amendments to the Uniform Rules for the Supreme Court and County Court





Request for Public Comment on proposed amendments to the Uniform Rules for the Supreme Court and County Court, relating to litigation financing agreements. If

these rules are adopted, litigation financing agreements are not subject to disclosure or discovery before the matter is settled or otherwise resolved.

These requests will be posted on the OCA website and comments are due no later than May 24, 2024 to to rulecomments@nycourts.gov. Please cc: info@trialacademy.org on all comments to OCA.

View Proposed Amendments

NYS Academy of Trial Lawyers • 100 Great Oaks Blvd, Suite 123 • Albany, NY 12203
www.trialacademy.org • info@trialacademy.org
Phone: 518-364-4044
Fax: 518-514-1184

David Nocenti

From: Ken Riddett <kenriddett@gmail.com>
Sent: Monday, April 29, 2024 3:21 PM
To: rulecomments
Subject: Proposed amendments to Sec 202.67 and Sec 207.38 Uniform Civil Rules relating to litigation financing
Attachments: 2024.04.29 - OCA Lit Funding Rule Public Comment - F.pdf

Categories: Blue category

On behalf of the New York State Trial Lawyers Association attached please find comments on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Rules for the Supreme Court and County Court relating to litigation financing agreements as requested in Memorandum of David Nocenti dated April 12,2024.

--Ken Riddett

RIDDETT ASSOCIATES
PO Box 7141
Albany, New York 12224
518 463-7784
(C) 518 225-9986

NYSTLA Memorandum in OPPOSITION

Public Comment & Opposition To Proposed Amendments To Sections 202.67 And 207.38 Of The Uniform Civil Rules For The Supreme Court Relating To Litigation Financing Agreements

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Introduction

NYSTLA understands that our civil justice system is premised on the bedrock foundation that citizens with a need to have their rights vindicated can have their "day in court" to seek justice. And that our justice system is equal and fair. Some victims find themselves fighting against large, powerful corporate interests. Large corporations can summon unlimited resources and hire armies of defense lawyers to drag out and increase the costs of going to court. Indeed, sometimes their goal is to raise the cost of the litigation so that poor, middle class, and hard-working New York families can't afford the fight.

A litigation funding agreement ("LFA") can even the playing field. It provides funds to victims so they can better match the legal resources of large, corporate wrongdoers to obtain restitution and hold them accountable. It also acts as a disincentive for corporate defendants to endlessly litigate unwinnable cases in hopes of forcing an unjust settlement.

However, currently the litigation funding industry is not regulated in New York State. A few unscrupulous lenders have taken advantage of the lack of rules and regulations to act in bad faith and charge unjustified fees. Accordingly, NYSTLA supports legislation pending in the legislature that would provide a set of robust provisions to tightly regulate litigation funding services. The legislation supported by NYSTLA succeeds in its goal of *supporting* litigation funding while *banning* abuses.[1]

The OCA's proposed rule changes, justified in part as a need to act "while the Legislature is considering proposed statutory changes," would require the disclosure of LFAs in applications seeking leave to compromise in: (1) a wrongful death action and (2) a personal injury action involving an infant or a judicially declared incapacitated person including an incompetent or conservatee.

OCA's proposed amendments to 22 N.Y.C.R.R. §§ 207.38 and 202.67 are well-intentioned. However, as described in more detail below:

- NYSTLA opposes the proposed change to 22 N.Y.C.R.R. § 207.38 because requiring the disclosure of an LFA as part of application seeking leave to compromise in a wrongful death action is unnecessary, unjustified, and unfair to competent adult distributees.

- NYSTLA opposes the proposed changes to 22 N.Y.C.R.R. § 202.67 to the extent that such changes would require the disclosure of an LFA to a defendant as well as to the court. In a personal injury action involving an infant or a judicially declared incapacitated person, NYSTLA would ***support*** disclosure of an

[1] *See* S.4146-A (Cooney)/A.7655-A (Walker).

LFA for an *in camera* review. Accordingly, NYSTLA suggests herein suggested modifications to OCA's proposal in connection with § 202.67 to limit disclosure of LFAs for an *in camera* review.

Additionally, NYSTLA believes OCA needs to modify the current language of 22 N.Y.C.R.R. 202.67(a)(7) to comport that provision with Appellate Division rules that permit, under certain circumstances, reimbursement of disbursements after calculation of attorneys' fees.

Opposition To Amendments To 22 N.Y.C.R.R. § 207.38

Distributees in wrongful death actions should have the same unrestricted right to seek assistance from entering into an LFA (set aside against their anticipated distributive share) that any other adult has in a personal injury action.

NYSTLA thus opposes the imposition of a new requirement for the disclosure of LFAs in wrongful death cases as unjustified, unnecessary and, most importantly, unfair. It is not the Court's role to regulate the purported fairness (or unfairness) of a private funding arrangement entered into by a competent adult distributee in a wrongful death action.

The accompanying memo from OCA Counsel David Nocenti dated April 12, 2024 justifying the OCA Amendments ("Nocenti Memo") discusses at length Judge Marx' opinion in *Luke's Cornwall Hospital et. al.,* 63 Misc.3d 384 (Sup. Ct., Rockland Co. 2019). In that opinion, Judge Marx suggested that that Rule 202.67 be amended to provide for disclosure "of any litigation funding agreements used to finance disbursements in personal injury and medical malpractice claims ***involving infants*** ..." *Id.* at 418 (emphasis added). The *Marx* decision did not address wrongful death actions or Rule 207.38 at all.

However, the Nocenti memo states that there is "clear justification" to amend the rules for "all petitions seeking court approval of a settlement, including not only infant compromises but also matters involving incapacitated persons ***or wrongful death compromises***" without setting forth *any* evidence or justification for a special need or appropriateness for such disclosure in wrongful death cases.

The legislature has been carefully weighing several proposals to regulate the LFA industry statewide in a manner that protects consumers and empowers litigants across-the-board. That is the ideal way for the state to proceed here. There is no special need to subject potential distributees in wrongful death actions to the disclosure and review of an LFA into which they choose to enter.

Opposition To Amendments To 22 N.Y.C.R.R. § 202.67

OCA's proposal to amend 22 N.Y.C.R.R. § 202.67 is fundamentally flawed because it would require disclosure of LFAs to ***defendants*** in applications seeking leave to compromise in a personal injury action involving an infant or a judicially declared incapacitated person. However, NYSTLA would ***support*** disclosure of LFAs in such cases for the purpose of an *in camera* review [2]

[2] OCA"s proposed amendment to § 202.67 here also goes beyond Judge Marx' request in Luke's Cornwall Hospital. Judge Marx' decision in that case limited his request disclose an LFA in cases involving infants "to the client at inception and ***to the Court*** in connection with any application for leave to compromise such cases." *Id.* (emphasis added). Nowhere did Judge

Disclosure of an LFA to a defendant in any action is unnecessary to any public policy goal involving the fairness (or not) of a particular LFA. Critically, such disclosure will result in the abuse and misuse of such information by defendants to delay the resolution of litigation in order to allow the litigation funding to grow and put economic pressure on the plaintiff. Litigation strategy and settlements should be based on the potential liability, culpability and financial exposure of the defendant—and *not* on the individual economic circumstance of an injured victim. Additionally, Defendants might be able to use the disclosed information to undermine the actual legal claim of the litigant. This will unfairly deter litigants from entering into an otherwise beneficial LFA.

Accordingly, NYSTLA ***supports*** the proposed amendments to 22 N.Y.C.R.R. 207.67 if ***modified language*** is included to limit the provision of statements, information or documentation related to an LFA for an *in camera* review. This would require the insertion of the underlined language to the proposed amendments to 22 N.Y.C.R.R. § 202.67:

- **22 NYCRR 202.67(b):** "...and set forth and provide [<u>for in camera review by the court</u>] documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements pertaining, and any money borrowed against the anticipated settlement proceeds.

- **22 NYCRR 202.67(d):** "Such affidavit or affirmation also shall set forth and provide [<u>for in camera review by the court</u>] documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements and any money borrowed against the anticipated settlement proceeds."

- **22 NYCRR 202.67(f)(9):** "[<u>for in camera review by the court</u>] a statement detailing the relationships, if any, among the direct or indirect recipients of such expenditures;"

- **22 NYCRR 202.67(f)(10):** "[<u>for in camera review by the court</u>] a statement that no other entitlement, benefit or fund is available to pay the proposed expenditures;"

- **22 NYCRR 202.67(f)(11):** "[<u>for in camera review by the court</u>] any other facts material to the application, including but not limited to the complete terms and conditions of any agreement for litigation funding and fee arrangements."

<u>Proposal to Conform 22 N.Y.C.R.R. 202.67(a)(7) with Appellate Division Rules</u>

NYSTLA does not oppose OCA's proposal to add language to 22 N.Y.C.R.R. § 202.67a)(7) stating that "Attorneys representing the petitioner may not charge or receive interest on disbursements without express approval in the court order." Disclosure and approval by the court of costs and disbursements in cases involving infants (and wrongful death cases) are already required.

But OCA should modify the *current* language of 22 N.Y.C.R.R. 202.67(a)(7) to comport with Appellate Division rules. § 202.67(a)(7) currently reads in relevant part: "The order shall not provide for attorney's fees in excess of one third of the amount remaining after deduction of the above disbursements unless otherwise specifically authorized by the court."

Marx suggest disclosure of the details of an LFA to a defendant.

However, the provision of that sentence regarding "after deduction of the above disbursements," is inconsistent with the rules of the Appellate Division that permit, under certain circumstances, reimbursement of disbursements after calculation of attorneys' fees. *See* 22 N.Y.C.R.R. §§ 603.25(e)(3),691.20(e)(3), 806.27(c), 1015.15(c).

Accordingly, NYSTLA recommends that this sentence be amended by striking the language underscored as follows: "The order shall not provide for attorney's fees in excess of one third of the amount ~~[remaining after deduction of the above disbursements]~~ unless otherwise specifically authorized by the court."

###

David Nocenti

From: David Nocenti
Sent: Friday, May 10, 2024 2:40 PM
To: rulecomments
Subject: FW: [EXTERNAL] Request for Public Comment -- Litigation financing agreements
Attachments: RequestForPublicComment-LitigationFinancingAgreements-041224..pdf; Corporation Counsel comment on proposed amendments to Uniform Rules regarding litigation financing.pdf

Categories: Blue category

From: Potak, Andrew (Law) <apotak@law.nyc.gov>
Sent: Friday, May 10, 2024 12:58 PM
To: David Nocenti <DNOCENTI@nycourts.gov>
Cc: Goode-Trufant, Muriel (Law) <mgoodetr@law.nyc.gov>; Matondo-John, Betty (LAW) <bmjohn@law.nyc.gov>; Yarde, Ann-Marie (Law) <ayarde@law.nyc.gov>; Leoussis, Fay (Law) <FLeoussi@law.nyc.gov>; Griffin, Karen (Law) <kgriffin@law.nyc.gov>; Aurigemma, Lisa (Law) <LAurigem@law.nyc.gov>; White, Christina (Law) <CWhite@law.nyc.gov>
Subject: FW: [EXTERNAL] Request for Public Comment -- Litigation financing agreements

Dear Mr. Nocenti,

Annexed as the second attachment, please find a comment from the Office of the Corporation Counsel on the proposed amendments to the Uniform Rules regarding litigation financing agreements.

Andrew J. Potak
Deputy Chief, Tort Division
212-356-3128 | apotak@law.nyc.gov

New York City
Law Department

From: David Nocenti <DNOCENTI@nycourts.gov>
Sent: Friday, April 12, 2024 9:01 AM

To: David Nocenti <DNOCENTI@nycourts.gov>
Subject: [EXTERNAL] Request for Public Comment -- Litigation financing agreements

Attached please find a Request for Public Comment on proposed amendments to the Uniform Civil Rules for the Supreme Court and County Court, relating to litigation financing agreements.

This request will be posted on the OCA website at https://ww2.nycourts.gov/rules/comments/index.shtml in the next few days, and comments are due no later than Friday, May 24, 2024.

Thank you.

David Nocenti
Counsel
NYS Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004
dnocenti@nycourts.gov
(212) 428-2146

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

May 8, 2024

SUBMITTED ELECTRONICALLY

Via email to *rulecomments@nycourts.gov*
Attn: David Nocenti, Esq., Counsel, Office of Court Administration

Re: **Comment on Proposed Amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules relating to Litigation Financing Agreements**

To Whom It May Concern:

The City supports the proposed amendments to the court rules, which would require disclosure of litigation financing agreements in actions for wrongful death and personal injury actions involving infants or judicially declared incapacitated persons. As those discrete cases require court approval of negotiated settlements, requiring disclosure of financing agreements is an appropriate salutary step toward increasing protections and fairness to litigants, particularly those litigants who are most vulnerable.

Despite commentary positing the advantages of litigation financing, the industry's unregulated presence in litigation matters has presented numerous concerns: potential conflicts of interest; confidentiality concerns; delays and influence on case outcomes; usurious compounding of interest; and threatened loss of fair distribution of proceeds upon case disposition. Ultimately, lawyers have ethical responsibilities to their clients, funding firms do not. The proposed amendments to the court rules, which would require increased transparency, are important changes that recognize the reality that litigation financing agreements are often in the backdrop of personal injury and wrongful death actions. Further, the proposed amendments work toward addressing the litigation financing industry's longstanding position that financing agreements are separate and distinct contract arrangements that should be outside of a court's review. To the contrary, the proposed amendments recognize that consumers are in need of protection through judicial

oversight of these financing agreements in pending settlements involving wrongful death, injured infants, and judicially declared incapacitated persons.

The City offers a specific comment addressed to the proposed amendment that would require disclosure of "any contingency, or deferred payment agreements and any money borrowed against anticipated settlement proceeds." See proposed amendments to N.Y. Ct. Rule §207.38(b); §207.38(d); §202.67(b); §202.67(d). As language in standard litigation financing agreements is specifically crafted to avoid the context of a loan/borrowing agreement, the inclusion of terms in the amendments that are commonly found in those agreement may serve to ensure capturing those arrangements should the amendments be enacted. Accordingly, a proposed suggestion is to add to the above-cited sections some additional terms that are found in the context of funding agreements, such as: "investment;" "advance;" "advancement;" "non-recourse purchase;" and "purchase and sale."

While this proposal is limited to requiring disclosure in certain discrete actions, broader legislative reform is warranted. In addition to the City's support of the proposed amendment to court rules, the City supports the passage of legislation that requires general oversight and regulation of the litigation financing industry, and the passage of amendments to the State's Civil Practice Law and Rules and other relevant statutes to require transparency in all actions pending in courts of this state. Over the past several legislative sessions in New York, bills have been introduced that would require increased transparency, registration of litigation funding entities, and establish certain protections directed specifically at eliminating the buried costs incurred by a recipient of a funding "advancement." Presently, despite its increasing involvement as a third-party to a private party's lawsuit, the litigation financing industry is unregulated due to the industry's questionable characterization of its funding as "non-recourse," thereby bringing it out from under protective usury laws.

Cases handled by the Law Department illustrate the need for reform in this area where plaintiffs have entered into litigation funding arrangements and the funding entity asserted "liens" against settlement proceeds. The matter *Guss v. City of New York*, Supreme Court Kings County Index #008353/2006, is one such example. In *Guss*, a plaintiff entered into two litigation funding loans from 2006 totaling $4,250. After appeal, the underlying action was settled in early March 2017 for $2.1 million plus repayment of the plaintiff's Medicaid lien. However, post settlement, the City received notice from the litigation funding company that the loan had become due and, with accrued interest, amounted to $2,838,487.65—668 times the original "advance". The interest rate was more than 60 percent with an effective annual rate (APY) of 80%. Plaintiff died soon after the settlement, and the City continued to hold the settlement monies until the issue was resolved six years later. In addition to the asserted liens resulting in a hold on final resolution of the plaintiff's case, the litigation funding company countersued the Estate of Guss and her attorneys for breach of contract and breach of good faith and fair dealing. This and other instances of plaintiffs entering into litigation financing agreements that severely compromised the rights of the litigants highlight the need for remedial legislation.

Conclusion

The City strongly supports the proposed amendments to the court rules. Although litigation financing agreements play an important role in providing access to the judicial process, common

sense reform, transparency, and oversight is clearly needed. These proposed amendments are an important first step in addressing the myriad of legal and ethical concerns involved with litigation financing agreements in civil litigation. The City also endorses even broader reforms to ensure transparency and oversight of third party funding agreements in all court proceedings.

Sincerely,

Hon. Sylvia O. Hinds-Radix
Corporation Counsel

David Nocenti

From: Miranda, David <dmiranda@nysba.org>
Sent: Friday, May 17, 2024 11:36 AM
To: rulecomments
Cc: David Nocenti
Subject: Response to Request for Public Comment 22 NYCRR §§ 202.67 and 207.38.
Attachments: Nocenti Litigation Financing (5.17.24).pdf

Categories: Blue category

David Nocenti, Esq.
Counsel,
Office of Court Administration

Please find enclosed letter in response to the Request for Public Comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements. Please contact me with any questions. Thanks.

Respectfully,

David P. Miranda, Esq.
General Counsel
New York State Bar Association
One Elk Street, Albany, NY 12207
NYSBA
direct: 518.487.5524 | **main**: 518.463.3200 | **email**: dmiranda@nysba.org | www.nysba.org

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May 17, 2024

David Nocenti, Esq.
Counsel
New York State Office of Court Administration
25 Beaver Street
New York, NY 10004

Re: Response to Request for Public Comment 22 NYCRR §§ 202.67 and 207.38.

Dear Mr. Nocenti:

This is in response to the Request for Public Comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements.

The New York State Bar Association (NYSBA) has longstanding concerns over the impact of "litigation loans" or "litigation financing" on attorney ethical obligations to their clients, as well as the public benefit of such practice.

We support the proposed amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court (22 NYCRR §§ 202.67 and 207.38), to require disclosure of information relating to litigation financing agreements in certain circumstances. Our support is not a comment on the underlying issue of whether "litigation loans" are appropriate, or whether additional regulations of such practice are necessary.

NYSBA has longstanding policy in opposition to conduct or practices that compromise an attorney's duty of independent advocacy and decision-making on behalf of their clients. In Opinion 666, NYSBA's Committee on Professional Ethics stated:

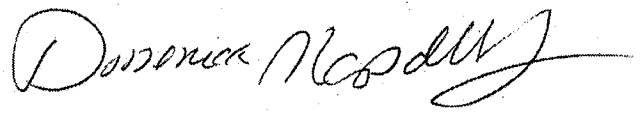
"Ethically, the principles underlying the traditional ban on maintenance found their expression in DR 5-103(B). That rule prohibits a lawyer from advancing litigation expenses, the repayment of which is contingent on the outcome of the claim, because the client must remain "ultimately liable" for the expenses. *See e.g.,* N.Y. State 553 (1983); N.Y. State 464 (1977). The client must bear those expenses regardless of the outcome of the claim...The lawyer must be careful not to compromise confidentiality in disclosing information to the lending institution. The client must be made aware of such a possibility and any disclosures to the lending institution by the lawyer should be made with the fully informed consent of the client. *See* DR 4-101(B), (C)(1); see also Philadelphia Op. 91-9."

NYSBA welcomes the opportunity for further discussion of issues and concerns related to "litigation loans" and whether further regulation is required.

Respectfully,

Richard C. Lewis, Esq.
President

Respectfully,



Domenick Napoletano, Esq.
President-Elect

David Nocenti

From:	Eric Schuller <eschuller@arclegalfunding.org>
Sent:	Monday, May 20, 2024 10:23 AM
To:	rulecomments
Subject:	Notice regarding Litigation Financing Agreements
Attachments:	Request For Public Comment-Litigation Financing Agreements-041224..pdf
Categories:	Blue category

Mr. Nocenti:

I was just made aware the attached proposed rule change. I see that it was made available on April 12, 2024 and sent to Interested persons.

I run a Trade Association that represents companies that offer Consumer Legal Funding to consumers in New York and across the country as we may be affected by the proposed rule.

I was wondering how was this distributed as I was not made aware it until last night by one of my members.

Is the date of May 24, this Friday, a had date as we may need some additional time to respond.

Feel free to contact me on my cell, 815-341-9564, or via this email.

Thank you for your time and consideration.

Eric

Eric Schuller
President
Alliance for Responsible
Consumer Legal Funding (ARC)
815-341-9564 (cell)
eschuller@arclegalfunding.org
www.arclegalfunding.org

Please be CAREFUL when clicking links or opening attachments from external senders.

David Nocenti

From: Porfilio, Dale <dalep@iii.org>
Sent: Wednesday, May 22, 2024 9:22 PM
To: rulecomments
Subject: Request for Public Comment
Attachments: 20240524 Triple-I Comment re NY TPLF Disclosure.pdf

Categories: Blue category

The Insurance Information Institute is pleased to submit the attached public comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements. Please let us know if we can assist in any way as you review all public comments on this important issue.

Dale Porfilio, FCAS, MAAA
Chief Insurance Officer, Insurance Information Institute | www.iii.org
President, Insurance Research Council | www.insurance-research.org
T (212) 346-5533 | M (904) 608-1457

INSURANCE INFORMATION INSTITUTE
Affiliated with THE INSTITUTES

We are the trusted source of unique, data-driven insights on insurance to inform and empower consumers

110 William Street, New York, NY 10038
212.346.5500 | info@iii.org
iii.org

Public Comment on Proposed Amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the New York Supreme Court and County Court (22 NYCRR §§ 202.67 & 207.38) Relating to Litigation Financing Agreements

On behalf of the Insurance Information Institute
Comment Date: May 24, 2024

Introduction

The Insurance Information Institute (Triple-I) is the trusted source of unique, data driven insights on insurance to inform and empower consumers, industry professionals, media, and public policymakers. We have been educating and informing consumers about our growing concern with third party litigation funding within the broader umbrella of what we refer to as "legal system abuse." Please allow me to provide some brief context.

Triple-I defines legal system abuse as policyholder or plaintiff attorney practices which increase costs and time to settle insurance claims. While litigation is considered a policyholder's last resort, legal system abuse exploits litigation when a disputed claim could have been resolved without judicial intervention. Legal system abuse contributes to higher costs for insurance operations and policyholder pricing.

Our growing concern with third-party litigation funding is based on the change in the motivation of the investors. TPLF can be an effective tool for judicial good. Yet, in recent years, TPLF has devolved in unfortunate ways. Without any direct ties to litigated cases and minimal transparency, institutional investors and even sovereign nations are contributing significant amounts of capital toward litigation for the sole intent of making a profit.

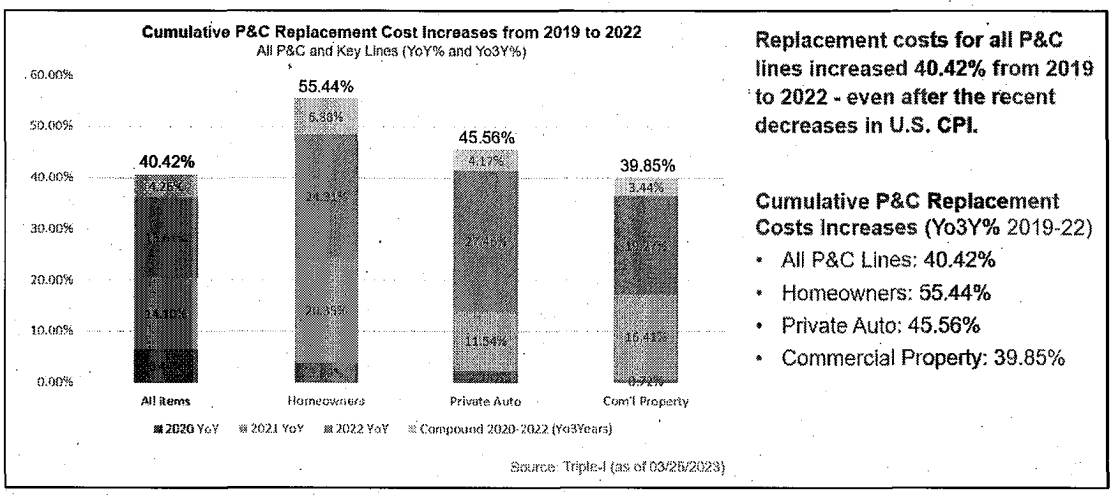
Without transparency, we are not able to provide deep data-driven insights about TPLF's impacts on consumers and the insurance industry. Therefore, Triple-I supports mandatory disclosure of TPLF so we can study the impacts on consumers and carriers alike.

Background

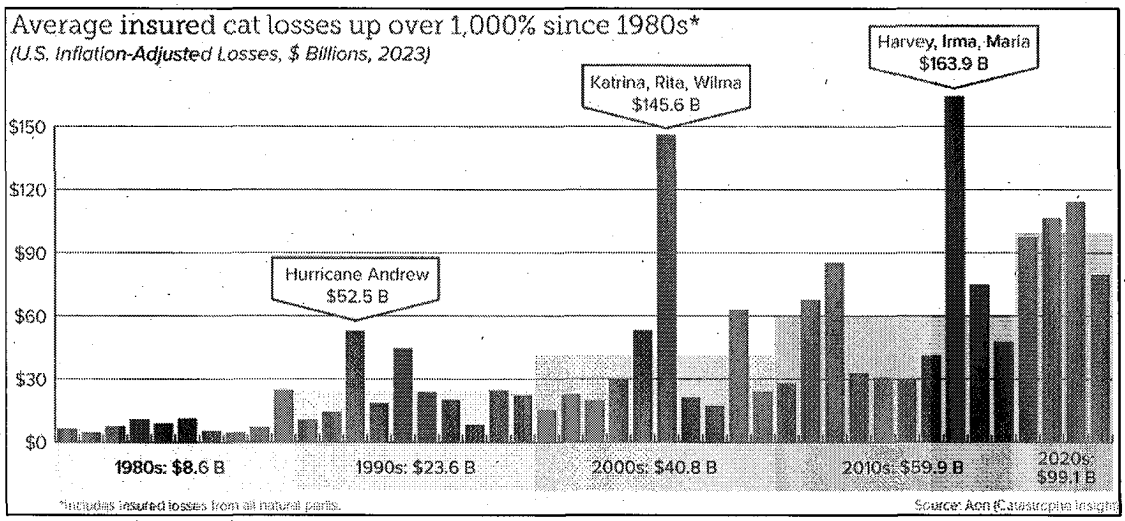
A foundational principle for the insurance industry is that prices need to reflect the expected loss payments and expenses for each policyholder. This means prices need to increase when losses or loss adjustment expenses increase. The industry has paid significantly higher losses in recent years, with some of the more influential drivers including:

- Increases in replacement costs for autos, homes, and businesses,
- Record-setting insured losses from natural catastrophes,
- Litigation costs,
- Theft and crime, and
- Risky behaviors like distracted driving.

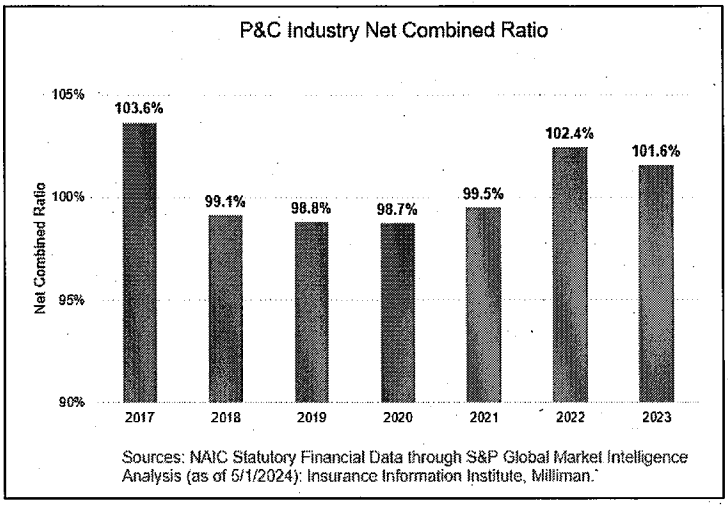
To elaborate with data-driven insights, replacement costs for all P&C lines increased 40% cumulatively from 2019 to 2022. Homeowners had the highest increase at 55%, with Personal Auto increasing 46%.



Regarding catastrophes, the industry has experienced over a tenfold increase in insured losses from natural catastrophes from the 1980's to the 2020's (even after adjusting for inflation).



The insurance industry's financial results have deteriorated significantly since the beginning of the COVID pandemic, with the overall P&C Net Combined Ratio rising from 98.7 in 2020 to 102.4 in 2022 before improving slightly to 101.6 in 2023. This means the industry is paying out on average $1.02 for every $1.00 of premium collected. Increased losses caused the insurance industry to increase rates to improve results and restore strong policyholder surplus to be the financial first responders for future losses. Triple-I expects this cycle of rate increases for the most heavily impacted product lines (i.e., personal auto and homeowners) to continue into 2025.

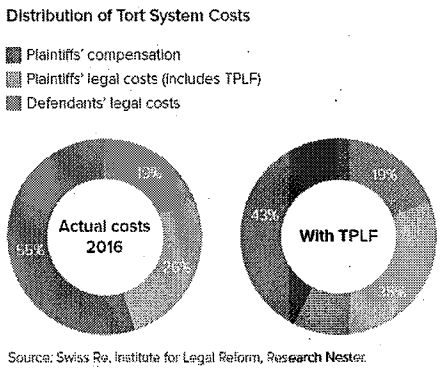


Litigation Costs and TPLF

The insurance industry retains claim adjusters, litigation managers, and defense attorneys to help settle claims. The portion allocated to defense costs are defined as "Defense and Cost Containment Expenses" (DCC). These expense dollars across all P&C products increased 29% from 2018 to 2023, while increasing 65% for General Liability (GL) products across these same years. GL products are where more of the complex and high limit litigation occurs for large corporations.

Because TPLF is not disclosed in New York as well as most other states, Triple-I cannot today quantify how much TPLF is contributing to the increase in DCC and industry's financial results. That said, the 2021 Swiss Re Institute's report entitled "US Litigation Funding and Social Inflation: The Rising Costs of Legal Liability" included several key data insights about TPLF.

- More than half of the USD 17 billion investment in litigation funding globally in 2020 was deployed in the U.S.
- They project this investment to grow to USD 30 billion by 2028, with most of the growth occurring in the U.S.
- TPLF investments have produced internal rates of return from 25% upwards in recent years.
- Plaintiffs receive only 43% of the tort system costs (on average) when TPLF is involved, 12 pts less than without TPLF.



Although merely an estimate, Swiss Re's study implies the insurance industry would be annually funding $7.5B (25% return on $30B) of investment returns for TPLF investors by 2028.

Conclusion

In 2022, the Triple-I issued the research report What is third party litigation funding and how does it affect insurance pricing and affordability?, in which we summarized four key conclusions.

Third party litigation funding:

- *is no longer about David vs Goliath, but about speculative investors getting richer as they focus on cases more likely to win the big settlements.*
- *Lacks transparency and a sense of fair play – if attorneys can communicate across the table about insurance coverage, why not disclose the involvement of TPLF?*
- *Creates a moral hazard as sharing the settlement pie in exchange for funding can fuel a desire for wanting a bigger pie to resolve the claim.*
- *Siphons value from the claims and risk management ecosystem – away from policyholders, claimants, and insurers – and transfers it to attorneys and investors.*

TPLF investment returns and any accompanying increase in claim payments would have a direct impact on insurance premiums. The investment proceeds to any TPLF of insurance claims would be paid within losses, and the insurance company defense costs would be captured within DCC. The higher losses and DCC would be considered in the pricing of future policies, alongside economic inflation and catastrophes. Thus, TPLF of insurance claims can impact the cost of insurance, which for businesses must be embedded in the price consumers pay for goods and services.

Triple-I is eager to assist with the quantification of how TPLF is impacting consumers and insurance carriers. But until disclosure of TPLF in insurance claims is standard procedure, no one will be able to quantify the impacts. Other state governments have recently taken steps to advance third-party litigation funding transparency in civil lawsuits. Indiana enacted House Bill 1124 which requires a plaintiff to disclose whether they've entered into a TPLF agreement. Montana acted similarly when passing Senate Bill 269. At the federal level, there's bi-partisan support for TPLF legislation called the 'Protecting Our Courts from Foreign Manipulation Act of 2023.'

On behalf of consumers, businesses, and the insurance industry, Triple-I supports the proposed amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court (22 NYCRR §§ 202.67 & 207.38) to require disclosure of litigation financing agreements.

Sincerely,

Dale Porfilio

Dale Porfilio, FCAS, MAAA
Chief Insurance Officer, Insurance Information Institute
President, Insurance Research Council

David Nocenti

From: Anthe Maria Bova <abova@nycla.org>
Sent: Thursday, May 23, 2024 11:03 AM
To: rulecomments
Cc: akoch@katskykorins.com
Subject: NYCLA Joint Committee Comment Submission on Litigation Financing Agreement Amendments
Attachments: NYCLA Joint Committee Comment on Litigation Funding 5.23.24.pdf

Categories: Blue category

Good morning,

Please see attached in connection with the Administrative Board of the Courts' request for Public Comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements.

Kind regards,

Anthe Maria Bova
General Counsel & Director of Pro Bono Programs
New York County Lawyers Association
111 Broadway, 10th Floor
New York, NY 10006
Tel. (212) 267-6650
abova@nycla.org

New York County Lawyers Association

Committee on Tort Law
Committee on Supreme Court
Committee on Professional Ethics
Committee on Professionalism and Professional Discipline

Joint Comment on Proposed Litigation Funding Rule

Introduction

The New York County Lawyers Association's Committee on Tort Law, Committee on Supreme Court, Committee on Professionalism and Professional Discipline and Committee on Professional Ethics (collectively, the "Committees")[1] share the Office of Court Administration's view that litigation financing agreements with plaintiffs or their representatives in certain kinds of personal injury cases – those requiring court approval of any settlement -- should be disclosed to a Court when approval of that settlement is sought. However, it does not support the proposed amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules (the "Rules") for Supreme Court and County Court in their current form. Proposed alternate language is included with this statement.

Litigation funding agreements have become increasingly prevalent. They allow litigants and attorneys to "borrow" money against their interest in an anticipated future recovery. However, because of the way these transactions are structured, funding companies are permitted to charge interest and other fees that exceed, or fall outside of, applicable usury laws. In some cases, the rates can be exorbitant. As the Hon. Paul Marx noted in his opinion in *S.D., an infant by his mother and natural guardian, Jennifer Trelles v. St. Lukes Cornwall Hospital, et. al.*, 63 Misc.3d 384 (N.Y. Sup. 2019), some attorneys also have used litigation funding to pay disbursements in a case and then have tried to pass the interest charges on to their clients. And in *Echeverria v. Estate of Linder,* 2005 N.Y. Slip Op. 50675(u) at 4-5 (Sup. Ct. N.Y. Co. 2005), the Court criticized the high interest rates that a litigation funder charged to an impecunious plaintiff, noting that those additional costs made settlements more expensive and therefore more difficult to achieve.

The proposed rules would require disclosure of essentially any funding agreement relating to a given case in petitions for approval of settlements involving Estates, infants, and incapacitated persons. These Rules would cover both "client-side" and "lawyer-side" funding arrangements in these classes of cases—information proponents of the Rules believe judges need in determining whether to approve these settlements. We disagree. Though we believe disclosure of certain kinds of "client side" funding is appropriate, we do not agree the same is true of disclosure of "lawyer-side" funding or funding to potential distributees of Estates.

The proposed rule changes address wrongful death actions [22 NYCRR § 207.38] and infant compromises [22 NYCRR § 202.67]. The proposed amendments to the two Rules differ slightly, so we will address them separately.

Wrongful Death Actions

[1] The New York County Lawyers Association was founded in 1908 as one of the first major bar associations in the country that admitted members without regard to race, ethnicity, religion or gender. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence, including through the work of its many committees that provide in-depth analysis and insight into legal practice areas. The views expressed here are those of the Committees only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

In wrongful death actions, the proposed rules would require the Estate representative and attorney to disclose "the terms and documentation of any interest or any other fees charged to the personal representative of the decedent *or any person entitled to take or share in the proceeds of the settlement and any contingency or deferred payments agreement* and any money borrowed against anticipated settlement proceeds." (emphasis added). The italicized language is broad enough to cover lawyer-side funding, regardless of the form that funding takes and regardless of whether the funding relates to the one particular settlement or is part of a more complex arrangement regarding financing the lawyer's office overhead.

It is the Committees' view that this language is overbroad. We agree that any funding agreement which impacts the Estate's recovery – that is, anything taken out against proceeds otherwise allocable to the Estate – should be disclosed to the Court so it can evaluate the reasonableness of the settlement. Agreements reducing the ultimate Estate recovery can potentially bear on the fairness or appropriate size of the settlement, or may otherwise be of concern for the Surrogate. We also agree that no attorney should be allowed to charge interest to an Estate on disbursements without disclosing as much to the Court and seeking its explicit approval.

However, to the extent the rule requires disclosure of funding agreements taken out by an attorney and relating solely to the attorney's legal fee, the Committees do not support it. An attorney's personal financial affairs typically are not a relevant concern for the courts and whether an attorney has obtained funding has no bearing on the reasonableness of a settlement. An attorney is not a party to a case in which he or she merely represents a client and should not be required to disclose to a judge their internal financial arrangements simply because they take on a certain kind of personal injury matter. In any event, a wrongful death petition contains documentation of the terms of a settlement and requires an explanation to the Court of the reasons why it is in the best interest of the Estate to accept.

Nor is it relevant if a distributee who is not the Estate representative obtains funding. If a distributee borrows against monies he or she expects to receive from an Estate, it does not have any relationship to whether the Estate's recovery, prior to distribution, is fair under the circumstances.

Infant and Incompetent Compromises

The Committees have the same reservations about the proposed rules for infants and incompetent persons. The proposed rule requires essentially the same disclosure as the one applicable to wrongful death actions: attorneys and petitioners must "set forth and provide documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements and any money borrowed against anticipated settlement proceeds." This language would, like the wrongful death proposal, also require disclosure of agreements purely relating to the attorney's legal fee, which is unnecessary and does not reflect on the reasonableness of the infant's or incapacitated person's settlement. The Committees agree that any funding taken out which would affect the infant's or incapacitated person's financial interest, including the monetary amount ultimately to be recovered from the resolution of the lawsuit, are relevant to an evaluation of the reasonableness of the settlement and must be disclosed to the Court.

The proposal also would require a "statement that no other entitlement, benefit or fund is available to pay the proposed expenditures," apparently referring to the repayment of funding agreements. This language does not merely require disclosure, which is the asserted purpose of the proposed rule. It effectively codifies an affirmative mandate that an expenditure cannot be repaid from a recovery if there are other funds "available" to do so. This language could conceivably interfere with medical treatment paid for by funding. Sometimes, injured parties receive medical treatment from doctors who do not accept their insurance and then use litigation funding to pay the bill. This is a particular problem when the medical treatment is especially complex and specialized, and "in-network" doctors available to the plaintiff may not have the experience or expertise to do the work adequately. The proposed language about additional funding could lead a court to find in that situation that insurance was "available" to pay for medical treatment (no matter how otherwise inadequate) and deny repayment of funding. This would not necessarily be beneficial to injured parties, and certainly is beyond the scope of rules intended to ensure transparency. We do not view this mandate as necessary.

We are attaching proposed modified language, which would ensure that agreements bearing on the financial interests of an Estate, infant, or incapacitated person are disclosed, but addressing our concerns about overbreadth.

The Committees' support for limited disclosure of funding agreements in context of applications for court approval of settlements on behalf of infants, estates, and incapacitated persons also should not be construed to express any view concerning the discoverability of these agreements during the active phases of litigation. The discoverability of such agreements by adverse parties presents entirely different concerns, which are not before us here.[2]

Respectfully submitted,

Committee on Tort Law
Committee on Supreme Court
Committee on Professional Ethics
Committee on Professionalism and Professional Discipline

May 23, 2024

[2] There are aspects of some litigation funding agreements or their implementation that may present issues under the Rules of Professional Conduct. These potential issues are being studied and debated by various ethics committees or other groups, including NYCLA. These potential issues are unrelated to the purposes of the disclosure proposals on which we are commenting and therefore we do not address them here.

PROPOSED AMENDMENTS

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A. Proposed amendments to§ 207.38:
Subdivision (b) of §207.38 is amended to read as follows:
(b) The petition also shall show the following:
(1) the age, residence, occupation and earnings of the decedent at time of death;
(2) the names, addresses, dates of birth and ages of all the persons entitled to take or share in the proceeds of the settlement or judgment, as provided by EPTL 5-4.4, or by the applicable law of the jurisdiction under which the claim arose, and a statement whether or not there are any children born out of wedlock;
(3) a complete statement of the nature and extent of the disability other than infancy, of any person set forth in (2) of this subdivision;
(4) the gross amount of the proceeds of settlement, the amount to be paid as attorneys' fees, and the net amount to be received by petitioner as a result of the settlement;
(5) any obligations incurred for funeral expenses, or for hospital, medical or nursing services, the name and address of each such creditor, the respective amounts of the obligations so incurred, whether such obligations have been paid in full and/or the amount of the unpaid balance due on each of said claims as evidenced by proper bills filed with the clerk;
(6) whether any hospital notice of lien has been filed under section 189 of the Lien Law, and if so, the particulars relating thereto;
(7) on the basis of the applicable law, a tabulation showing the proposed distribution including the names of the persons entitled to share in the proceeds and the percentage or fraction representing their respective shares, including a reference to the mortality table, if any, employed in the proceeding which resulted in the settlement or judgment, and the mortality table employed in the proposed distribution of the proceeds; [and]
(8) the cost of any annuities in compromises based upon structured settlements in wrongful death actions[.]; and
(9) the terms and documentation of ~~of any interest or any other fees charged to the personal representative of the decedent or any person entitled to take or share in the proceeds of the settlement and any contingency or deferred payments agreement and~~of any agreement relating to money borrowed against anticipated ~~settlement~~ lawsuit proceeds on behalf of the Estate or otherwise affecting the Estate's financial interest or the financial interest of the designated Estate representative.

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Notwithstanding the foregoing, any litigation funding agreement or other financial arrangement entered into solely for the benefit of the attorney and not affecting the financial interest of the Estate is excluded from this rule.

Subdivision (d) is amended to read as follows:
(d) A supporting affidavit by the attorney for petitioner must be filed with each petition for leave to compromise showing:
(1) whether the attorney has become concerned in the application or its subject matter at the instance of the party with whom the compromise is proposed or at the instance of any representative of such party;

(2) whether the attorney's fee is to be paid by the administrator and whether any payment has been or is to be made to the attorney by any other person or corporation interested in the subject matter of the compromise;
(3) if the attorney's compensation is to be paid by any other person, the name of such person;
(4) the services rendered by the attorney in detail; [and]
(5) the amount to be paid as compensation to the attorney, including an itemization of disbursements on the case, and whether the compensation was fixed by prior agreement or based on reasonable value, and ifby agreement, the person with whom such agreement was made and the terms thereof[.]; Attorneys representing the petitioner may not charge or receive interest on disbursements without express approval of the court
; and
(6) The terms and documentation of any agreement relating to money borrowed against anticipated settlement proceeds on behalf of the Estate or otherwise affecting the Estate's financial interest or the financial interest of the designated Estate representative.
~~any interest or any other fees charged to the personal representative of the decedent or any person entitled to take or share in the proceeds of the settlement and any contingency or deferred payments agreement and any money borrowed against anticipated settlement proceeds.~~

B. Proposed amendment to § 202.67:
1. Subdivision (a)(7) is amended to read as follows:
(a) The settlement of an action or claim by an infant or judicially declared incapacitated person (including an incompetent or conservatee) shall comply with CPLR 1207 and 1208 and, in the case of an infant, with section 474 of the Judiciary Law. The proposed order in such cases may provide for deduction of the following disbursements from the settlement:
(1) motor vehicle reports;
(2) police reports;
(3) photographs;
(4) deposition stenographic expenses;
(5) service of summons and complaint and of subpoenas;
(6) expert's fees, including analysis of materials; and
(7) other items approved by court order.
Attorneys representing the Petitioner may not charge or receive interest on disbursements without express approval in the court order.
The order shall not provide for attorney's fees in excess of one third of the amount remaining after deduction of the above disbursements unless otherwise specifically authorized by the court.

2. Subdivision (b) is amended to read as follows:
(b) The petition or affidavit in support of the application also shall set forth the total amount of the charge incurred for each doctor and hospital in the treatment and care of the infant or incapacitated person, and the amount remaining unpaid to each doctor and hospital for such treatment and care, and shall set forth and provide documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements affecting the infant's or incapacitated person's financial interest, and any money borrowed against· anticipated settlement proceeds by or on behalf of the infant or incapacitated person. If an order be made approving the application, the order shall provide that all such charges for doctors and hospitals shall be paid from the proceeds, if any, received by the parent,

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guardian, or other person, in settlement of any action or claim for the loss of the infant's or incapacitated person's services; provided, however, that if there be any bona fide dispute as to such charges, the judge presiding, in the order, may make such provision with respect to them as justice requires. With respect to an incapacitated person, the judge presiding may provide for the posting of a bond as required by the Mental Hygiene Law.

3. Subdivision (d) is amended to read as follows:

(d) The affidavit or affirmation of the attorney for a plaintiff, in addition to complying with CPLR 1208, must show compliance with the requirements for filing a retainer statement and recite the number assigned by the Office of Court Administration, or show that such requirements do not apply. ~~Such affidavit or affirmation also shall set forth and provide documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements and any money borrowed against anticipated settlement proceeds.~~ Such affidavit or affirmation shall provide documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements affecting the infant's or incapacitated person's financial interest, and any money borrowed against anticipated litigation proceeds by or on behalf of the infant or incapacitated person or otherwise anticipated to be repaid from the infant's or incapacitated person's case. Notwithstanding the foregoing, any litigation funding agreement or other financial arrangement entered into solely for the benefit of the attorney and not affecting the infant's or incapacitated person's financial interest is excluded from this rule.

4. Subdivision (t) is amended to read as follows:

(f) A petition for the expenditure of the funds of an infant shall comply with CPLR Article 12, and also shall set forth:

(1) a full explanation of the purpose of the withdrawal;

(2) a sworn statement of the reasonable cost of the proposed expenditure;

(3) the infant's age;

(4) the date and amounts of the infant's and parents' recovery;

(5) the balance from such recovery;

(6) the nature of the infant's injuries and present condition;

(7) a statement that the family of the infant is financially unable to afford the proposed expenditures;

(8) a statement as to previous orders authorizing such expenditures;

~~(9) [any other facts material to the application,] a statement detailing the relationships, if any, among the direct or indirect recipients of such expenditures;~~

~~(10) a statement that no other entitlement, benefit or fund is available to pay the proposed expenditures;~~

(11) any other facts material to the application, including but not limited to the complete terms and conditions of any agreement for litigation funding and fee arrangements affecting the infant's or incapacitated person's financial interest.

(12) any other facts material to the application.

(g) No authorization will be granted to withdraw such funds, except for unusual circumstances, where the parents are financially able to support the infant and to provide for the infant's necessaries, treatment and education.

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(h) Expenditures of the funds of an incapacitated person shall comply with the provisions of the Mental Hygiene Law.
(i) The required notice of the filing of a final account by an incapacitated person's guardian and of a petition for settlement thereof shall show the amounts requested for additional services of the guardian and for legal services. Prior to approving such allowances, the court shall require written proof of the nature and extent of such services. Where notice is given to the attorney for the Veteran's Administration, if the attorney for the Veteran's Administration does not appear after notice, the court shall be advised whether the Veteran's Administration attorney has examined the account and whether he objects to it or to any proposed commission or fee.

David Nocenti

From: Marc Craw <mcraw@mlmic.com>
Sent: Friday, May 24, 2024 9:12 AM
To: rulecomments
Cc: Marc Craw
Subject: Request for Public Comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements
Attachments: MLMIC comment letter on OCA proposed TPLF disclosure rule.pdf

Categories: Blue category

Good morning, please find attached MLMIC Insurance Company's comment letter regarding the above-captioned request for comments.

Do not hesitate to reach out to me if you have any questions.

Thank you for the opportunity to provide feedback on this matter, which is very important to MLMIC Insurance Company.

Marc

Marc D. Craw, Esq.
Attorney, General Counsel Office
MLMIC Insurance Company
Tel. (518) 786 – 2777
Email: mcraw@mlmic.com

MLMIC
MLMIC Insurance Company
a Berkshire Hathaway company

P.O. Box 1287, Latham, NY 12110
(800) ASK-MLMIC | MLMIC.com
New York City | Long Island | Colonie | Syracuse | Buffalo

May 24, 2024

Mr. David Nocenti, Esq.
Counsel, Office of Court Administration ("OCA")
25 Beaver Street, 10th Floor
New York, New York 10004

RE: OCA Request for public comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements

Dear Mr. Nocenti:

I am writing on behalf of MLMIC Insurance Company ("MLMIC"). MLMIC is the largest medical liability insurer in New York State, covering more than 13,000 physicians, 3,000 dentists, dozens of hospitals, and thousands of other healthcare professionals and facilities in the state. As a result of this coverage, we defend and indemnify medical defendants in thousands of medical malpractice lawsuits in the state every year.

MLMIC supports OCA's above-captioned proposed amendment to require disclosure of third-party litigation financing ("TPLF") agreements in lawsuits involving requests for judicial approval of settlements in wrongful death actions and in personal injury cases involving an infant or judicially declared incapacitated person. However, for the following reasons we urge OCA to expand the proposed amendments to include all personal injury cases.

As noted by the OCA letter on page 2, there has been a proliferation of TPLF agreements in recent years and these agreements can have a potential impact on settlements. In fact, the U.S. Government Accountability Office ("GAO") found that TPLF agreements "may create incentives for parties not to reach settlement."[1] The GAO also noted in their report that the TPLF market increased by 100 percent from 2017 to 2021. These agreements impose extremely high interest rates that can lead to a plaintiff rejecting a reasonable settlement offer to "seek extra money to make up the amount that has to be repaid."[2]

Most New York courts are presently not permitting disclosure of TPLF agreements in personal injury cases, primarily on the basis that these lending agreements are not "material and necessary" to the defense. However, we would respectfully submit that the very real potential impact of delaying settlements and increasing costs to both the New York court system and defendants caused by these TPLF agreements renders the disclosure of these agreements material and necessary.

In fact, defendants in New York must disclose all insurance policies with a potential to satisfy part or all of a judgment that may be entered in their actions as a result of the Comprehensive Insurance Disclosure Act ("CIDA"), Chapter 136 of the Laws of 2022. As noted by the Governor in Approval Memorandum 169 of 2021, the CIDA is designed to "insure that parties in a litigation are correctly informed about the limits of potential insurance coverage." TPLF agreements are no different than a defendant's insurance policies in

terms of potential impacts on settlement. Accordingly, TPLF agreements should similarly be disclosed in all New York personal injury actions.

For example, a plaintiff in a medical malpractice action received a referral from her attorney to a TPLF company that provided her a lawsuit loan. The loan had a 65 percent interest rate that eventually grew by 1.5 percent every month. The plaintiff, a mother with one of her twins suffering brain damage, was not informed by her attorney that the TPLF company she received the loan from was owned by her attorney's brother.[3] Mandatory disclosure of the existence of any TPLF loans in all civil personal injury actions would provide greater awareness and transparency of these loans to all of the parties involved in the action.

For these reasons, MLMIC urges the OCA to expand its proposed rule to mandate disclosure of TPLF arrangements in all New York civil personal injury actions. This will provide much-needed transparency and facilitate orderly settlements of actions, when possible, by informing defendants as to both the existence and amount of loans a plaintiff has taken out and will be responsible for paying back. In that respect, it is equivalent to the CIDA law's mandated disclosure of a defendant's liability insurance information. We also strongly believe that mandating disclosure of TPLF arrangements in all personal injury actions will serve to protect the public, in their roles as consumers, patients and as litigants.

Sincerely,

Michael J. Schoppmann, Esq.
CEO, MLMIC Insurance Company

1 U.S. Government Accountability Office, GAO-23-105210, Third Party Litigation Financing: Market Characteristics, Data and Trends, December 1, 2022 at pages 11, 18 (https://www.gao.gov/assets/gao-23-105210.pdf.
2 Ibid at page 20
3 https://www.bxtimes.com/op-ed-reform-lawsuit-lending-industry/

David Nocenti

From: Ellen Melchionni <emelch@nyia.org>
Sent: Friday, May 24, 2024 11:29 AM
To: rulecomments
Cc: Robert T. Farley
Subject: Litigation Financing Agreement Letter
Attachments: OCA letter re litigation financing from NYIA.pdf

Categories: Blue category

Attached please find the New York Insurance Association's comments regarding the proposed amendments to Sections 202.67 and 207.38 of the Uniform Rules for the Supreme Court and County Court relating to litigation financing agreements.

Please feel free to reach out if you have any questions.

Ellen Melchionni, President
New York Insurance Association, Inc.
130 Washington Avenue
Albany, NY 12210
www.nyia.org
(518) 432-4227 Office
(518) 281-7660 Cell

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Stay informed, follow us on Facebook, Twitter and LinkedIn

The New York Insurance Association (NYIA®) is a state trade association that has represented the property and casualty insurance industry for more than 140 years.

May 24, 2024

David Nocenti
Counsel, Office of Court Administration
25 Beaver St, 10th floor
New York, NY 10004
Via email: Rulecomments@nycourts.gov

Dear Mr. Nocenti,

We appreciate the opportunity to provide comments on the proposed amendments to Sections 202.67 and 207.38 of the Uniform Rules for the Supreme Court and County Court relating to litigation financing agreements.

We applaud you for initiating a conversation about litigation funding and considering the implementation of rules to protect litigants, consumers, and the integrity of the court system. As stated in the April 12 memorandum, the problems associated with litigation funding include "exorbitant interest rates, fees and other charges that vastly reduce the recovery of injured parties." We believe that this, while true, is an incomplete recitation of the harms posed by unregulated litigation funding. Undisclosed litigation funding prioritizes recovery of the litigation funder's investment at the expense of maximizing the litigant's recovery, often leaving successful claimants without a meaningful recovery. Critically, undisclosed litigation funding distorts the normal incentives for timely and rational dispute resolution. It disincentivizes settlement, and seeking reasonable compensation to remedy one's injuries, instead incentivizing unreasonable demands for compensation disproportionate to one's losses, with resulting outlandish and inappropriate "nuclear verdicts."

The various legislative bills referenced in the Memorandum vary in their specifics but generally share common goals of establishing a framework of regulation and registration, requiring clear and understandable contract terms and disclosure of fees; some bills also go further and impose reasonable rates of interest, rights of recission and other consumer protections. One bill, S.2594a (Comrie), importantly contains a provision that seeks to require the affirmative disclosure of any litigation funding agreement to all parties to such litigation. None seek to unduly discourage or functionally prohibit the use of litigation financing. We believe that the approaches contemplated by the legislature complement the intent of this proposed amendment and would work in concert to protect consumers by ensuring they are not taken advantage of in times of need.

The proposal advanced by the unified court system requires disclosure of the existence of litigation funding arrangements in "a limited set of cases – most notably requests for judicial approval of settlements in, wrongful death actions, and in personal injury actions involving an infant or a judicially-declared incapacitated person." By advancing this measure, the court acknowledges the implicit value in disclosure of these arrangements, and the salutary effect of transparency regarding "financing agreements affecting disbursements or attorney fees but also other financial agreements that adversely affect the recovery of the injured plaintiff."

One concern with this proposal is that the harms motivating this amendment are present not only in the categories to which the proposed rule would apply but are present wherever litigation funding arrangements occur. Further, the transparency and disclosure elements of the amendment put a very modest requirement in place for attorneys. The adoption of this rule, while beneficial in a vacuum, does not go far enough. We fear that it could be perceived as embodying the totality of needed reforms on litigation funding, and obviating other reforms that could work in conjunction with this rule.

We support the laudable intent of the proposal, and respectfully suggest that this rule be expanded to further require affirmative disclosure of all financing agreements to all parties to the litigation. This will ensure the protection of the most vulnerable litigants and advance the intent of this proposal without unduly burdening or restricting litigants or their attorneys.
Thank you for the opportunity to comment on this proposal.

Sincerely,

Ellen Melchionni

Ellen Melchionni
President

David Nocenti

From: Liz Benjamin <Liz@marathonstrategies.com>
Sent: Friday, May 24, 2024 11:31 AM
To: rulecomments
Subject: Section 202.67 and 207.38 re: litigation financing agreements.
Attachments: FINAL.CFLF OCA Letter 5.24.24.pdf

Categories: Blue category

Dear Mr. Nocenti. Attached and below please find a submission in response to OCA's request for public comment related to the rules governing disclosure of litigation financing agreements. Thank you. Liz Benjamin

CONSUMERS FOR FAIR LEGAL FUNDING

May 24, 2024

New York State Office of Court Administration (OCA)
ATTN: David Nocenti, Esq.
Counsel, Office of Court Administration
25 Beaver St., 10th Fl.
New York, New York, 10004

Dear Mr. Nocenti,

Thank you for the opportunity to submit public comment on the proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements. The Office of Court Administration's (OCA) attention to the need for disclosure of this financing in the litigation process is timely and appreciated. Our hope is that any amendments – should they be finalized – will positively impact New Yorkers statewide.

Consumers for Fair Legal Funding (CFLF) is a statewide coalition of community groups, social justice organizations, and business interests established in 2021 to educate lawmakers, regulators, and members of the public about the harm perpetrated by the unregulated lawsuit lending (third-party litigation financing) industry.

Part of our mission includes ensuring that the interests of vulnerable New Yorkers who are unbanked, underbanked, and without a financial safety net are represented. Often these individuals need access to funding streams outside a traditional lending framework and lawsuit loans can fill that need. But failing to require disclosure of these finance agreements in the litigation process makes a mockery of our legal system by allowing potential conflicts of interest to persist and establishes an uneven playing field for plaintiffs.

In this context, OCA has afforded our coalition the opportunity to examine the need for transparency around the existence of lawsuit lending in a limited – but critically important – number of wrongful death cases and certain personal injury cases.

Lawsuit lending has ballooned into a multibillion-dollar industry due to a complete absence of regulation. Unscrupulous lenders have been known to charge ruinous interest rates, leaving those who borrowed against an expected legal settlement owing much or even all their awards – should they receive a settlement or judgement. A 2020 study found that the average profit on these loans is 60 percent, though some borrowers have reported paying more than 100 percent in annual interest. As a result, some plaintiffs even end up in debt.

CFLF spokesman, the Rev. Kirsten John Foy, has firsthand experience of the tactics used by some members of this shadowy industry. His story is but one of many examples of a self-interested industry operating in a cavalier manner, profiting off vulnerable New Yorkers. The list includes 9/11 first responders, wrongfully convicted prisoners, former NFL players with cognitive impairments, survivors of police brutality, and victims of the Deepwater Horizon oil-rig disaster.

In addition, a recent white paper by the law firm Kahana Feld revealed how third-party litigation financing has become, "*an albatross around the neck of New York's civil court system that ensnares litigants in a morass of needless and costly litigation while jeopardizing plaintiffs' hard-won recoveries, and simultaneously creating an unsightly mess of undisclosed conflicts and serious ethical breaches.*"

The white paper delves deeply into examples of the "incestuous relationship" between third-party litigation finance companies and plaintiff counsel, which cry out for mandated disclosure.

The lack of regulation and transparency in the legal system, for example, impacted a young Bronx mother of newborn twins, who took out a lawsuit loan after suing over alleged insufficient care from her obstetrician that resulted in life-threatening neurological injuries for her second-born child. The attorney representing this mother directed her to a funding company that was owned and operated by his brother, where she received funding with an aggressive interest rate structure.

OCA's willingness to shine a light on the opaque practice of litigation financing is a positive step in the right direction. We hope, however, that this is just the first step toward broader disclosure requirements for all litigation finance deals in courtrooms across the state.

Ultimately, Consumers for Fair Legal Funding believes statutory reform is necessary to ensure transparency in the process and establish an interest rate cap to protect plaintiff borrowers.

Until Albany lawmakers act, we welcome OCA's attention to this matter and look forward to its forthcoming decision regarding litigation finance that we firmly believe will positively impact many vulnerable and wronged New Yorkers.

Thank you for your consideration.

Sincerely,

Consumers for Fair Legal Funding

David Nocenti

From: Lucinski, Ryan J. <RLucinsk@hodgsonruss.com>
Sent: Friday, May 24, 2024 11:34 AM
To: rulecomments
Subject: Comment on Proposed Amendments to Sections 202.67 and 207.38 of the Uniform Trial Rules

Categories: Blue category

Mr. Nocenti:

I write as a NY defense attorney who has handled personal injury litigation for 20 years, on behalf of Fortune 100 companies, manufacturers, suppliers, contractors, property owners/lessees, and insurers.

I support the proposed amendments for the disclosure of third-party litigation financing ("TPLF") agreements in limited cases, but respectfully urge that the OCA expand the proposed amendments to include all personal injury cases, not just after-the-fact petitions to approve settlements in either wrongful death or infant cases.

The proliferation of TPLF agreements in recent years has had a material impact on litigants' ability to resolve personal injury litigation efficiently and justly, and upon information and belief, the TPLF financing scheme can actually create incentives for a funded plaintiff not to settle for fair value. There are a number of reports of potential and actual abuse by lenders in these circumstances, and as a result, injured plaintiffs are saddled with heavy-interest-laden loan obligations that thwart their reasoned judgment and decisions to settle for what a case is objectively worth. The fallout from this is increased costs to the parties and courts, as well as increasingly-clogged dockets for the courts.

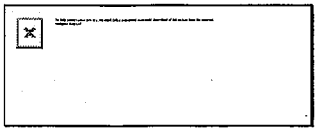
Disclosure of TPLF agreements in all personal injury cases is really no different than a defendant's statutory requirement to disclose insurance information. Neither disclosure, in and of itself, is "material and necessary" to the prosecution or defense of *the merits* of any given case. But the disclosure of each would provide more balanced transparency of all stakeholders in an action, and would facilitate orderly, and perhaps earlier, settlements of actions, when and where appropriate. I also believe that mandating disclosure of TPLF agreements in all personal injury cases—not just petitions to approve settlements in certain instances—would better protect the public, in their respective roles as consumers, patients, and litigants.

Thank you for your attention and consideration of these comments.

Very truly yours,

Ryan J. Lucinski
Partner
Hodgson Russ LLP

Tel: 716.848.1343
Mobile: 716.316.5416
Fax: 716.819.4739



Twitter | LinkedIn | website | Bio | e-mail | vCard

The Guaranty Building | 140 Pearl Street, Suite 100 | Buffalo, NY 14202
Tel: 716.856.4000 | map

David Nocenti

From: Tom Stebbins <tstebbins@lrany.org>
Sent: Friday, May 24, 2024 12:54 PM
To: rulecomments
Cc: Kate Hobday
Subject: Comment on Proposed Amendments to Sections 202.67 and 207.38
Attachments: LRANY OCA Lending Letter 5-24-2024 FINAL.pdf

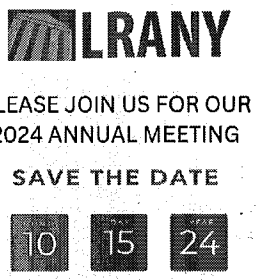
Categories: Blue category

Mr. Nocenti,

Attached and below are our comments on the proposed amendments to Sections 202.67 and 207.38.

Many thanks for this opportunity and your consideration.

Tom Stebbins
Executive Director
Lawsuit Reform Alliance of New York
Mobile: (518) 424-5811
tstebbins@LRANY.org
www.LRANY.org



May 24, 2024

New York State Office of Court Administration (OCA)
ATTN: David Nocenti, Esq.
25 Beaver St., 10th Fl.
New York, New York, 10004

Dear Mr. Nocenti:

Thank you for the opportunity to comment on the critical issue of litigation financing in New York's court system. While we support disclosure of third party litigation financing as laid out in the proposed amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules, we believe the proposal is far too narrow.

The Lawsuit Reform Alliance of New York has long been concerned about those who treat our civil courts as a center of profit, not justice. We represent a vast network of doctors and hospitals, trade associations, businesses large and small, and regular New Yorkers who are concerned about the proliferation of speculative, and at times fraudulent, lawsuits in

our state's court system. Litigation lending, whether run by hedge funds, foreign adversaries, or the Lawsuit Cash Truck, fuels the kind of speculative litigation that is costing New Yorkers hundreds of millions of dollars.

LRANY has long advocated for reasonable regulation of the litigation lending industry. We have pushed for strong conflict of interest standards, a prohibition on kickbacks or commissions, and a reasonable cap on the interest lenders can charge. These provisions would not be workable, and regulations would be unenforceable, without disclosure.

During our years of advocacy, legislators have often asked us for more information about the litigation lending industry and its practices. Without disclosure, information about this multi-billion-dollar industry is nearly impossible to find. The lenders frequently crow to the markets about massive returns (52%), while insisting to New York legislators that they cannot function under the rate of criminal usury (25%).

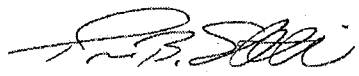
But far more important than the public policy arguments for disclosure are the civil justice arguments. Participants in our court system, whether the judges, juries, attorneys, or parties themselves, absolutely need to know if there is a third-party involved that has only one agenda: to increase the dollar value of the claim. Without disclosure of this massive, singularly-focused outside influence, court actors are completely unaware of any conflicts of interest, ethical violations, or financial thresholds.

There is very little reason to limit the scope of disclosure. The example cited in Exhibit A (memorandum from George Carpinello, Chair, Advisory Committee on Civil Practice Law and Rules), where the interest rate was at 65%, escalating every month, and the lender and plaintiff's attorney were brothers, represents a massive conflict of interest in any context, not just the narrow scope proposed. Conflicts of interest should be removed from the justice system no matter the cause of action or alleged injury.

In sum, regulation of litigation lending cannot be properly implemented without disclosure. That disclosure must come in discovery or within a reasonable amount of time after any financing contracts are signed. Triers of fact cannot properly and justly adjudicate cases without disclosure. Transparency should be paramount in all cases, not just in the narrow set of controversies proposed. New York State recently enacted comprehensive insurance disclosure legislation, creating a new mandate for defendants to disclose details of any and all insurance policies relevant to the case. Transparency in what outside parties have a monetary interest in bringing a case is a fundamental necessity to protect integrity of the civil justice system.

We greatly appreciate the opportunity to comment on the critical issue of transparency in litigation financing and consumer lawsuit lending. Thank you for your careful consideration of how disclosure of litigation funding agreements is necessary to combat the undue influence of lucrative investments into our civil justice system.

Sincerely,



Tom Stebbins
Executive Director
Lawsuit Reform Alliance of New York

May 24, 2024

New York State Office of Court Administration (OCA)
ATTN: David Nocenti, Esq.
25 Beaver St., 10th Fl.
New York, New York, 10004

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themselves, absolutely need to know if there is a third-party involved that has only one agenda: to increase the dollar value of the claim. Without disclosure of this massive, singularly-focused outside influence, court actors are completely unaware of any conflicts of interest, ethical violations, or financial thresholds.

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In sum, regulation of litigation lending cannot be properly implemented without disclosure. That disclosure must come in discovery or within a reasonable amount of time after any financing contracts are signed. Triers of fact cannot properly and justly adjudicate cases without disclosure. Transparency should be paramount in all cases, not just in the narrow set of controversies proposed. New York State recently enacted comprehensive insurance disclosure legislation, creating a new mandate for defendants to disclose details of any and all insurance policies relevant to the case. Transparency in what outside parties have a monetary interest in bringing a case is a fundamental necessity to protect integrity of the civil justice system.

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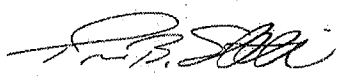
Sincerely,



Tom Stebbins
Executive Director
Lawsuit Reform Alliance of New York

David Nocenti

From: Baldwin, Kristina <kristina.baldwin@apci.org>
Sent: Friday, May 24, 2024 1:29 PM
To: rulecomments
Subject: APCIA Comments on Proposed Amendments to Sections 202.67 and 207.38 - disclosure of litigation financing agreements
Attachments: APCIA Comments Proposed Amendments Sections 202.67 and 207.38 litigation financing agreements.pdf

Categories: Blue category

Attached please find comments from the American Property Casualty Insurance Association with respect to the proposed amendments to 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court, to require disclosure of information relating to litigation financing agreements in certain circumstances.

Thank you for your consideration of these comments.

Regards,

Kristina Baldwin
Vice President
American Property Casualty Insurance Association
kristina.baldwin@apci.org
518-443-2220 (office)
518-322-1923 (cell)
95 Columbia Street
Albany, NY 12210

American Property Casualty Insurance Association℠
INSURING AMERICA apci.org

May 24, 2024

VIA EMAIL

New York State Office of Court Administration
ATTN: David Nocenti, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 10th Floor
New York, New York 10004
rulecomments@nycourts.gov

Re: Proposed Amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements

Dear Mr. Nocenti:

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA members represent all sizes, structures, and regions, and protect families, communities and businesses in the U.S. and across the globe.

APCIA writes to express its strong support for amending §§ 202.67 and 207.38 of the Uniform Civil Rules to require disclosure of litigation funding, assignments or other financial agreements (collectively, "litigation financing agreements"), as set forth in George Carpinello's February 23, 2024, memorandum to Chief Administrative Judge Joseph A. Zayas.

Litigation financing needs greater scrutiny and transparency. The proposed amendments would require disclosure of litigation financing agreements but only in limited situations -- applications seeking leave to compromise a wrongful death action, or a personal injury action involving an infant or a judicially declared incapacitated person including an incompetent or conservatee. While APCIA believes disclosure obligations for third-party litigation financing should apply even more broadly, the proposed amendments are a needed first step in bringing transparency to an opaque, unregulated industry.[1] The resulting transparency will benefit New York through an improved civil justice system that better serves the interests of its courts, litigants and the public.

New York state courts will benefit from the adoption of the proposed amendments. At present, a court has the burden of confirming the existence and terms of litigation financing agreements as part of its evaluation of a petitioner's application to approve disbursements or a settlement. The

[1] The need for broader disclosure was reinforced by a recent *Bloomberg Law* investigative report into how a litigation funding company linked to sanctioned Russian billionaires financed litigation in New York federal court and elsewhere to try and evade international sanctions. *See* Putin's Billionaires Dodge Sanctions by Financing Lawsuits, *Bloomberg Law* (March 28, 2024).

proposed amendments address this seeming incongruity by placing the burden where it belongs -- on the petitioner and their counsel. Mandatory disclosure will improve efficiency and ensure courts have access to information that is critical to their analysis of the fairness and propriety of proposed disbursements and settlements.

Litigants also stand to benefit from the increased transparency that mandatory disclosure of litigation financing agreements will bring. Plaintiffs in the types of cases covered by the proposed amendments may bear emotional and financial burdens that increase the likelihood of entering into a litigation financing agreement. These agreements, as the February 23, 2024, memorandum to Chief Administrative Judge Zayas makes clear, can include fees and interest rates that are so high the funder's share of a settlement can easily and quickly exceed the plaintiff's share.[2] Requiring disclosure puts a court in a better position to understand the effect of a proposed settlement and determine whether the fees and interest rates charged, and the services provided were reasonable and necessary. This analysis can result in a plaintiff retaining a greater percentage of a settlement than they otherwise would have without disclosure. Moreover, disclosure can alert the court to the existence of both a third-party that may have exerted influence or control over the litigation or plaintiff's decision to settle, and undisclosed conflicts of interest.

The public also will see benefits from increased transparency. As mentioned above, disclosure will make courts more efficient and reduce burdens on the administration of justice, which favors the public. In addition, disclosure reinforces important ethical and professional obligations contained in New York's Rules of Professional Conduct, which help increase public confidence in New York's judicial system.

The benefits that will flow from the proposed amendments to §§ 202.67 and 207.38 are manifest and we strongly encourage their adoption. Disclosure of litigation financing agreements will provide courts, litigants and the public with information that is essential to the fair, efficient and ethical administration of justice. Furthermore, the proposed amendments are an important first step in bringing transparency to a rapidly growing, unregulated industry that operates largely out of the public view.

APCIA appreciates the opportunity to assist in the consideration of this issue

Sincerely,

Kristina Baldwin

Kristina Baldwin
Vice President, State Government Relations
American Property Casualty Insurance Association
kristina.baldwin@apci.org
518-443-2220

[2] Other examples of where litigation funders have charged New Yorkers usurious interest rates include one funder that charged a disabled first responder $28,636 in interest on a three-month, $35,000 bridge loan, a rate exceeding 250% on an annualized basis, and another funder that participated in a $31 million insurance fraud scheme that charged interest rates of between 50% and 100%. *See* Complaint, *CFPB v. RD Legal Funding*, ¶¶ 29-32, 1:17-cv-00890 (SDNY 2017), and *U.S. v. Constantine, et al.*, 21-CR-531 (SDNY 2021).

David Nocenti

From: Hayley Prim <prim@uber.com>
Sent: Friday, May 24, 2024 4:08 PM
To: rulecomments
Subject: Uber Technologies, Inc. Public Comment 202.67 & 207.38
Attachments: Re_ Letter for public comment on 202.67 & 207.38 -- ACPRIV_WP.pdf

Categories: Blue category

Good afternoon,

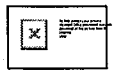
Please find public comments from Uber Technologies, Inc. regarding the proposed rules that would require disclosure of third party litigation funding arrangements in cases involving either wrongful death or infants.

Please don't hesitate to reach out should you have any questions or want to discuss further.

Thank you,

Hayley

--
Hayley Prim
Senior Policy Manager



Uber

May 24, 2024

Mr. David Nocenti, Esq.
Office of Court Administration
25 Beaver Street, Tenth Floor
New York, New York, 10004

Re: Request for public comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements.

Mr. Nocenti,

We write in response to your request for public comment on the proposed amendments to New York Supreme Court and County Court Rules 202.67 and 207.38 (the "Rules"). We strongly support transparency of litigation funding in civil actions. Our experience tells us this opaque, unregulated industry can create perverse incentives and interfere with the fair and expeditious administration of civil justice. While we are encouraged by the proposed changes to the Rules, we believe the proposed amendments fall short of needed changes to provide transparency and fairness in civil litigation across the state.

First, disclosure of litigation financing should apply to *all civil actions*, not just limited to those matters seeking leave to compromise a wrongful death action or a personal injury action involving an infant or a judicially declared incapacitated person. No policy reason exists for such a limitation; litigation funding affects all civil cases and the need for transparency is universal.

Second, the rules should require more explicit disclosure, specifically the existence of funding and the entire litigation funding agreement. The rules could benefit from a more specific requirement to disclose the entire litigation financing agreement rather than the "terms and documentation." In addition, plaintiffs should be required to explicitly provide notice that the plaintiff has entered into a litigation funding agreement.

In short, we agree with the comments of Hon. Paul I. Marx cited in your letter. There is clear justification to amend the Rules in light of the proliferation of litigation funding arrangements in recent years and the potential impact that such arrangements may have on the administration of the civil justice system. By requiring comprehensive disclosure in all civil tort cases, the court can better safeguard the integrity of the legal system and ensure equitable outcomes for all parties involved.

Sincerely,

Hayley Prim
Senior Policy Manager
Uber Technologies, Inc.

David Nocenti

From: concetta mcclenin <danyexecdir@gmail.com>
Sent: Friday, May 24, 2024 4:14 PM
To: rulecomments
Subject: Re: Request for Public Comment -- Litigation financing agreements
Attachments: DANY - Letter to David Nocenti - 5-24-2024.pdf

Categories: Blue category

Good afternoon,

Attached please find our response to your request for comment.

Thank you,

On Thu, Apr 25, 2024 at 8:28 AM concetta mcclenin <danyexecdir@gmail.com> wrote:
>
> ---------- Forwarded message ---------
> From: David Nocenti <DNOCENTI@nycourts.gov>
> Date: Fri, Apr 12, 2024 at 8:34 AM
> Subject: Request for Public Comment -- Litigation financing agreements
> To: David Nocenti <DNOCENTI@nycourts.gov>
>
>
> To: Bar Association Leaders
>
>
>
> Attached please find a Request for Public Comment on proposed
> amendments to the Uniform Rules for the Supreme Court and County
> Court, relating to litigation financing agreements.
>
>
>
> This request will be posted on the OCA website at
> https://gcc02.safelinks.protection.outlook.com/?url=https%3A%2F%2Fww2.
>
nycourts.gov%2Frules%2Fcomments%2Findex.shtml&data=05%7C02%7Crulecomments%40nycourts.gov%7C850c5550eaf543cb676008dc7c2e2013%7C3456fe92cbd1406db5a35364bec0a833%7C0%7C0%7C638521785144834994%7CUnknown%7CTWFpbGZsb3d8eyJWIjoiMC4wLjAwMDAiLCJQIjoiV2luMzIiLCJBTiI6Ik1haWwiLCJXVCI6Mn0%3D%7C0%7C%7C%7C%7C&sdata=VqDlzSt2MJ%2FcxZZyOwr4egFCkg0LIkfynUMsWBNQK4Y%3D&reserved=0 in the next few days, and comments are due no later than Friday, May 24, 2024.
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>
> Thank you.
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> ----------
>
> David Nocenti
>
> Counsel
>
> NYS Office of Court Administration
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> 25 Beaver Street, 10th Floor
>
> New York, NY 10004
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> dnocenti@nycourts.gov
>
> (212) 428-2146
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> --
> We thank you for supporting DANY.
>
> Kind regards,
> Concetta McClenin, Executive Director
> The Defense Association of New York, Inc.
> Executive Offices
> P.O. Box 950
> New York, N.Y. 10274-0950
> (212) 313-3657

--
We thank you for supporting DANY.

Kind regards,
Concetta McClenin, Executive Director
The Defense Association of New York, Inc.
Executive Offices
P.O. Box 950
New York, N.Y. 10274-0950
(212) 313-3657

THE DEFENSE ASSOCIATION OF NEW YORK, INC.
Executive Offices
P.O. Box 950
New York, New York 10274-0950
(212) 313-3657

May 24, 2024

Via E-mail: rulecomments@nycourts.gov
And Regular Mail
David Nocenti, Esq.
Office of Court Administration
25 Beaver Street, 10th Floor
New York, New York 10004

Re: Request for Public Comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Rules for the Supreme Court and County Court relating to litigation financing agreements

The Defense Association of New York ("DANY") is a statewide bar organization whose members regularly defend individuals, corporations, municipalities and public authorities in civil lawsuits. DANY offers the following comments to the Administrative Board of Courts regarding the proposed amendments to Sections 202.67 and 207.38 of the Uniform Rues for the Supreme Court and County Court (22 NYCRR §§ 202.67 and 207.38), to require disclosure of information relating to litigation financing agreements in certain circumstances.

DANY commends the Administrative Board for taking the first step in recognizing the problems created by litigation financing agreements during civil litigation and the urgent need for disclosure of such litigation financing agreements. As the Administrative Board is probably aware, third-party litigation financing entities and the plaintiffs zealously guard the confidentiality of their funding agreements preventing the disclosure of the agreements to the defendants in civil lawsuits and to the public. For far too long the Courts have allowed litigation funders to hide behind a veil of secrecy while directing the outcomes of civil litigation. This lack of disclosure unfairly prejudices the actual parties to a litigation, especially the defendants, and is ripe for fraud and abuse.

DANY believes that at a minimum, the existence and terms of any litigation financing agreement ought to be disclosed in the same way, at the same time, and to the same extent that defendants are required to disclose to plaintiffs the existence of insurance. The parties and the Court need to know who has a financial stake in the outcome of a civil litigation as a matter of fundamental fairness to all parties and all New Yorkers, and to assist the parties in resolving civil cases via amicable settlements.

DANY notes that the proposed amendments only satisfy the Court's need to determine if a proposed settlement is fundamentally fair in limited circumstances. The effect of the proposed amendments is simply too limited because they require disclosure only after the parties have reached a tentative settlement agreement and are seeking Court approval. The unfair prejudice to the parties, especially the defendants, has already occurred. The proposed amendments do add a layer of fairness to the proceedings for the Court to oversee settlements in limited circumstances, but do not nearly come close to satisfying the spirit and breadth of New York's fundamental policies of transparency, openness, and fairness in all actions. If these are the only rule changes, all other defendants who are parties to a civil litigation not involving a minor, incapacitated person or decedent will continue to be deprived of attempting to effectuate fair settlements in their cases because they will not know who they are negotiating with – whether it be the plaintiff and/or the litigation funder who holds a financial stake in the outcome of the litigation.

DANY recommends that the disclosure requirements in the proposed amendments not only be adopted in the context of applications seeking leave to compromise a wrongful death action, personal injury action involving an infant, or personal injury action involving a judicially declared incapacitated person including an incompetent or conservatee, but also that rules be adopted and amended to require disclosure of the identities of litigation financing entities and litigation financing agreements in all personal injury actions filed within the Supreme and County Courts of the State of New York.

For example, DANY recommends that the Board enact rules in all personal injury matters without limitation requiring the disclosure of the identity of the litigation financing entity during the preliminary conference, subsequent discovery conferences, and when the Note of Issue and Certificate of Readiness is filed. DANY also recommends that rules be enacted in all personal injury matters without limitation allowing the Court to order litigation financing entities to Court to meet and confer in Court regarding settlement with all parties and financial stakeholders present. These rules would proactively allow the parties to engage in fair settlement negotiations, and would also alleviate some of the Court's burden in determining whether an application to enforce a settlement in case involving wrongful death, an infant or incompetent is indeed fair. In other words, the parties will already have contemplated the financial stakes in such agreements and also have contemplated the fairness of such agreements before proceeding to Court seeking to enforce the settlement terms. The veil of secrecy will have been lifted on the litigation financing entity controlling the plaintiff's side of the litigation before seeking approval.

Should you have any questions or concerns regarding the foregoing, our Executive Board would be happy to discuss these issues further.

Very truly yours,

Claire F. Rush

Claire F. Rush
Chair -Board of Directors-Immediate Past President
Co-Chair -Legislative Committee

Steven R. Dyki

Steven R. Dyki
Vice-President
Co-Chair -Legislative Committee

David Nocenti

From: Linda A. Chiaverini <lchiaverini@wbasny.org>
Sent: Monday, May 27, 2024 3:00 PM
To: rulecomments
Subject: Public Comment & Opposition To Proposed Amendments To Sections 202.67 And 207.38 of The Uniform Civil Rules for The Supreme Court Relating To Litigation Financing Agreements
Attachments: Letter - Public Comment - Finance Agreement.pdf

Categories: Blue category

Attached please find the Women's Bar Association of the State of New York's response to Public Comment & Opposition To Proposed Amendments To Sections 202.67 And 207.38 of The Uniform Civil Rules for The Supreme Court Relating To Litigation Financing Agreements.

WBASNY

Linda A. Chiaverini
Executive Director
Post Office Box 936
New York, NY 10024
(212) 362-4445
lchiaverini@wbasny.org
www.wbasny.org

Follow us on:

Women's Bar Association

OF THE STATE WBASNY OF NEW YORK

May 24, 2024

Rulecomments@nycourts.gov
Office of Court Administration
25 Beaver Street, 10th Fl.
New York, New York 100044
Attn: David Nocenti, Esq., Counsel

Re: Public Comment & Opposition To Proposed Amendments
To Sections 202.67 And 207.38 Of The Uniform Civil Rules
For The Supreme Court Relating To Litigation Financing Agreements

Dear Mr. Nocenti:

The Women's Bar Association of the State of New York ("WBASNY") submits the following comments:

A litigation funding agreement ("LFA") can even the playing field. It provides funds to victims so they can better match the legal resources of large, corporate wrongdoers to obtain restitution and hold them accountable. It also acts as a disincentive for corporate defendants to endlessly litigate unwinnable cases in hopes of forcing an unjust settlement.

However, currently the litigation funding industry is not regulated in New York State. A few unscrupulous lenders have taken advantage of the lack of rules and regulations to act in bad faith and charge unjustified fees. Accordingly, WBASNY supports legislation pending in the legislature that would provide a set of robust provisions to regulate litigation funding services tightly.

The OCA's proposed rule changes, justified in part as a need to act "while the Legislature is considering proposed statutory changes," would require the disclosure of LFAs in applications seeking leave to compromise in: (1) a wrongful death action and (2) a personal injury action involving an infant or a judicially declared incapacitated person including an incompetent or conservatee.

The OCA's proposed amendments to 22 N.Y.C.R.R. §§ 207.38 and 202.67 are well-intentioned. However, as described in more detail below:

- WBASNY opposes the proposed change to 22 N.Y.C.R.R. § 207.38 because requiring the disclosure of an LFA as part of an application seeking leave to compromise in a wrongful death action is unnecessary, unjustified, and unfair to competent adult distributees.
- WBASNY opposes the proposed changes to 22 N.Y.C.R.R. § 202.67 to the extent that such changes would require the disclosure of an LFA to a defendant and the court. In a personal injury action involving an infant or a judicially declared incapacitated person, WBASNY would ***support*** disclosure of an LFA for an *in camera* review. Accordingly, NYSTLA suggests herein suggested modifications to OCA's proposal in connection with § 202.67 to limit disclosure of LFAs for an *in camera* review.

Additionally, WBASNY believes OCA should modify the current language of 22 N.Y.C.R.R. 202.67(a)(7) to comport that provision with Appellate Division rules that permit, under certain circumstances, reimbursement of disbursements after calculation of attorneys' fees.

Opposition To Amendments To 22 N.Y.C.R.R. § 207.38

Distributees in wrongful death actions should have the same unrestricted right to seek assistance from entering into an LFA (set aside against their anticipated distributive share) that any other adult has in a personal injury action.

WBASNY opposes the imposition of a new requirement for the disclosure of LFAs in wrongful death cases as unjustified, unnecessary and, most importantly, unfair. It is not the Court's role to regulate the purported fairness (or unfairness) of a private funding arrangement entered into by a competent adult distribute in a wrongful death action.

The accompanying memo from OCA Counsel David Nocenti dated April 12, 2024 justifying the OCA Amendments ("Nocenti Memo") discusses at length Judge Marx' opinion in *Luke's Cornwall Hospital et. al.,* 63 Misc.3d 384 (Sup. Ct., Rockland Co. 2019). In that opinion, Judge Marx suggested that Rule 202.67 be amended to provide for disclosure "of any litigation funding agreements used to finance disbursements in personal injury and medical malpractice claims ***involving infants*** ..." *Id.* at 418 (emphasis added). The *Marx* decision did not address wrongful death actions or Rule 207.38 at all.

However, the Nocenti memo states that there is "clear justification" to amend the rules for "all petitions seeking court approval of a settlement, including not only infant compromises but also matters involving incapacitated persons ***or wrongful death compromises***" without setting forth *any* evidence or justification for a special need or appropriateness for such disclosure in wrongful death cases.

The legislature has been carefully weighing several proposals to regulate the LFA industry statewide to protect consumers and empower litigants across the board. That is the ideal way for the state to proceed here. There is no particular need to subject potential distributees in wrongful death actions to the disclosure and review of an LFA they choose to enter.

Opposition To Amendments To 22 N.Y.C.R.R. § 202.67

OCA's proposal to amend 22 N.Y.C.R.R. § 202.67 is fundamentally flawed because it would require disclosure of LFAs to defendants in applications seeking leave to compromise in a personal injury action involving an infant or a judicially declared incapacitated person. However, WBASNY would ***support*** disclosure of LFAs in such cases for the purpose of an *in camera* review[1]

[1]OCA"s proposed amendment to § 202.67 here also goes beyond Judge Marx' request in Luke's Cornwall Hospital. Judge Marx' decision in that case limited his request disclose an LFA in cases involving infants "to the client at inception and ***to the Court*** in connection with any application for leave to compromise such cases." *Id.* (emphasis added). Nowhere did Judge Marx suggest disclosure of the details of an LFA to a defendant.

Disclosure of an LFA to a defendant in any action is unnecessary to any public policy goal involving the fairness (or not) of a particular LFA. Critically, such disclosure will result in the abuse and misuse of such information by defendants, which will delay the resolution of litigation, allow the litigation funding to grow, and put economic pressure on the plaintiff. Litigation strategy and settlements should be based on the defendant's potential liability, culpability and financial exposure—and *not* on the individual economic circumstance of an injured victim. Additionally, defendants might be able to use the disclosed information to undermine the actual legal claim of the litigant. This will unfairly deter litigants from entering into an otherwise beneficial LFA.

Accordingly, WBASNY ***supports*** the proposed amendments to 22 N.Y.C.R.R. 207.67 if ***modified language*** is included to limit the provision of statements, information or documentation related to an LFA for an *in camera* review. This would require the insertion of the underlined language to the proposed amendments to 22 N.Y.C.R.R. § 202.67:

- **22 NYCRR 202.67(b):** "...and set forth and provide [<u>for in camera review by the court</u>] documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements pertaining, and any money borrowed against the anticipated settlement proceeds.
- **22 NYCRR 202.67(d):** "Such affidavit or affirmation also shall set forth and provide [<u>for in camera review by the court</u>] documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements and any money borrowed against the anticipated settlement proceeds."
- **22 NYCRR 202.67(f)(9):** "[<u>for in camera review by the court</u>] a statement detailing the relationships, if any, among the direct or indirect recipients of such expenditures;"
- **22 NYCRR 202.67(f)(10):** "[<u>for in camera review by the court</u>] a statement that no other entitlement, benefit or fund is available to pay the proposed expenditures;"
- **22 NYCRR 202.67(f)(11):** "[<u>for in camera review by the court</u>] any other facts material to the application, including but not limited to the complete terms and conditions of any agreement for litigation funding and fee arrangements."

<u>Proposal to Conform 22 N.Y.C.R.R. 202.67(a)(7) with Appellate Division Rules</u>

WBASNY does not oppose OCA's proposal to add language to 22 N.Y.C.R.R. § 202.67a)(7) stating that "Attorneys representing the petitioner may not charge or receive interest on disbursements without express approval in the court order." Disclosure and approval by the court of costs and disbursements in cases involving infants (and wrongful death cases) are already required.

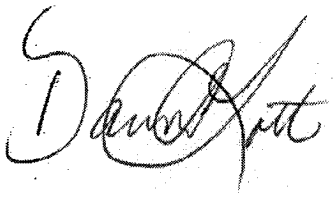
But OCA should modify the *current* language of 22 N.Y.C.R.R. 202.67(a)(7) to comport with Appellate Division rules. § 202.67(a)(7) currently reads in relevant part: "The order shall not provide for attorney's fees in excess of one third of the amount remaining after deduction of the above disbursements unless otherwise specifically authorized by the court."

However, the provision of that sentence regarding "after deduction of the above disbursements," is inconsistent with the rules of the Appellate Division that permit, under certain circumstances, reimbursement of disbursements after calculating attorneys' fees. *See* 22 N.Y.C.R.R. §§ 603.25(e)(3),691.20(e)(3), 806.27(c), 1015.15(c).

Accordingly, WBASNY recommends that this sentence be amended by striking the language underscored as follows: "The order shall not provide for attorney's fees in excess of one third of the amount unless otherwise specifically authorized by the court."

Thank you for your consideration.

Yours Sincerely,



Dawn A. Lott
President, WBASNY

David Nocenti

From: Dave Kluepfel <DKluepfel@cklaw.com>
Sent: Thursday, May 30, 2024 10:35 AM
To: rulecomments
Cc: Len Cascone
Subject: Funding Loan Disclosure

Categories: Blue category

To: David Nocenti, Esq., Counsel
Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004.

We are writing in support of a new rule requiring plaintiffs in ALL cases to disclose the existence and details of any funding loans against their case. As a civil defense firm, we are involved in numerous cases where we do not become aware of the existence of said "lien" until it benefits plaintiff's attorney to reveal it, and by that point, it is almost always an obstacle to a reasonable settlement. On many occasions, had our client insurance carrier known about the loan sooner, the amount owed would have been much less, and the case could have been settled within reason. These loans remove the incentive for plaintiffs to settle their cases as they have already been paid, and many don't particularly care what happens with their lawsuit after they receive a funding loan. If they lose, they need not pay it back. These loans take the plaintiffs themselves out of the decision-making process and put them at odds with their attorneys. The plaintiff has been paid, but the attorney has not. These loans are clogging our court system with cases that could have been resolved much earlier, but now are forced to "go the distance" because the case cannot be settled within reason.

A rule requiring plaintiffs to disclose the existence and details of a funding loan in ALL cases will undoubtedly facilitate the more efficient resolution of cases. This will help prevent further backlog and give all litigants more fair and timely access to our system of justice. Not to mention the cost-savings to the insurance industry as a whole which would trickle down to consumers.

Thank you,

David F. Kluepfel
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www.cklaw.com

David Nocenti

From: Patricia Oconnor <patricia.oconnor@oconnorlaw.co>
Sent: Thursday, May 30, 2024 11:17 AM
To: rulecomments
Subject: Proposed TPLF Rule

Categories: Blue category

We urge a broadening of the proposed rule to provide for disclosure of third-party litigation funding agreements in **all** personal injury litigation, not just in cases involving wrongful death or infants. An undisclosed TPLF hampers settlement. A plaintiff's obligation to the funding company dwarfs their own recovery in many instances, resulting in an untenable settlement demand to cover compensation for themselves as well as the monies due the funding company. Defendants, seldom privy to the existence or terms of these agreements, cannot accurately value their cases and do not understand the plaintiff's insistence on an astronomical recovery. The result is inefficiency, more litigation, and less settlement. Transparency and full disclosure in all personal injury cases is necessary.

Patricia A. O'Connor
O'Connor & O'Connor, Esqs.
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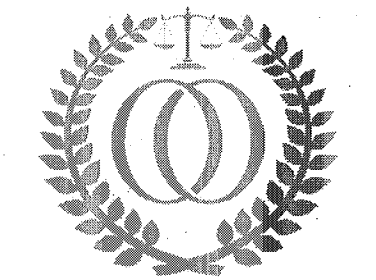

David Nocenti

From: Michael Cavanagh <cavanagh@oobf.com>
Sent: Thursday, May 30, 2024 11:38 AM
To: rulecomments
Subject: Proposed Rule - Require Disclosure of Litigation Funding Agreements

Categories: Blue category

I am writing to support the proposed rule change to require disclosure of third-party litigation funding agreements in cases involving either wrongful death or infants. However, we urge that the rule be extended to include all personal injury litigation matters. These agreements typically involve excessively high interest rates and fees that greatly reduce the recovery of injured parties. Moreover, an undisclosed third-party funding agreement often impedes the settlement process. Without knowledge of these agreements, defendants cannot properly assess the reasonable settlement value of these cases. Conversely, with greater transparency, all parties would be in a better position to work together to resolve litigated personal injury cases.

Regards,

Michael P. Cavanagh

Partner

O'CONNOR • FIRST

ATTORNEYS AT LAW

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David Nocenti

From: Pauline C. Will <PWill@BSAWLAW.COM>
Sent: Thursday, May 30, 2024 2:58 PM
To: rulecomments
Subject: Public Comment for the proposed TPLF Rule in New York

Categories: Blue category

We agree with the proposed TPLF Rule in that disclosure of any litigation finance agreement that directly impacts plaintiff's recovery would be an overall net positive as it would increase transparency and further help ensure that settlements are fully approved and finalized.

Sincerely,

Pauline Costanzo Will

BSAW
Bennett Schechter Arcuri & Will LLP

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David Nocenti

From: V Christopher Potenza <VCP@hurwitzfine.com>
Sent: Thursday, May 30, 2024 3:28 PM
To: rulecomments
Subject: Third-Party Litigation Funding- 22 NYCRR §§ 202.67 & 207.38

Categories: Blue category

ATTN:

David Nocenti, Esq., Counsel
Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004.

Hello David,

We are primarily an insurance coverage and defense litigation firm and wanted to provide you our comments concerning these proposed rule changes to disclosure of third-party litigation funding.

Trial level courts in NY have held that litigation financing information is not discoverable on the basis that it is not relevant to the merits of the dispute. See *Quan v. Peghe Deli Inc [casetext.com]*., 2019 N.Y. Slip Op. 32422 (N.Y. Sup. Ct. 2019). Based on this proposal, https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/LitigationFinancingAgreements.pdf [nycourts.gov], there appears to be a recognition that some disclosure of this information will assist in resolving claims. In my humble opinion, if you are to create a statutory requirement for disclosure, I don't know why you would limit disclosure to certain cases (death and infants). We advocate for a more blanket rule requiring the disclosure of the existence and terms of such agreements for all cases, even if certain information contained in these loan documents is protected, such as statements of the parties, counsel's impressions on the merits of the case, etc. I think the balance/compromise should be on what information is required to be disclosed, not limiting to a small niche of cases. As currently written in the proposal, these disclosures would only take place in the context of a court application to approve a wrongful death or infant settlement. Any prejudice would thus have already occurred if a settlement has been reached in principal without this knowledge. Understanding the financial stake all interested parties have in a case is highly beneficial to the settlement process. This is beneficial to the plaintiff's bar as well as the lawyer may be unaware that the client has taken out a no-recourse loan, and thus be forced to take a case to trial since the plaintiff has already received his or her money and has no incentive to settle for an amount less than what is due on the loan.

For example, should the plaintiff take a loan of $50,000 at a 25% interest rate. In three years, the plaintiff will have to pay back $100,000 to the lender. Thus the plaintiff must deduct contingency fees, disbursements, and the loan amount from any prospective settlement, or take the case to verdict to seek an award in excess of the loan plus interest. If the parties have this knowledge at the outset, perhaps an earlier settlement could be reached before accrual of substantial interest.

To be most beneficial, disclosure of these arrangements should be made at the outset, and be a continuing discovery obligation, the same way that defendants are required to disclose insurance coverage. The existence of insurance does not relate to the merits of a dispute, but it certainly impacts the decision on

whether to bring a claim, settle, and/or go to trial. If the point of the disclosure is to better understand the playing field when entering into settlement negotiations, and to increase the likelihood of a pretrial settlement, what is the point of the limiting the disclosure to wrongful death and infant settlement petitions once the agreement has been reached?

-Chris Potenza

HURWITZ FINE PC

PROVEN.

V. Christopher Potenza
Member

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David Nocenti

From: Tom <tfaist@aol.com>
Sent: Thursday, May 30, 2024 3:45 PM
To: rulecomments
Cc: Melchionni William
Subject: Letter-in-Support of Proposed Amendments to Sections 202.67 and 207.38 of the Uniform Civil Court Rules - Litigation Funding Agreements
Attachments: AIG - LTR-IN-SUPPORT - OCA CIVIL CT. RULES AMENDS - LITIGATION FINANCING AGREEMENTS.pdf

Categories: Blue category

TO: DAVID NOCENTI, ESQ., COUNSEL
NYS OFFICE OF COURT ADMINISTRATION

Attached, please find the referenced Letter-in-Support of the Proposed Amendments to Sections 202.67 and 207.38 of the Uniform Civil Court Rules to require disclosure of information to the courts relating to Litigation Financing Agreements in certain circumstances.

Respectfully submitted on behalf of the American International Group (AIG).

Thomas W. Faist, Esq.
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David Nocenti, Esq., Counsel
NYS Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004

May 30, 2024

BY ELECTRONIC MAIL
rulecomments@nycourts.gov

Re: **LETTER-IN-SUPPORT**
Proposed Amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court (22 NYCRR 202.67 & 207.38) relating to Litigation Financing Agreements

Dear Mr. Nocenti,

The referenced amendments, which are currently out for public comment, would amend the referenced Sections 202.67 and 207.38 of the Uniform Civil Rules to require disclosure of litigation funding/litigation loans, assignments or other financial agreements in all court applications seeking leave to compromise a wrongful death action, or a personal injury action involving an infant or judicially declared incapacitated person, including an incompetent or conservatee.

The **American International Group (AIG),** an international commercial and personal lines insurer domiciled in New York, **STRONGLY SUPPORTS** and concurs with the assessments set forth and recommendations made by George Carpinello, Esq., Chair of the Advisory Committee on Civil Practice Law and Rules, in its Memorandum to Chief Administrative Judge Joseph A. Zayas, dated February 23, 2024, for the instant civil court rules amendments.

The explosion in recent years of the opaque, unregulated Litigation Lending Industry in the State is nothing short of breathtaking and problematic. In point of fact, just yesterday (May 29, 2024) the proposed Consumer Litigation Funding Act [S.4146-B (Cooney)] unanimously passed the NYS Senate in a bipartisan vote of 61-0 and was referred to the State Assembly for consideration of the identical "same as" bill, A.7655-B (Walker). The bill would regulate the Litigation Lending Industry by capping charges & interest rates, restricting fee-sharing arrangements,

requiring contract disclosures to consumers, providing a 10-day right of rescission, defining how litigation loans would impact attorney-client privilege, requiring litigation funding companies to register with and report to the NYS Department of State, and setting penalties for violations thereof. Such legislative reforms are overdue and necessary to provide greater transparency and accountability of an unsavory, unregulated industry that preys upon unsuspecting litigants who are undergoing emotional and financial burdens and then charges usurious fees that dissipate any future settlements.

However, absent legislative action during the current 2024 Regular Legislative Session, the proposed OCA amendments are a good first step to bring some measure of transparency and clarity in court proceedings, by requiring full disclosure to the court of competent jurisdiction of any litigation funding agreement, deferred payment, assignment of money or other financial arrangements that adversely affect the recovery of an infant, incapacitated person, or beneficiary of an estate. These disclosures will immeasurably aid the courts in making approvals of proposed settlements and disbursements that are fair and equitable. The added transparency will also serve consumers/litigants by avoiding hidden conflicts of interest between counsel and litigation funding companies and limiting their exorbitant fees and interest rates. This is also in the public interest.

For the enumerated herein, the **American International Group (AIG), STRONGLY SUPPORTS** the proposed amendments to Sections 202.67 and 207.38 of the Uniform Civil Court Rules relating to Litigation Funding Agreements and **URGES THEIR IMMEDIATE ADOPTION.**

Respectfully submitted,

William Melchionni, III
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David Nocenti

From: Rory Whelan <rwhelan@namic.org>
Sent: Thursday, May 30, 2024 5:17 PM
To: rulecomments
Subject: Re: Request for Public Comment on proposed amendments to Section 202.67 and Section 207.38
Attachments: NAMIC Comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to TPLF.docx

Categories: Blue category

On behalf of NAMIC, I am pleased to submit the attached.

Thank you.

Rory Whelan
Regional Vice President - Northeast
M: 518.312.9287

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May 30, 2024

Mr. David Nocenti, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 10th Floor
New York, New York 10004

(submitted via email to rulecomments@nycourts.gov)

Re: Request for Public Comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements

Dear Mr. Nocenti,

The National Association of Mutual Insurance Companies (NAMIC)[1] and its members, thank you for the opportunity to submit comments relative to the proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements.

NAMIC supports the proposed amendments. However, we respectfully object to limiting proposed disclosure to "a limited set of cases --- most notably, requests for judicial approval of settlements in wrongful death actions, and in personal injury actions involving an infant or a judicially-declared incapacitated person."[2]

Justice Brandeis famously wrote "sunlight is said to be the best of disinfectants." Alas, the limited scope in disclosure proposed in these amendments are akin to a *partial eclipse* that will have minimal effect on the pernicious impact dark money is placing on our civil justice system.

The negative effects of third-party litigation funding ("TPLF") are well documented. These include incentivizing frivolous litigation, loss of control by plaintiffs, plaintiffs often having to return $2 for every dollar borrowed, and threats to national security by foreign actors seeking to "influence strategy, and encourage and exploit commercial disputes involving U.S. companies to advance their own national interests --- in defense, technology, and other highly sensitive industries --- while gaining important intellectual property (IP) about U.S. companies."[3] Moreover, TPLF has been identified as "one of

[1] The National Association of Mutual Insurance Companies is the largest property/casualty insurance trade group with a diverse membership of nearly 1,500 local, regional, and national member companies, including seven of the top 10 property/casualty insurers in the United States. NAMIC members lead the personal lines sector representing 66 percent of the homeowner's insurance market and 53 percent of the auto market.

[2] RequestForPublicComment-LitigationFinancingAgreements-041224 .pdf

[3] Exposing Foreign Influence in Third Party Litigation Funding | U.S. Chamber of Commerce (uschamber.com)

the key drivers of increasing litigation costs"[4] and described as "contingency financing in an arena on steroids."[5] The secrecy surrounding these legal entanglements disadvantage defendants and sow seeds of doubt into the veracity of our civil justice system --- "the TPLF phenomenon is somewhat amorphous because TPLFs often hide in the background, and defendants are often not even aware that a third party is financing a plaintiff's case."[6]

TPLF is also contributing to the backlog of cases in our civil courts "due to the rapid growth of TPLFs and their increased involvement in litigation, cases often take a year longer to resolve than they would if a TPLF was not involved in the case."[7]

The Advisory Committee on Civil Practice and Rules 23 February 2024 memorandum accompanying the proposed amendments concludes "[r]requiring disclosure of this additional information to the courts being asked to approve such settlements is necessary in light of the proliferation of litigation funding arrangements in recent years and the potential impact that such arrangements may have on the value of settlements to the persons receiving the settlements" without providing any justification nor reasoning to limit disclosure to wrongful death actions, and in personal injury actions involving an infant or a judicially-declared incapacitated person.

However, the "proliferation of litigation funding arrangements in recent years" is not limited to wrongful death and the narrow category of cases the proposed amendments would apply. While the origins of TPLF began in England and Australia[8], the US has become "the centre of the world's third-party litigation finance (TPLF) industry... of the USD 17 billion investment into litigation funding globally in 2020, more than half was deployed in the US. Litigation funding companies (LFCs) invest in consumer and commercial litigation by funding legal action in return for a percentage of a successful claim sum."[9]

Accordingly, we question why the proposed amendments would exempt from full disclosure other personal injury actions as well as all tort claims that have also witnessed a proliferation of litigation funding in recent years.

A recent United States Government Accountability Office (GAO) report highlights both the types of claims ("including intellectual property, antitrust, asset recovery, fraud, and class actions..." and the

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[4] When Lawsuits Are Investments. Uncovering the Pernicious Toxicity of Litigation Funding - Risk & Insurance : Risk & Insurance (riskandinsurance.com)

[5] Third-Party Litigation Funding (TPLF) and Ethical Issues In Bankruptcy - DailyDAC

[6] Third-Party Litigation Funding and Its Impact on Commercial Auto — Part One : Risk & Insurance (riskandinsurance.com)

[7] Third-Party Litigation Funding and Its Impact on Commercial Auto — Part Two : Risk & Insurance (riskandinsurance.com)

[8] Third-Party Litigation Financing: Market Characteristics, Data, and Trends | U.S. GAO

[9] US litigation funding and social inflation: the rising costs of legal liability | Swiss Re

importance litigation funders place on "factors such as whether the region had an existing TPLF market and a legal system favorable to TPLF."[10]

As an example, claims for wrongful conviction/incarceration have become a lucrative investment for hedge funds, private equity and other investor-backed companies who demand upwards of 40% or more in interest on loans made to unjustly prosecuted and often impoverished individuals. As reported by the New York Times, "[a]cross the nation, exonerations --- and cash settlements --- have risen steadily thanks to DNA-based reinvestigations, conviction-integrity units created by prosecutors and the vigor of innocence. Now, the billions in payouts have attracted companies offering high interest cash advances while exonerated people await their claims. Many firms are backed by private equity investors eager to bet on nearly certain short-term profit."[11] Prisoner and public interest advocates have warned "with interest rates so high, it [TPLF] could end up being a new form of confinement."[12]

Another major target of TPLFs in recent years has been the commercial auto industry, a key contributor to driving higher insurance premiums. "The rise in large verdicts on commercial auto cases is partially attributable to social inflation and the rise of third-party litigation financing.... TPLFs have turned their focus toward commercial litigation and class actions in an effort to seek out much larger recoveries..." and "as the claims increase in cost, so do insurance premiums, and therefore policyholders are forced to bear the brunt of the cost. TPLFs therefore have a significant effect on how risks are underwritten in insurance policies."[13]

There is additional evidence that individuals and small businesses are increasingly turning to TPLF in bankruptcy cases, which have seen a steep rise since 2023.[14] "Because the practice largely developed during the economically prosperous years that followed the Great Recession, it hasn't before featured in a wide-scale distress cycle. But with Chapter 11 cases swelling this year at a pace not seen since the aftermath of the financial crisis, it appears the time has come."[15]

Lastly, the proposed amendments should explicitly require disclosure of secondary market agreements whereby a TPLF sells some of its existing portfolio of deals further placing these agreements in the murky shadows of nameless, faceless profiteers.[16]

I wish to reiterate NAMIC's appreciation for the efforts made by the Advisory Committee on Civil Practice and Rules as it relates to TPFL disclosure as a good "first step." However, we respectfully

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[10] GAO-23-105210, THIRD-PARTY LITIGATION FINANCING: Market Characteristics, Data, and Trends

[11] Finance Companies Target Exonerated Prisoners With High Interest Advances - The New York Times (nytimes.com)

[12] Finance companies have a new customer: The wrongfully convicted | On Point (wbur.org)

[13] Third-Party Litigation Funding and Its Impact on Commercial Auto — Part One : Risk & Insurance (riskandinsurance.com)

[14] Current Trends in Litigation Finance for 2024 - GLS Capital

[15] Litigation Funders See Growing Opportunities in Bankruptcy Boom (bloomberglaw.com)

[16] Current Trends in Litigation Finance for 2024 - GLS Capital

request that the final amendments shine a brighter light on an aspect of our civil justice system desperately needing reform and therefore include full disclosure of litigation funding agreements in all consumer and commercial actions, including, but not limited to personal injury, wrongful incarceration, bankruptcy, class action et al.

Sincerely,

Rory Whelan
Regional Vice President, Northeast

David Nocenti

From: Donnelly, Brian <bdonnelly@cullenllp.com>
Sent: Thursday, May 30, 2024 5:22 PM
To: rulecomments
Subject: Proposed Rule on Disclosure of Third Party Litigation Funding

Categories: Blue category

I understand that the NY CPLR Advisory Committee seeks to revise Court Rules §§ 202.67 and 207.38 to require the disclosure of litigation financing agreements in all applications seeking leave to compromise a wrongful death action, or a personal injury action involving an infant or a judicially declared incapacitated person including an incompetent or conservatee. I am in favor of this proposed rule but feel it doesn't go far enough since it is limited to a narrow spectrum of cases. I would suggest that the committee consider extending the proposed rule to require disclosure of litigation financing agreements in all matters.

Best,

Brian Donnelly
Partner
Cullen and Dykman LLP
333 Earle Ovington Boulevard, 2nd Floor
Uniondale, New York 11553
T: 516.357.3824 | F: 516.357.3792 | M: 516.456.9752
E: bdonnelly@cullenllp.com

David Nocenti

From: White, Chris <cwhite@whitemcspedon.com>
Sent: Friday, May 31, 2024 9:58 AM
To: rulecomments
Cc: cwhite@whitemcspedon.com
Subject: Request for Public Comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements

Categories: Blue category

Dear Mr. Nocenti:

I have been a practicing attorney in the States of New York and New Jersey in good standing since 1984. My practice includes both plaintiff and defense personal injury litigation. I am writing to comment on this new proposal. I believe this proposal should be passed and apply to all personal injury cases. The litigation funding companies are creating havoc with our system. As an example, we currently have a case in our office wherein the plaintiff attorney has a case that realistically has a settlement value of between $125,00.00 to $200,000.00 tops. In fact, the plaintiff attorney, our office and the co-defendant all agree on those parameters. This case cannot settle as the plaintiff has a funding loan over $250,000.00 and climbing. This is a case that could and would have settled after depositions of the parties and physical examinations but it cannot because of this loan. Our client's insurance carrier has been forced to incur numerous additional conferences and an upcoming trial because this case cannot settle due to the funding loan. We were only made aware of this loan when we attempted to settle the case. We could have prepared differently if we knew of this loan from the outset.

This is just one example of the complications these funding loans create. There is no doubt that these loans are causing protracted, expensive litigation. They are also causing the Court system to incur a large backload of cases. Again, I strongly support this new proposal and think it should apply to all personal injury cases. If you have any questions or need any further input, please feel free to contact me. Thank you for your consideration.

Christopher J. White, Esq.
White & McSpedon, P.C.
363 7th Avenue
14th Floor
New York, N.Y. 10001
(212) 564-6633 Ext. 226
(212) 564-9799 (Fax)
cwhite@whitemcspedon.com

David Nocenti

From: Behrens, Scott <SBehrens@lockton.com>
Sent: Friday, May 31, 2024 10:28 AM
To: rulecomments
Subject: Comment on proposed amendments to Section 202.67 and Section 207.38
Attachments: NY TPLF Comment.pdf

Categories: Blue category

Attached, please find a comment on behalf of Lockton with respect to the above referenced rule.

Thank you,

Scott Behrens, JD
Senior Vice President
Director, Government Relations
Lockton Companies

444 W. 47th St., Suite 900 | Kansas City, MO 64112
Tel 816.751.2240 | Mobile 816.401.9258
sbehrens@lockton.com

May 31, 2024

Mr. David Nocenti, Esq.
Counsel, Office of Court Administration ("OCA")
25 Beaver Street, 10th Floor
New York, New York 10004

RE: OCA Request for public comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements

Dear Mr. Nocenti:

As the world's largest privately owned, independent insurance broker, Lockton appreciates the opportunity to provide comment on the proposed amendments to Section 202.67 and Section 207 that would require disclosure of third-party litigation funding (TPLF) arrangements for civil lawsuits involving claims of wrongful death or infants. Lockton provide insurance brokerage and other services for more than 1,200 New York based businesses and many more that have operations within the state. We view the Office of Court Administration's (OCA) efforts as positive steps towards bringing transparency to opaque business practices that have an untold impact on our clients and employees.

Lockton, as intermediaries to our insurance carrier partners and our New York clients, stands in a position where we can observe the scope a network of unknown global investors underwriting litigation funding: from creating a longer litigation process thereby driving up costs and expenses for litigants to increasing the settlement values needed to cover the high interest rates associated with these TPLF arrangements. While the exact financial impact to Lockton's clients is unclear without disclosure and transparency of TPLF arrangements in litigation, there is a correlation to artificially increased overall litigation case values when the nature of these arrangements is disclosed during litigation.

What is clear, however, is the cost of insurance for our New York based clients continues to increase at a single to double digit rate as a result of the increase in litigation expenses and payouts. As advocates for our clients and employees and stewards of the insurance industry, Lockton supports OCA's proposal for increased transparency and disclosure of TPLF arrangements that allow our clients to fairly evaluate the circumstances and merits of each individual case.

Thank you for considering these comments. Please do not hesitate to contact me if you need additional information,

Sincerely

Scott Behrens, J.D.

SVP, Lockton Companies
Director, Government Relations

David Nocenti

From: Thomas D. Smith <Smith@reinsurance.org>
Sent: Friday, May 31, 2024 12:18 PM
To: rulecomments
Cc: Dennis Burke
Subject: RAA Comments on Proposed Litigation Financing Agreement Amendments
Attachments: RAA Comment Letter on Proposed Litigation Financing Agreements Amendments.pdf

Categories: Blue category

Mr. Nocenti,

On behalf of Dennis Burke, please find attached the RAA's comments on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements.

Thank you and please let us know if you have any questions,
Tom

Thomas D. Smith
Assistant Vice President and Assistant General Counsel
Reinsurance Association of America
Office: 202-783-8320 | Cell: 812-361-2947 | smith@reinsurance.org
www.reinsurance.org

REINSURANCE ASSOCIATION OF AMERICA

RAA
REINSURANCE ASSOCIATION OF AMERICA

May 31, 2024

David Nocenti, Esq., Counsel
New York State Office of Court Administration
25 Beaver Street, 10th Floor
New York, New York 10004
Via email rulecomments@nycourts.gov

Re: RAA Comments regarding proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements

Dear Mr. Nocenti:

The Reinsurance Association of America (RAA) appreciates the opportunity to submit comments to the Office of Court Administration regarding the proposed amendments relating to litigation financing agreements. The Reinsurance Association of America (RAA) is a national trade association representing reinsurance companies doing business in the United States. RAA membership is diverse, including reinsurance underwriters and intermediaries licensed in the U.S. and those that conduct business on a cross-border basis. The RAA also has life reinsurance affiliates and insurance-linked securities (ILS) fund managers and market participants that are engaged in the assumption of property/casualty risks. The RAA represents its members before state, federal and international bodies.

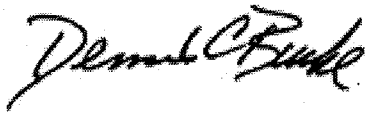
The RAA strongly supports amending Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court to require litigation financing agreement disclosure. The proposal, laid out in full in the February 23, 2024 Memorandum from George Carpinello, Chair of the Advisory Committee on Civil Practice Law and Rules, would shed light on the increasingly prolific practice of litigation funding agreements.

The RAA supports broad disclosure of all litigation financing agreements. While this current proposal is limited in scope, it represents an important first step in ensuring transparency of this ever-growing practice. Third-party litigation financing agreements have long operated in the shadows and beginning to establish rules and procedures around the practice is important going forward. Taking the step to require disclosure in all petitions seeking court approval of a settlement, including infant compromises, incapacitated person, and wrongful death compromises, is an important first area to focus on. The RAA supports these first needed amendments and encourages their expansion in the future.

Mandating disclosure of litigation financing agreements will have benefits to a number of interested parties, including the court, litigants, and the public at large. Mandatory disclosure will enable courts to streamline the current process under which courts have to confirm such agreements outside of disclosure. This will enable courts to operate more efficiently and ensure they approve fair and reasonable settlements. Efficient courts also ensure the public benefits from having the judicial system function as well as possible. Mandatory disclosure of such agreements also echoes the important obligations of professional and ethical conduct contained in New York's Rules of Professional Conduct. When these standards are upheld and reinforced it increases public confidence in the behavior of the courts. Lastly, litigants themselves also would benefit from mandatory disclosure. Litigation agreements often result in plaintiffs receiving less money than the funder and increased transparency and disclosure would enable plaintiffs to be properly informed when considering accepting funding. Disclosure also allows the court to assess whether the plaintiffs were given fair deals and enable proper analysis of such agreements. Additionally, such disclosures would also enable the court to ensure funders are not exerting undue influence over the litigation, preventing conflicts of interest. Courts being able to fairly and properly evaluate such agreements is an important part of ensuring the justice system operates in a transparent and fair manner, with benefits to all interested parties.

The RAA appreciates the opportunity to comment on this proposal and fully supports its adoption as a first step towards eventually mandating such disclosures across the board.

Sincerely,



Dennis C. Burke
Vice President, State Relations
Reinsurance Association of America

David Nocenti

From: Levin, Sean <levins4@nationwide.com>
Sent: Friday, May 31, 2024 1:01 PM
To: rulecomments
Cc: Cerrone, John
Subject: Proposed TPLF Rule in New York

Good afternoon,

On behalf of Nationwide Insurance, please be advised that we support the comments already submitted by the New York Insurance Association (NYIA) with regard to the proposed rule (proposed rule) concerning third party litigation funding currently being considered by the Office of Court Administration.

Thank you.

Sean

Nationwide® is on your side

FORTUNE 100 BEST COMPANIES TO WORK FOR®

Sean R. Levin
Counsel - P&C State Legal
Mid Atlantic / Northeast
P&C Transformation & Shared Services
Proud Nationwide Member
W 480-365-2928 / C 781-879-4023
levins4@nationwide.com

David Nocenti

From: Alvino, Ginamarie <Ginamarie_Alvino@trg.com>
Sent: Friday, May 31, 2024 2:13 PM
To: rulecomments
Subject: Comments to Proposed Amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements
Attachments: 5.31.2024 Letter to NYS Office of Court Administration.pdf

We appreciate the opportunity to provide comments on the proposed amendments relating to disclosure of litigation funding agreements. Please see attached comment for your consideration.

GINAMARIE ALVINO
Vice President, Director, Legal Reform

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RIVERSTONE | RISKSMART RUN-OFF™ SOLUTIONS

A FAIRFAX COMPANY

May 31, 2024

New York State Office of Court Administration
ATT: David Nocenti, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004
rulecomments@nycourts.gov

Re: Proposed Amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements

Dear Mr. Nocenti,

We are writing on behalf of RiverStone, a group of companies that specialize in the management of legacy and run-off insurance claims, including potential liabilities for matters that may extend back decades. Because of their complexity, most claims are handled through the civil litigation system, providing RiverStone with a unique perspective on the issue of third-party commercial litigation financing. Riverstone employs over 400 associates operating across multiple offices throughout the United States, including within the State of New York.

Riverstone supports the proposed amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court to require disclosure of litigation financing agreements in certain circumstances and would support a broadening of the proposal to require disclosure of litigation financing arrangements to apply to all commercial civil litigation in New York.

As referenced in George Carpinello's memorandum to the Chief Administrative Judge Zayas dated February 23, 2024, "[t]here is clear justification to amend the existing Rules for all petitions seeking court approval of a settlement .... to require full disclosure by the petitioner and counsel for the petitioner of any financial arrangement affecting the settlement funds." The proposed disclosure in certain circumstances (wrongful death or personal injuries and infant claims) of "any funding agreement, deferred payment, assignment of money or other financial agreement" is justified by the "potential impact that such arrangements may have on the value of settlements to the persons receiving the settlements" and because of the "proliferation of litigation funding arrangements in recent years." Disclosure of litigation financing information would provide the judge and litigants with information essential to the fair, efficient and ethical administration of justice.

Broadening the proposed disclosure requirements beyond the identified circumstances to the mass tort arena would similarly be justified. In many cases, the litigation financing agreement is not known to parties in the litigation and may allow the funder to exercise strategic control over the litigation. By funders' own admission, litigation financing makes it "harder and more expensive to settle cases."[1] In the mass tort arena, the civil litigation system has become a profit center that attracts sophisticated investors,

[1] Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, Wall Street Journal, March 21, 2018, quoting Allison Chock, *available at* https://www.wsj.com/articles/ lawsuit-funding-long-hidden-in-the-shadows-faces-calls-for-more-sunlight-1521633600.

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including foreign investors. As a result, litigation awards and settlements are diverted to provide funders with a return on their investment and thereby significantly reduce injured parties' relative compensation.[2]

Third party litigation financing may also contravene longstanding ethical rules such as those addressing improper fee splitting between lawyers and non-lawyers or conflicts of interest.[3] These issues are exacerbated by the fact that third party litigation financing is largely unregulated and is generally not subject to disclosure in litigation.

In December 2022, the U.S. Government Accountability Office released a study that identified 47 active commercial litigation funders that had a total of $12.4 billion in assets under management.[4] Another study projected funding to reach $31 billion by 2028.[5] There is also a growing concern that foreign-sourced money is being poured into U.S. courts, creating a risk that foreign adversaries may undermine the U.S. economy and security interests.[6]

RiverStone supports disclosure of litigation financing arrangements in commercial civil litigation, including those beyond the limited circumstances identified in the proposed amendments. When funders have undisclosed control or influence over cases to their own advantage, left unchecked, commercial litigation financing may have the effect of increasing the cost of goods or services to consumers, including insurance. The requirements set forth in the proposed amendments are a first step and a balanced approach to address these concerns, would not adversely affect the rights or duties of any party to the litigation, and would ensure fairness during the settlement process.

We appreciate the opportunity to provide comments on the referenced proposed amendments relating to disclosure of litigation funding agreements. The proposed amendments will benefit New York courts by improving the civil litigation system, but we urge the Office to continue to examine this issue and expand the application of the proposed amendments. Doing so will also benefit the public from increased transparency and reinforcement of important ethical obligations contained in New York's Rules of Professional Conduct.

Sincerely,
RiverStone Claims Management LLC

/s/ Ginamarie Alvino

By: Ginamarie Alvino, Vice President

---

[2] *See Swiss Re Institute, US Litigation Funding and Social Inflation: The rising costs of legal liability,* at 2 (Dec. 2021) (in U.S. TPLF cases, up to 57% of legal costs and compensation go to lawyers, funders and others compared with an average of 45% in typical tort liability cases)

[3] Unlike attorneys, funders do not owe a fiduciary duty to plaintiffs, nor are they bound by ethical obligations. A plaintiff may not even know their lawyer has entered into an agreement with a funder.

[4] *See Third Party Litigation Financing: Market Characteristics, Data, and Trends,* U.S. Gov't Accountability Office, GAO-23-105210 (Dec. 2022), at 11-12 (citing Westfleet Advisors, The Westfleet Insider).

[5] *See* Swiss Re Institute, *US Litigation Funding and Social Inflation: The Rising Costs of Legal Liability,* at 8 (Dec. 2021)

[6] Former House Armed Services Committee Chairman Buck McKeon, observed that third-party litigation funding provides a "clear path for foreign adversaries to undermine U.S. national economic and security interests through the infiltration of the American litigation system." *See* Howard McKeon, *Some Third-Party Funders Pose a Threat to US National Security,* Bloomberg Law, April 7, 2023.

David Nocenti

From: Mortimer, Rachelle <RMortimer@USChamber.com>
Sent: Friday, May 31, 2024 2:58 PM
To: rulecomments
Subject: U.S. Chamber ILR Comments on Proposed Amendments to Section 202.67 and 207.38
Attachments: U.S. Chamber ILR - Comments on Proposed Amendments to Section 202.67 and 207.38.pdf

Good afternoon Mr. Nocenti,

Please find attached the U.S. Chamber ILR's submission in response to your April 12, 2024 request for public comment related to litigation financing agreements. Thank you for your time and consideration of this important topic.
Best,
Rachelle

Rachelle Mortimer
Director, Legislative Affairs
U.S. Chamber of Commerce
Institute for Legal Reform (ILR)
202-604-6816
instituteforlegalreform.com
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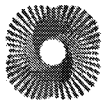

U.S. Chamber of Commerce
Institute for Legal Reform

May 31, 2024

Submitted via E-Mail

David Nocenti, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 10th Floor
New York, New York, 10004

Dear Mr. Nocenti:

The U.S. Chamber of Commerce Institute for Legal Reform ("ILR") respectfully submits these comments in response to the April 12, 2024 "Request for Public Comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements" ("Request for Comment") issued by the Administrative Board of the Courts (the "Board").

The mission of ILR, a program of the U.S. Chamber of Commerce (the "Chamber"), is to champion a fair legal system that promotes economic growth and opportunity. The Chamber is the world's largest business federation, representing the interests of businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations. For more than 100 years, the Chamber has advocated for pro-business policies that help businesses create jobs and grow our economy. And for over a decade, ILR has been the leading voice on behalf of the business community calling for reforms to and transparency in third party litigation investment.

ILR commends the Board's efforts to ensure transparency in certain litigation funding activities occurring in New York State by, as the Board's Request for Comment aptly summed it up, "simply requir[ing] disclosure of such arrangements." To that end, ILR supports the proposed amendments and further strongly encourages the Board to consider extending these requirements to *all* civil litigation in the state and requiring these disclosures earlier in the litigation process.

The scenario cited by the Advisory Committee on Civil Practice Law and Rules (the "Advisory Committee") in Exhibit A to the Request for Comment is alarming and speaks to the need for transparency in litigation funding when judicial approval is requested for settlements in wrongful death actions and in personal injury actions involving an infant or judicially-declared incapacitated person. However, the thoughtful and beneficial transparency requirements proposed by the Board through these amendments could and should apply to all civil litigation in the State. The full impacts of litigation funding on the New York court system and other potential abuses remain hidden because transparency requirements are not commonplace.

Broader application of disclosure requirements for litigation funding will better protect litigants (including, but not limited to, those who are particularly vulnerable), attorneys, and the State's courts and will promote public trust and confidence in the State's judicial system. Moreover, requiring these disclosures to be made at the outset of—or at a minimum, early on in—the litigation process will best ensure transparency and fairness throughout judicial and settlement

proceedings. And, while the Board appears inclined to defer to the legislature on whether and how to "place restrictions on the use and/or scope of [litigation funding] agreements," the Board would be well within its authority to amend the New York Court Rules to simply require disclosure for litigation funding agreements for all civil litigation within the State.

I. The Prevalence of Litigation Funding Has Exploded in Recent Years.

In its memorandum attached to the Request for Comment as Exhibit A, the Advisory Committee rightly observes that, "[i]n recent years, the use of litigation funding to pay for disbursements incurred during the litigation has increased." According to Reuters, "[l]itigation funders in the U.S. market had a combined $15.2 billion assets under management in 2023."[1] In fact, "[p]atent, antitrust, commercial litigation, and bankruptcy lawsuits have attracted the most activity—whether as part of a portfolio or a single-case funding—from funders."[2]

Without disclosure it is impossible to know just how prolific litigation funding is or its effects on our courts. Mandatory disclosure of all litigation funding related to cases proceeding in the State's courts would provide the Board and policymakers with useful data on the prevalence of financing, the types of cases being financed, where those cases arise, and how litigation financing impacts resolution timelines and judicial workloads. As a judge in Minnesota noted while addressing one in a series of cases culminating in a request by Burford Capital, a large litigation financier, to replace the original plaintiff, "the litigation burden caused by Burford's efforts to maximize return on investment has been enormous."[3]

While the present lack of disclosure prevents an accounting of the current volume and value of litigation funding occurring in New York, given the level of economic activity in the State, and its leading place in the funding industry, its courts are likely an attractive market for investment.

II. Broader Application of Disclosure Would Help Address a Range of Practical Issues and Potential Abuses.

As noted above, the example cited by the Advisory Committee of an unconscionable litigation funding agreement—which, unbeknownst to the superior court until much later, subjected a medical malpractice settlement obtained on behalf of an infant to usurious fees and escalation clauses, with significant conflicts of interest between the plaintiff attorney and funder—was startling and disturbing. Mandatory disclosure of litigation funding agreements will give the courts and litigants the information necessary to ameliorate negative impacts to plaintiffs early on.

Similarly shocking examples in other litigation contexts reinforce why broader application of litigation funding disclosure requirements in New York is warranted. For example, in 2021, federal prosecutors in Manhattan indicted (and later convicted and secured a three-year prison

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[1] *Id.*

[2] Sara Merken, "US litigation funding in 'state of flux' as deal commitments dip, says report," Reuters (Mar. 27, 2024), available at: https://www.reuters.com/legal/transactional/us-litigation-funding-state-flux-deal-commitments-dip-says-report-2024-03-27/.

[3] Mike Scarcella, "Litigation funder Burford loses bid to takeover Sysco antitrust cases," Reuters (February 9, 2024), available at: https://www.reuters.com/legal/legalindustry/litigation-funder-burford-loses-bid-take-over-sysco-antitrust-cases-2024-02-09/.

sentence for[4]) a "ring of conspirators—personal injury lawyers, doctors and a litigation funder – [who] fleeced property owners and insurers out of $31 million by staging fake slip-and-falls; sending accident "victims" for extensive medical treatment, including surgery; and suing to recover for the fake victims' unnecessary health care."[5] There, the funder provided prospective plaintiffs with upfront incentive payments in exchange for their entering into litigation funding agreements and likewise paid large referral fees to co-conspirators who recruited more plaintiffs. "[A]ccording to prosecutors, [those agreements] covered plaintiffs' legal and medical costs—but imposed such exorbitant interest rates that when cases settled, most of the money went to funders and lawyers. Little if any was left over for the plaintiffs who had undergone surgeries."[6]

Also in 2021, federal prosecutors in Brooklyn obtained guilty pleas related to a litigation funding scheme in which women suing transvaginal mesh manufacturers over complications with their implants were pressured into having the implants removed to potentially increase the values of their litigation claims, so that lawyers and funders could reap larger profits.[7] This type of questionable medical financing tied to tort litigation, which is not currently subject to transparency requirements in New York, is not new. In fact, Reuters Investigates issued a lengthy report in 2015 about the burgeoning industry in which funders offer to finance surgeries in exchange for highly inflated shares of future damages or settlements in tort litigation.[8]

In addition to helping better protect litigants from abusive terms in funding agreements, mandatory disclosure early in the litigation process will also provide New York State courts with crucial information about potential conflicts of interest and control of litigation and settlement discussions. Without disclosure, a judge cannot adequately determine whether the presence of the funding entity in a case before him or her creates a conflict of interest that warrants the judge's recusal. Likewise, opposing counsel is left in the dark about who exactly they are litigating against and whether a funder on the opposite side of a given case might have some attorney-client relationship with opposing counsel or their law firm. This disclosure should occur early in the litigation process to ensure that the judges and advocates are aware of these dynamics and account for them accordingly, rather than only finding out about funding arrangements after critical litigation decisions have been made. And absent disclosure, a funder could exert significant control or influence over litigation decisions, including whether and for how much to settle a claim, without the plaintiff or court ever knowing it. One recent and prominent example of this, also mentioned above, occurred when litigation funding goliath Burford Capital (which maintains a presence in New York) accused the food distributor Sysco "of trying to settle the antitrust claims

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[4] U.S. Attorney's Office SDNY, "New York Litigation Funder Convicted In Trip-And-Fall Fraud Scheme Sentenced To 36 Months In Prison," Press Release (April 13, 2023), available at: https://www.justice.gov/usao-sdny/pr/new-york-litigation-funder-convicted-trip-and-fall-fraud-scheme-sentenced-36-months.

[5] Alison Frankel, "N.Y. feds allege litigation funder horror story," Reuters (Oct. 21, 2021), available at: https://www.reuters.com/legal/transactional/ny-feds-allege-litigation-funder-horror-story-2021-10-21/.

[6] *Id.*

[7] *Id.*; Matthew Goldstein, "Women Who Sued Makers of Pelvic Mesh Are Suing Their Own Lawyers, Too," New York Times (June 14, 2019), available at: https://www.nytimes.com/2019/06/14/business/pelvic-mesh-surgery-litigation.html.

[8] Alison Frankel and Jessica Dye, "The Lien Machine New breed of investor profits by financing surgeries for desperate women patients," Reuters Investigates (Aug. 18, 2015), available at: https://www.reuters.com/investigates/special-report/usa-litigation-mesh/.

for too little[,]" with Sysco accusing Burford of "unfairly trying to assert control over its ability to resolve its lawsuits on its own terms."[9]

The troubling example provided by Judge Marx and cited in the Advisory Committee's memorandum of undisclosed litigation funding and the harm to plaintiffs that stemmed from it was clearly at least a partial impetus for the Board's proposed amendments. The other examples outlined above show that serious litigation funding abuses in various areas of civil litigation also have occurred in New York, with other similar abuses potentially going undetected. The Board should endeavor to thoroughly identify litigation funding arrangements through disclosure at the outset of litigation and allow courts to account for the systemic impacts of litigation funding.

III. The Board Has the Authority to Require Disclosure for All Litigation Funding Agreements.

The New York State Unified Court System is statutorily empowered to implement "rules and orders regulating practice and procedure in the courts, subject to the reserved power of the legislature provided for in section thirty of article six of the constitution."[10] Requiring disclosure of third-party financial interests in and other related engagement with litigation before a New York court is squarely within the four corners of that authority. As noted at the outset, transparency and fairness are the foundations of the effective functioning of and public confidence in the Unified Court System. Hidden financial interests increasingly permeating litigation in the State challenge the strength of those foundations, and the Board can and should take action to address it.

IV. Conclusion.

ILR strongly supports the proposed amendments set forth in the Request for Comment and thanks the Board for correctly identifying undisclosed third party litigation funding as a growing problem and for taking action to begin to address it. But, as outlined throughout, the problem extends far beyond the narrow category of litigation that the currently proposed amendments would reach. Mandatory disclosure at the outset of all civil litigation is a simple and effective solution and ILR strongly urges the Board to consider expanding the proposed amendments.

Sincerely,

Rachelle Mortimer
Director, Legislative Affairs
U.S. Chamber of Commerce
Institute for Legal Reform
rmortimer@uschamber.com

[9] Mike Scarcella, "Litigation funder Burford wins bid to take over Sysco chicken antitrust cases," Reuters (Mar. 22, 2024), available at: https://www.reuters.com/legal/litigation/litigation-funder-burford-wins-bid-take-over-sysco-chicken-antitrust-cases-2024-03-22/.

[10] N.Y. JUD. § 211(b).

David Nocenti

From: Guth Bonnie - MRAS-US <BGuth@munichre.com>
Sent: Friday, May 31, 2024 3:07 PM
To: rulecomments
Cc: Rivera Ignacio - MRAS-US
Subject: Letter of Support for Proposed Amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court
Attachments: Comments to NY Courts re litigaiton financing rule amendments)_encrypted_.pdf

Please see attached. Thank you for your consideration.

Bonnie Guth
Head of Government Affairs

LSD-LAW-Corporate

Munich Re America Services, Inc.

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Munich RE

VIA EMAIL

David Nocenti, Esq., Counsel
Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004
email: rulecomments@nycourts.gov

May 31, 2024

Ignacio Rivera
General Counsel and Chief
Compliance and Ethics Officer
irivera@munichre.com

Bonnie Guth
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Re: Letter of Support for Proposed Amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements.

Dear Mr. Nocenti:

We are reaching out to you to express our strong support for the proposed amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County relating to litigation financing and other financial agreements as set forth in George Carpinello's February 23, 2024, memorandum to Chief Administrative Judge Joseph A. Zayas.

Our organization, Munich Re America Services, Inc., is part of the Munich Re Group. Munich Re is one of the world's largest risk carriers and provides insurance and reinsurance solutions globally. Our global workforce represents 131 different nationalities in more than 50 locations worldwide, including our NYC offices at 330 Madison Avenue and our US P&C headquarters in Princeton, NJ.

Our support for the proposed rule amendments is based on the need for greater transparency into third-party litigation financing and related transactions. The proposed rule amendments would require disclosure of litigation financing agreements, albeit in limited situations. While we believe that disclosure obligations for third-party litigation financing should apply even more broadly, the proposed amendments are a needed first step in bringing transparency to an opaque, unregulated industry. The resulting transparency will benefit New York through an improved civil justice system that better serves the interests of its courts, litigants and the public. This simple disclosure would not adversely affect the rights or duties of any of the

parties to the litigation but would ensure fairness during the settlement process.
Finally, while we applaud and appreciate this disclosure proposal, we would also like to see the rule broadened to apply to all lawsuits, not just those situations outlined in the proposed rule.

Thank you for the opportunity to comment on the proposal and to weigh in on this issue.

Best regards,

Ignacio Rivera (May 31, 2024 14:56 EDT)

Ignacio Rivera
Munich Re America Services, Inc.

Bonnie Guth
Bonnie Guth (May 31, 2024 15:00 EDT)

Bonnie Guth
Munich Re America Services, Inc.

David Nocenti

From:	Baldini, Donald <donald.baldini@libertymutual.com>
Sent:	Friday, May 31, 2024 3:19 PM
To:	rulecomments
Subject:	Liberty Mutual support for proposed court rule amendments related to litigation financing agreements
Attachments:	APCIA Comments Proposed Amendments Sections 202.67 and 207.38 litigation financing agreements.pdf
Categories:	Blue category

Dear Mr. Nocenti:

Liberty Mutual Insurance Company, the eighth largest global property and casualty insurer based on 2023 gross written premium and a significant participant in the New York PnC insurance market, wishes to register its support for proposed amendments to Section 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements.

Liberty Mutual is a member of the American Property and Casualty Insurance Association (APCIA) and we fully concur with the attached statement of Kristina Baldwin as to why this modest but meaningful proposal should be adopted.

Liberty Mutual has become increasingly concerned in recent years with the growth of this unregulated area of the litigation system and we believe litigation financing needs greater scrutiny and transparency. For all the reasons stated in APCIA's letter we urge the final adoption of these proposed rules and we look forward to engaging on additional rules which may be deemed appropriate in the future.

Thank you for the opportunity to comment. Please let me know if we may provide additional information or assistance as you review this proposal.

Donald F. Baldini
AVP and Senior Legislative Counsel
Liberty Mutual Insurance
Cell: 617 571 7598

American Property Casualty Insurance Association℠
INSURING AMERICA apci.org

May 24, 2024

VIA EMAIL

New York State Office of Court Administration
ATTN: David Nocenti, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 10th Floor
New York, New York 10004
rulecomments@nycourts.gov

Re: Proposed Amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements

Dear Mr. Nocenti:

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA members represent all sizes, structures, and regions, and protect families, communities and businesses in the U.S. and across the globe.

APCIA writes to express its strong support for amending §§ 202.67 and 207.38 of the Uniform Civil Rules to require disclosure of litigation funding, assignments or other financial agreements (collectively, "litigation financing agreements"), as set forth in George Carpinello's February 23, 2024, memorandum to Chief Administrative Judge Joseph A. Zayas.

Litigation financing needs greater scrutiny and transparency. The proposed amendments would require disclosure of litigation financing agreements but only in limited situations -- applications seeking leave to compromise a wrongful death action, or a personal injury action involving an infant or a judicially declared incapacitated person including an incompetent or conservatee. While APCIA believes disclosure obligations for third-party litigation financing should apply even more broadly, the proposed amendments are a needed first step in bringing transparency to an opaque, unregulated industry.[1] The resulting transparency will benefit New York through an improved civil justice system that better serves the interests of its courts, litigants and the public.

New York state courts will benefit from the adoption of the proposed amendments. At present, a court has the burden of confirming the existence and terms of litigation financing agreements as part of its evaluation of a petitioner's application to approve disbursements or a settlement. The

[1] The need for broader disclosure was reinforced by a recent *Bloomberg Law* investigative report into how a litigation funding company linked to sanctioned Russian billionaires financed litigation in New York federal court and elsewhere to try and evade international sanctions. *See* Putin's Billionaires Dodge Sanctions by Financing Lawsuits, *Bloomberg Law* (March 28, 2024).

proposed amendments address this seeming incongruity by placing the burden where it belongs -- on the petitioner and their counsel. Mandatory disclosure will improve efficiency and ensure courts have access to information that is critical to their analysis of the fairness and propriety of proposed disbursements and settlements.

Litigants also stand to benefit from the increased transparency that mandatory disclosure of litigation financing agreements will bring. Plaintiffs in the types of cases covered by the proposed amendments may bear emotional and financial burdens that increase the likelihood of entering into a litigation financing agreement. These agreements, as the February 23, 2024, memorandum to Chief Administrative Judge Zayas makes clear, can include fees and interest rates that are so high the funder's share of a settlement can easily and quickly exceed the plaintiff's share.[2] Requiring disclosure puts a court in a better position to understand the effect of a proposed settlement and determine whether the fees and interest rates charged, and the services provided were reasonable and necessary. This analysis can result in a plaintiff retaining a greater percentage of a settlement than they otherwise would have without disclosure. Moreover, disclosure can alert the court to the existence of both a third-party that may have exerted influence or control over the litigation or plaintiff's decision to settle, and undisclosed conflicts of interest.

The public also will see benefits from increased transparency. As mentioned above, disclosure will make courts more efficient and reduce burdens on the administration of justice, which favors the public. In addition, disclosure reinforces important ethical and professional obligations contained in New York's Rules of Professional Conduct, which help increase public confidence in New York's judicial system.

The benefits that will flow from the proposed amendments to §§ 202.67 and 207.38 are manifest and we strongly encourage their adoption. Disclosure of litigation financing agreements will provide courts, litigants and the public with information that is essential to the fair, efficient and ethical administration of justice. Furthermore, the proposed amendments are an important first step in bringing transparency to a rapidly growing, unregulated industry that operates largely out of the public view.

APCIA appreciates the opportunity to assist in the consideration of this issue

Sincerely,

Kristina Baldwin

Kristina Baldwin
Vice President, State Government Relations
American Property Casualty Insurance Association
kristina.baldwin@apci.org
518-443-2220

[2] Other examples of where litigation funders have charged New Yorkers usurious interest rates include one funder that charged a disabled first responder $28,636 in interest on a three-month, $35,000 bridge loan, a rate exceeding 250% on an annualized basis, and another funder that participated in a $31 million insurance fraud scheme that charged interest rates of between 50% and 100%. *See* Complaint, *CFPB v. RD Legal Funding*, ¶¶ 29-32, 1:17-cv-00890 (SDNY 2017), and *U.S. v. Constantine, et al.*, 21-CR-531 (SDNY 2021).