STATE OF NEW YORK

4555

2019-2020 Regular Sessions

IN SENATE

March 14, 2019

Introduced by Sens. KAPLAN, ORTT -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

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

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title. This act shall be known and may be cited as the "consumer litigation funding act".

§ 2. Legislative intent. In an effort to promote consumer protections related to consumer litigation funding transactions, this act establishes that such transactions should be subject to state regulation and sets forth requirements regarding disclosure, licensing, funding company and attorney responsibilities and limitations, violations and other items.

§ 3. The general business law is amended by adding a new article 39-H to read as follows:

ARTICLE 39-H

THIRD PARTY LITIGATION FINANCING

Section 899-ccc. Definitions.
899-ddd. Contract requirements; right of rescission.
899-eee. Prohibitions and charge limitations.
899-fff. Contracted amounts.
899-ggg. Disclosures.
899-hhh. Violations.
899-iii. Assignability; liens.
899-jjj. Effect of communication on privileges.
899-kkk. Registration.
899-lll. Reporting.
899-mmm. Severability.

§ 899-ccc. Definitions. As used in this article, the following terms shall have the following meanings:

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD00211-01-9

1. "Advertise" means publishing or disseminating any written, aural, electronic or printed communication or any communication by means of recorded telephone messages or transmitted or broadcast on radio, television, the internet or similar communications media, including audio recordings, film strips, motion pictures and videos, published, disseminated, circulated or placed before the public, directly or indirectly, for the purpose of inducing a consumer to enter into a consumer litigation funding.

2. "Charges" means the amount of money to be paid to the consumer litigation funding company by or on behalf of the consumer, above the funded amount provided by or on behalf of the company to a New York consumer pursuant to this article. Charges include all administrative, origination, underwriting or other fees no matter how denominated. Such charges shall not exceed the maximum annual percentage rate applicable to consumer credit extended to a member of the military as provided for in Title 10, United States Code, section 987(b). Any contract which exceeds such rate shall be considered usurious as defined by section 5-501 of the general obligations law.

3. "Consumer litigation funding" means a non-recourse transaction in which a consumer litigation funding company purchases and a consumer assigns to the company a contingent right to receive an amount of the potential proceeds of a settlement, judgment, award, or verdict obtained in the consumer's legal claim.

4. "Consumer litigation funding company" or "company" means a person or entity that enters into a consumer litigation funding contract of no more than five hundred thousand dollars with a consumer. This term shall not include:

(a) an immediate family member of the consumer;

(b) a bank, lender, financing entity, or other special purpose entity:

(i) that provides financing to a consumer litigation funding company; or

(ii) to which a consumer litigation funding company grants a security interest or transfers any rights or interest in a consumer litigation funding; or

(c) an attorney or accountant who provides services to a consumer.

5. "Consumer" means a natural person who has a pending legal claim and who resides or is domiciled in New York.

6. "Funded amount" means the amount of monies provided to, or on behalf of, the consumer in the consumer litigation funding. "Funded amount" excludes charges.

7. "Funding date" means the date on which the funded amount is transferred to the consumer by the consumer litigation funding company either by personal delivery or via wire, ACH or other electronic means or mailed by insured, certified or registered United States mail.

8. "Immediate family member" means a parent; sibling; child by blood, adoption, or marriage; spouse; grandparent or grandchild.

9. "Legal claim" means a bona fide civil claim or cause of action.

10. "Resolution date" means the date the funded amount, plus the agreed upon charges, are delivered to the consumer litigation funding company by the consumer, the consumer's attorney or otherwise.

§ 899-ddd. Contract requirements; right of rescission. 1. All consumer litigation funding contracts shall meet the following requirements:

(a) a contract shall be written in a clear and coherent manner using words with common, everyday meanings to enable the average consumer who makes a reasonable effort under ordinary circumstances to read and

understand the terms of the contract without having to obtain the assistance of a professional;

(b) the contract shall be completely filled in when presented to the consumer for signature;

(c) the contract shall contain, in twelve point bold type font, a right of rescission, allowing the consumer to cancel the contract without penalty or further obligation if, within ten business days after the funding date, the consumer returns to the consumer litigation funding company the full amount of the disbursed funds;

(d) the contract shall contain the initials of the consumer on each page;

(e) a statement that there are no fees or charges to be paid by the consumer other than what is disclosed on the disclosure form;

(f) in the event the consumer seeks more than one litigation funding contract from the same company, a disclosure providing the cumulative amount due from the consumer for all transactions, including charges under all contracts, if repayment is made any time after the contracts are executed;

(g) a statement of the maximum amount the consumer may be obligated to pay under the contract other than in a case of material breach, fraud or misrepresentation by or on behalf of the consumer; and

(h) clear and conspicuous detail of how charges, including any applicable fees, are incurred or accrued.

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

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

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

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

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

(e) the attorney has not received a referral fee or other consideration from the consumer litigation funding company in connection with the consumer litigation funding, nor will the attorney receive such fee or other consideration in the future; and

(f) the attorney in the legal claim has provided no tax, public or private benefit planning, or financial advice regarding this transaction.

3. Should the acknowledgement required in paragraph (c) of subdivision two of this section not be completed by the attorney or firm retained by the consumer in the legal claim, the contract shall be null and void. The contract will remain valid and enforceable in the event the consumer terminates the initial attorney and/or retains a new attorney with respect to the legal claim.

4. Notwithstanding paragraph b of subdivision three of section 5-501 of the general obligations law, no prepayment penalties or fees shall be charged or collected on consumer litigation funding. A prepayment penalty on consumer litigation funding shall be unenforceable.

§ 899-eee. Prohibitions and charge limitations. 1. Consumer litigation funding companies shall be prohibited from:

(a) paying or offering to pay commissions, referral fees, or other forms of consideration to any attorney, law firm, medical provider, chiropractor or physical therapist or any of their employees for referring a consumer to the company;

(b) accepting any commissions, referral fees, rebates or other forms of consideration from an attorney, law firm, medical provider, chiropractor or physical therapist or any of their employees;

(c) intentionally advertising materially false or misleading information regarding its products or services;

(d) referring, in furtherance of an initial legal funding, a customer or potential customer to a specific attorney, law firm, medical provider, chiropractor or physical therapist or any of their employees; provided, however, if a customer needs legal representation, the company may refer the customer to a local or state bar association referral service;

(e) knowingly providing funding to a consumer who has previously assigned and/or sold a portion of the consumer's right to proceeds from his or her legal claim without first making payment to and/or purchasing a prior unsatisfied consumer litigation funding company's entire funded amount and contracted charges, unless a lesser amount is otherwise agreed to in writing by the consumer litigation funding companies, except that multiple companies may agree to contemporaneously provide funding to a consumer provided that the consumer and the consumer's attorney consent to the arrangement in writing;

(f) receiving any right to, or making, any decisions with respect to the conduct of the underlying legal claim or any settlement or resolution thereof. The right to make such decisions shall remain solely with the consumer and the attorney in the legal claim;

(g) attempting to obtain a waiver of any remedy or right by the consumer, including but not limited to the right to trial by jury; and

(h) knowingly paying or offering to pay for court costs, filing fees or attorney's fees either during or after the resolution of the legal claim, using funds from the consumer litigation funding transaction.

2. An attorney or law firm retained by the consumer in the legal claim shall not have a financial interest in the consumer litigation funding company offering consumer litigation funding to that consumer.

3. Any attorney who has referred the consumer to his or her retained attorney shall not have a financial interest in the consumer litigation funding company offering consumer litigation funding to that consumer.

4. The attorney may only disclose privileged information to the consumer litigation funding company with the written consent of the consumer.

§ 899-fff. Contracted amounts. The contracted amount to be paid to the consumer litigation company shall be a predetermined amount based upon intervals of time from the funding date through the resolution date, and shall not be determined as a percentage of the recovery from the legal claim.

§ 899-ggg. Disclosures. All consumer litigation funding contracts shall contain the disclosures specified in this section, which shall constitute material terms of the contract. Unless otherwise specified, the disclosures shall be typed in at least twelve point bold type font and be placed clearly and conspicuously within the contract, as follows:

1. On the front page under appropriate headings, language specifying:

(a) the funded amount to be paid to the consumer by the consumer litigation funding company;

(b) an itemization of one-time charges;

(c) the maximum total amount to be assigned by the consumer to the company, including the funded amount and all charges; and

(d) a payment schedule to include the funded amount and charges, listing all dates and the amount due at the end of each one hundred eighty day period from the funding date, until the date the maximum amount due to the company pursuant to the contract is paid.

2. Pursuant to the provisions set forth in this section, within the body of the contract: "Consumer's right to cancellation: you may cancel this contract without penalty or further obligation within ten business days after the funding date if you return to the consumer litigation funding company the full amount of the disbursed funds."

3. The consumer litigation funding company shall have no role in deciding whether, when and how much the legal claim is settled for, however, the consumer and consumer's attorney must notify the company of the outcome of the legal claim by settlement or adjudication prior to the resolution date. The company may seek updated information about the status of the legal claim but in no event shall the company interfere with the independent professional judgement of the attorney in the handling of the legal claim or any settlement thereof.

4. Within the body of the contract, in all capital letters in at least twelve point bold type font contained within a box: "THE FUNDED AMOUNT AND AGREED UPON CHARGES SHALL BE PAID ONLY FROM THE PROCEEDS OF YOUR LEGAL CLAIM, AND SHALL BE PAID ONLY TO THE EXTENT THAT THERE ARE AVAILABLE PROCEEDS FROM YOUR LEGAL CLAIM. YOU WILL NOT OWE (INSERT NAME OF THE CONSUMER LITIGATION FUNDING COMPANY) ANYTHING IF THERE ARE NO PROCEEDS FROM YOUR LEGAL CLAIM, UNLESS YOU HAVE VIOLATED ANY MATERIAL TERM OF THIS CONTRACT OR YOU HAVE COMMITTED FRAUD AGAINST (INSERT NAME OF CONSUMER LITIGATION FUNDING COMPANY)."

5. Located immediately above the place on the contract where the consumer's signature is required, in twelve point bold type font: "Do not sign this contract before you read it completely. Do not sign this contract if it contains any blank spaces. You are entitled to a completely filled-in copy of the contract before you sign this contract. You should obtain the advice of any attorney. Depending on the circumstances, you may want to consult a tax, public or private benefits planning, or financial professional. You acknowledge that your attorney in the legal claim has provided no tax, public or private benefit planning, or financial advice regarding this transaction. You further acknowledge that your attorney has explained the terms and conditions of the consumer litigation funding contract."

6. A copy of the executed contract shall promptly be delivered to the attorney for the consumer.

§ 899-hhh. Violations. 1. Any company found in willful violation of any provision of this article in a specific funding case: (a) waives its right to recover both the funded amount and any and all charges, as defined in subdivision two of section eight hundred ninety-nine-ccc of this article, in that particular case; and (b) shall be liable for a civil penalty of not more than five thousand dollars for each violation, which shall accrue to the state of New York and may be recovered in a civil action brought by the attorney general.

2. Nothing in this article shall be construed to restrict the exercise of powers or the performance of the duties of the New York state attorney general, which he or she is authorized to exercise or perform by law.

§ 899-iii. Assignability; liens. 1. The contingent right to receive an amount of the potential proceeds of a legal claim is assignable by a consumer.

2. Only attorney's liens related to the legal claim which is the subject of the consumer litigation funding or medicare or other statutory liens related to the legal claim shall take priority over any lien of the consumer litigation funding company. All other liens shall take priority by normal operation of law.

§ 899-jjj. Effect of communication on privileges. All communication between the consumer's attorney in the legal claim and the consumer legal funding company as it pertains to the consumer legal funding shall fall within the scope of the attorney client privilege, including, without limitation, the work-product doctrine.

§ 899-kkk. Registration. 1. Unless a consumer litigation funding company has first registered with the state of New York pursuant to this article, the company may not engage in the business of consumer litigation funding in this state.

2. An applicant's registration must be filed in the manner prescribed by the secretary of state and must contain all the information required by the department of state to make an evaluation of the character and fitness of the applicant company. The initial application must be accompanied by a five hundred dollar fee. A renewal registration must include a two hundred dollar fee. A registration must be renewed every two years and expires on the thirtieth of September.

3. A certificate of registration may not be issued unless the department of state, upon investigation, finds that the character and fitness of the applicant company, and of the officers and directors thereof, are such as to warrant belief that the business will be operated honestly and fairly within the purposes of this article.

4. Every registrant shall also, at the time of filing such application, file with the department of state, if the department of state so requires, a bond satisfactory to the department of state in an amount not to exceed fifty thousand dollars. In lieu of the bond at the option of the registrant, the registrant may post an irrevocable letter of credit. The terms of the bond must run concurrent with the period of time during which the registration will be in effect. The bond must provide that the registrant will faithfully conform to and abide by the provisions of this article and to all rules lawfully made by the administrator under this act and to any such person or persons any and all amounts of money that may become due or owing to the state or to such person or persons from the registrant under and by virtue of this article during the period for which the bond is given.

5. Upon written request, the applicant shall be entitled to a hearing on the question of the applicant's qualifications for registration if:

(a) the department of state has notified the applicant in writing that the application has been denied, or

(b) the department of state has not issued a registration within sixty days after the application for the registration was filed.

6. A request for a hearing may not be made more than fifteen days after the department has mailed a written notice to the applicant that the application has been denied and stating in substance the department of state's findings supporting denial of the application.

7. Notwithstanding the prior approval requirement of subdivision one of this section, a consumer litigation funding company that registered with the department of state between the effective date of this article or when the department of state has made applications available to the

public, whichever is later, and one hundred eighty days thereafter may engage in consumer litigation funding while the company's registration is pending approval with the department of state. All funding agreements entered into prior to the effective date of this article are not subject to the terms of this article.

8. No consumer litigation funding company may use any form of consumer litigation funding contract in this state unless it has been filed with the department of state in accordance with the filing procedures set forth by the secretary of state.

9. The secretary of state is hereby authorized to adopt rules and regulations to implement the provisions of this section as needed.

§ 899-lll. Reporting. 1. Each consumer litigation funding company that engages in business in the state shall submit a report to the department of financial services no later than the thirty-first of January of each year specifying:

(a) number of consumer litigation fundings by the company;

(b) summation of funded amounts in dollar figure; and

(c) annual percentage charged to each consumer where repayment was made.

2. The department of state shall make these figures available to the public, in a manner which maintains the confidentiality of the name of each company and consumer, no later than one year after the reports are delivered.

§ 899-mmm. Severability. If any provision of this article is, for any reason, declared unconstitutional or invalid, in whole or in part, by any court of competent jurisdiction, such portion shall be deemed severable, and such unconstitutionality or invalidity shall not affect the validity of the remaining portions of this article, which remaining portions shall continue in full force and effect.

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law; provided, however, it shall not apply or in any way affect or invalidate any consumer litigation funding previously effectuated prior to the effective date of this act.