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Introduced by M. of A. WALKER, TAYLOR, GIBBS, DAVILA, HUNTER, STECK, RAMOS, WEPRIN, DARLING, HEVESI, FALL, CHANDLER-WATERMAN, CUNNINGHAM, ANDERSON, BURGOS, BRONSON -- read once and referred to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Judiciary in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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:

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

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

9 § 3. The general business law is amended by adding a new article 39-H
10 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.

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

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1 899-jjj. Effect of communication on privileges.

2 899-kkk. Registration.

3 899-lll. Reporting.

4 899-mmm. Severability.

5 § 899-ccc. Definitions. As used in this article, the following terms
6 shall have the following meanings:

7 1. "Advertise" means publishing or disseminating any written, oral,
8 electronic or printed communication or any communication by means of
9 recorded telephone messages or transmitted or broadcast on radio, tele-
10 vision, the internet or similar communications media, including audio
11 recordings, film strips, motion pictures and videos, published, dissem-
12 inated, circulated or placed before the public, directly or indirectly,
13 for the purpose of inducing a consumer to enter into a consumer liti-
14 gation funding.

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

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

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

34 (a) an immediate family member of the consumer;

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

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

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

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

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

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

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

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

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

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

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

3 (a) a contract shall be written in a clear and coherent manner using
4 words with common, everyday meanings to enable the average consumer who
5 makes a reasonable effort under ordinary circumstances to read and
6 understand the terms of the contract without having to obtain the
7 assistance of a professional;

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

10 (c) the contract shall contain, in twelve point bold type font, a
11 right of rescission, allowing the consumer to cancel the contract with-
12 out penalty or further obligation if, within ten business days after the
13 funding date, the consumer returns to the consumer litigation funding
14 company the full amount of the disbursed funds;

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

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

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

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

27 (h) clear and conspicuous detail of how charges, including any appli-
28 cable fees, are incurred or accrued.

29 2. The contract shall contain a written acknowledgement by the attor-
30 ney retained by the consumer in the legal claim that attests to the
31 following:

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

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

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

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

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

46 (f) the attorney in the legal claim has provided no tax, public or
47 private benefit planning, or financial advice regarding this trans-
48 action.

49 3. In the event that the acknowledgement required pursuant to para-
50 graph (c) of subdivision two of this section is not completed by the
51 attorney or firm retained by the consumer in the legal claim, the
52 contract shall be null and void. The contract shall remain valid and
53 enforceable in the event the consumer terminates the initial attorney
54 and/or retains a new attorney with respect to the legal claim.

55 4. Notwithstanding paragraph b of subdivision three of section 5-501
56 of the general obligations law, no prepayment penalties or fees shall be

1 charged or collected on consumer litigation funding. A prepayment
2 penalty on consumer litigation funding shall be unenforceable.

3 § 899-eee. Prohibitions and charge limitations. 1. Consumer liti-
4 gation funding companies shall be prohibited from:

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

9 (b) accepting any commissions, referral fees, rebates or other forms
10 of consideration from an attorney, law firm, medical provider, chiro-
11 practor or physical therapist or any of their employees;

12 (c) intentionally advertising materially false or misleading informa-
13 tion regarding its products or services;

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

20 (e) knowingly providing funding to a consumer who has previously
21 assigned and/or sold a portion of the consumer's right to proceeds from
22 the consumer's legal claim without first making payment to and/or
23 purchasing a prior unsatisfied consumer litigation funding company's
24 entire funded amount and contracted charges, unless a lesser amount is
25 otherwise agreed to in writing by the consumer litigation funding compa-
26 nies, except that multiple companies may agree to contemporaneously
27 provide funding to a consumer provided that the consumer and the consum-
28 er's attorney consent to the arrangement in writing;

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

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

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

38 (i) knowingly offering or colluding to provide funding as an induce-
39 ment to a consumer who is presently represented by counsel to terminate
40 that engagement and engage such lawyer or law firm to represent them in
41 the same matter. Any consumer litigation funding contract entered into
42 in violation of this paragraph shall be void ab initio; and

43 (j) colluding with or knowingly assisting a lawyer or law firm that is
44 enticing or intends to entice a consumer to bring a claim that the
45 company knows or has reason to know is fabricated or otherwise not
46 brought in good faith. Any consumer litigation funding contract entered
47 into in violation of this paragraph shall be void ab initio.

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

51 3. Any attorney who has referred the consumer to the consumer's
52 retained attorney shall not have a financial interest in the consumer
53 litigation funding company offering consumer litigation funding to that
54 consumer.

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

4 § 899-fff. Contracted amounts. The contracted amount to be paid to the
5 consumer litigation funding company shall be a predetermined amount
6 based upon intervals of time from the funding date through the resol-
7 ution date, and shall not be determined as a percentage of the recovery
8 from the legal claim.

9 § 899-ggg. Disclosures. All consumer litigation funding contracts
10 shall contain the disclosures specified in this section, which shall
11 constitute material terms of the contract. Unless otherwise specified,
12 such disclosures shall be typed in at least twelve point bold type font
13 and be placed clearly and conspicuously within the contract, as follows:

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

15 (a) the funded amount to be paid to the consumer by the consumer liti-
16 gation funding company;

17 (b) an itemization of one-time charges;

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

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

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

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

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

46 5. Located immediately above the place on the contract where the
47 consumer's signature is required, in twelve point bold type font: "Do
48 not sign this contract before you read it completely. Do not sign this
49 contract if it contains any blank spaces. You are entitled to a
50 completely filled-in copy of the contract before you sign this contract.
51 You should obtain the advice of any attorney. Depending on the circum-
52 stances, you may want to consult a tax, public or private benefits plan-
53 ning, or financial professional. You acknowledge that your attorney in
54 the legal claim has provided no tax, public or private benefit planning,
55 or financial advice regarding this transaction. You further acknowledge

1 that your attorney has explained the terms and conditions of the consum-
2 er litigation funding contract."

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

5 § 899-hhh. Violations. 1. Any consumer litigation funding company
6 found in willful violation of any provision of this article in a specif-
7 ic funding case: (a) waives its right to recover both the funded amount
8 and any and all charges, as defined in subdivision two of section eight
9 hundred ninety-nine-ccc of this article, in that particular case; and
10 (b) shall be liable for a civil penalty of not more than five thousand
11 dollars for each violation, which shall accrue to the state of New York
12 and may be recovered in a civil action brought by the attorney general.

13 2. Nothing in this article shall be construed to restrict the exercise
14 of powers or the performance of the duties of the New York state attor-
15 ney general, which the attorney general is authorized to exercise or
16 perform by law.

17 § 899-iii. Assignability; liens. 1. The contingent right to receive an
18 amount of the potential proceeds of a legal claim is assignable by a
19 consumer.

20 2. Only attorney's liens related to the legal claim which is the
21 subject of the consumer litigation funding or medicare or other statuto-
22 ry liens related to the legal claim shall take priority over any lien of
23 the consumer litigation funding company. All other liens shall take
24 priority by normal operation of law.

25 § 899-jjj. Effect of communication on privileges. All communication
26 between the consumer's attorney in the legal claim and the consumer
27 legal funding company as it pertains to the consumer legal funding shall
28 fall within the scope of the attorney client privilege, including, with-
29 out limitation, the work-product doctrine.

30 § 899-kkk. Registration. 1. Unless a consumer litigation funding
31 company has first registered with the state of New York pursuant to this
32 article, the company may not engage in the business of consumer liti-
33 gation funding in this state.

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

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

46 4. Every registrant shall also, at the time of filing such applica-
47 tion, file with the department of state, if the department of state so
48 requires, a bond satisfactory to the department of state in an amount
49 not to exceed fifty thousand dollars. In lieu of the bond at the option
50 of the registrant, the registrant may post an irrevocable letter of
51 credit. The terms of the bond must run concurrent with the period of
52 time during which the registration will be in effect. The bond must
53 provide that the registrant will faithfully conform to and abide by the
54 provisions of this article and to all rules lawfully made by the admin-
55 istrator under this act and to any such person or persons any and all
56 amounts of money that may become due or owing to the state or to such

1 person or persons from the registrant under and by virtue of this arti-
2 cle during the period for which the bond is given.

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

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

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

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

13 7. Notwithstanding the prior approval requirement of subdivision one
14 of this section, a consumer litigation funding company that registered
15 with the department of state between the effective date of this article
16 or when the department of state has made applications available to the
17 public, whichever is later, and one hundred eighty days thereafter may
18 engage in consumer litigation funding while the company's registration
19 is pending approval with the department of state. All funding agreements
20 entered into prior to the effective date of this article are not subject
21 to the terms of this article.

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

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

28 § 899-lll. Reporting. 1. Each consumer litigation funding company that
29 engages in business in the state shall submit a report to the department
30 of state no later than the thirty-first of January of each year specify-
31 ing:

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

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

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

36 2. The department of state shall make such information available to
37 the public, in a manner which maintains the confidentiality of the name
38 of each company and consumer, no later than ninety days after the
39 reports are submitted.

40 § 899-mmm. Severability. If any provision of this article is, for any
41 reason, declared unconstitutional or invalid, in whole or in part, by
42 any court of competent jurisdiction, such portion shall be deemed sever-
43 able, and such unconstitutionality or invalidity shall not affect the
44 validity of the remaining portions of this article, which remaining
45 portions shall continue in full force and effect.

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