BEFORE THE NEW YORK STATE SENATE
STANDING COMMITTEE ON CONSUMER PROTECTION

PUBLIC HEARING

ON LAWSUIT LENDING

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

May 16, 2018
12:00 p.m. to 4:00 p.m.

PRESIDING:

Senator Chris Jacobs, Chair

Senator Robert Ortt, Co-Sponsor

PRESENT:

Senator Marisol Alcantara (RM)

Senator Michael H. Ranzenhofer

Assemblyman William B. Magnarelli
(seated in the audience)

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SENATOR JACOBS: Good afternoon, everyone.

Thank you for being here.

I'm Senator Chris Jacobs. I represent the 60th Senate District located in Erie County, New York.

I serve as the Chair of the Senate Standing Committee on Consumer Protection, and today's public hearing.

This public hearing will focus on lawsuit lending, and how we can better regulate third-party litigation -- third-party litigation financing in New York.

A few quick housekeeping items before we begin.

Each testimony presented today, both oral and written, will be part of the official public record.

We will hear from seven witnesses. Speakers will be asked to keep their remarks to 10 minutes so that Committee members will have sufficient time to ask their questions.

The testimony you submitted is in every member's hands, so they have the opportunity to -- if they haven't read it yet, to read it in its entirety.

But we did want to make sure that we have

sufficient time for questions.

The third-party litigation-financing industry emerged in the 1990s.

In recent months, several media sources, including "The New York Post" and "The New York Times," have reported several stories of individuals that have been forced to forfeit much of their proceeds from their litigation settlements to businesses that funded the lawsuits due to very high interest rates.

However, we can all agree that litigation is not cheap.

Members of the lawsuit-lending industry claim they have served a much-needed role in providing loans to litigants who would otherwise struggle to make ends meet during their lengthy lawsuits.

Two pieces of legislation have been introduced to help claimants from excessive interest rates and fees.

These bills are S3911 and A8653, sponsored, respectively, by Senator Ortt and Assembly Member Magnarelli, and A899, sponsored by Assembly Member Dilan.

The Consumer Protection Committee has called this public hearing to hear from members of the

industry, consumer advocates, and experts on this topic so that they -- that we can reach a solution that will better protect claimants in our state.

I want to thank my Senate colleagues in their attendance.

Many of them are still at session, so I imagine many will be filing in over the next few minutes.

But, my Ranking Member, Senator Alcantara is here. Thank you for being here.

And, Senator Ortt, who is the author of one of the pieces of legislation that I just referenced.

I wanted to just mention, the members that are -- the individuals that are here that will be testifying, I'm just going to list them right now:

Tom Stebbins, executive director, and Adam Morey, managing (sic) public affairs director, for the Lawsuit Reform Alliance of New York;

Kelly Gilroy, executive director of the American Legal Finance Association;

Maya Steinitz, professor of law at the University of Iowa College of Law, and visiting professor of law at Harvard Law School;

Anthony Sebok, professor of law at the Benjamin Cardozo School of Law at Yeshiva

University, and visiting professor at Cornell Law School;

The Honorable Anthony -- and I'm going to maybe mispronounce this -- Coehlo, a retired member of U.S. House of Representatives from California, and current member of the board of directors from the -- for the Epilepsy Foundation;

Lev -- Lev Ginsburg, director of government affairs for the Business Council of New York;

James Copland, senior fellow director of legal policy, The Manhattan Institute.

Thank you all for being here today.

At this point in time I would like to -- Member Altantra -- Alcantara is -- is -- she just wants to get right to work, so no opening remarks, she said.

But, Senator Ortt did you want to say a few words before we begin.

And, thank you very much once again.

SENATOR ORTT: Well, I want to get to work too, but I wanted to make some opening comments.

I just wanted to thank Senator Jacobs and the Consumer Protection Committee, Senator Alcantara, for putting this hearing together.

I think it's important.

We pass a lot of pieces of legislation through the New York State Senate and, of course, the Assembly as well, and, very often, there is no real public discussion. There's discussions that happen in hallways, in closed-door meetings, and that's certainly a part of what we do.

But I think having a hearing like this where we have this discussion, because a lot of people probably don't know what this industry is. A lot of senators probably are unfamiliar with it.

And it's very important, I think, if we're going to have a real substantive discussion, and try to get to good policy, then we need to educate not only members of the public, but even the officials who will be voting on this legislation.

And so I think it's very important.

And I just want to say that, you know, the goal here really is to -- I think there's a lot of folks out there who are in this industry, who do a good job, and serve a very important need. Probably not a high need, but there's a very important need when it arises.

But, of course, like any industry, especially when it's not regulated or has no sort of oversight, you have a number of bad actors as well.

So the goal really is to try to make sure that we have some oversight, that we are not encouraging any practices that are untoward, or that encourage what I would call "unnecessary" lawsuits or litigation that don't increase the cost, and certainly don't take advantage of people who are incredibly vulnerable and have a high risk.

On the same token, if there's lenders out there who are serving a real important need and they're doing everything above-board, then I think having them part of this discussion can only result, hopefully, in positive legislation and positive oversight.

So, that's what I'm hoping for, as this is the first step.

So I want to again thank Senator Jacobs, I want to thank Senator Alcantara, and I want to thank all the folks who are coming here to testify today.

SENATOR JACOBS: Thank you, Senator.

And now I'd like to call up Tom Stebbins and Adam Morey, please.

And you know your hierarchy of your organization better, so whoever wants to go first, you're more than welcome.

TOM STEBBINS: Well, I appreciate that, Senators.

Thank you very much for having us today.

Chairman Jacobs, Senator Ortt, members of the Committee, thank you for the opportunity to provide testimony regarding third-party litigation financing.

Law suit cash-advance companies currently operate in New York unchecked and without meaningful consumer protections.

This is an obvious disservice to some of the state's most vulnerable citizens, those who have already fallen victim to the actions of a negligent party.

The industry targets New Yorkers when they are at their most desperate, when they are injured, and may be unable to work or afford their rent.

A quick Internet search for "lawsuit loans" turns up hundreds of thousands of results from companies that offer cash advances for pending lawsuits and claims.

Many funders promise "cash now," offering approval in just one day.

The interest is often compounded monthly, with annual interest rates that exceed 100 percent.

An individual who has entered into one of these lending contracts may ultimately settle or win a lawsuit, only to take home a tiny fraction of their award, or, in some cases, none at all.

"The New York Post" recently uncovered a story of Theresa Gus, a woman who borrowed $23,000 from two cash-advance law firms: LawBuck$, spelled with a dollar sign, and MFL Case Funding.

She passed away before she ever saw a cent of the $2.1 million settlement she received from a slip-and-fall case against the City because the companies had put liens on the total amount, nearly 100 times the original principal of the loan.

Lawsuit-lending companies claim, that because the advances are contingent on the borrower winning the case, the product they offer is risky and should be classified as an investment, not a loan.

This mischaracterization allows them to charge interest rates that are well beyond New York's civil and criminal usury rates.

The level of risk that actually exists here is questionable, and nowhere near anything that could justify interest rates over 100 percent.

There is no evidence to suggest that the rate of default on lawsuit loans is higher than it is for

other financial products.

As LawCash executives told "Crain's New York Business," the company, quote, uses strict underwriting screening rules to ensure only about 4 percent of the cases it advances money to are lost in court, end quote.

In one illustrative example, a Brooklyn resident, Joseph Gill, borrowed $4,000 from LawBuck$ -- again, spelled with a dollar sign -- in order to cover medical expenses while his lawsuit was pending in court.

At the time Gill's lawsuit settled five years later, LawBuck$ demanded repayment to the tune of $116,000, 29 times the original amount that he was advanced.

The judge who presided over the case in Brooklyn Supreme Court was incredulous, and ordered LawBUck$ to explain its loan agreement.

In court papers, the judge presiding over the case called the interest rate, quote, usurious, and if not usurious, then unconscionable, end quote.

In another case, Carolyn Williams, a former nurse in the midst of a disability lawsuit with her former employer, borrowed $5,000, in her case, to pay medical bills.

The lender, U.S. Claims, not spelled with a dollar sign, did not inform Williams or her lawyer of their rate of interest to be charged on the loan.

It was not until nearly a year later when she discovered the annual interest rate was 76 percent.

Williams told "The New York Times" that she was, quote, definitely misled, and, quote, never expected that high of a rate, end quote.

After three years, Williams' case remained unresolved and her loan debt had ballooned to nearly $19,000.

Due to many legal and ethical considerations surrounding lawsuit consumer -- consumer lawsuit financing, state officials around the country have begun to look into and investigate the legitimacy of the industry.

Colorado's Attorney General recently announced that she will be sending out restitution checks from a $2.3 million settlement her office reached with LawCash and Oasis Legal Finance.

Here in New York, the Office of the Attorney General joined with the Consumer Finance Protection Bureau to file a complaint last year against RD Legal Funding, a New Jersey-based cash-advance lawsuit firm -- lawsuit cash-advance firm, for

allegedly taking advantage of 9/11 first responders and NFL players with concussion-related complications by offering high-interest advances on expected payouts from legal settlements and compensation funds.

The court filings for this enforcement action highlight the case of an unnamed 9/11 first responder who fell victim to this scheme when she was advanced $18,000 while awaiting a payout from the Ground Zero Compensation Fund.

After six months, she owed $33,000, an 83 percent increase in less than a year.

Sadly, as media outlets continue to reveal, the abuse is more widespread than just the stories mentioned here.

A "New York Times" investigation has uncovered lenders advertising directly to women with claims in the "me too." movement.

Another report uncovered a scheme in which lawyers and lenders convince women to get often unnecessary and potentially dangerous surgeries in order to increase the value of their litigation.

This controversial practice is allowed to continue because lawsuit lending and surgical funding are not adequately regulated under New York

law.

This is why the Lawsuit Reform Alliance of New York supports Senator Ortt's bill, 3911-A, a bill introduced by Senator Ortt and Assemblyman William Magnarelli, that would protect consumers from usurous rates by requiring the lawsuit lenders and financiers to comply with existing lending laws that cap consumer interest rates.

To further reduce harms to individuals and protect the integrity of the civil justice system, the bill also ensures that lawyers do not have overlapping financial interests in lending outfits or arrangements to collect lucrative referral fees.

Such partnerships can encourage frivolous filings and prolong litigation that should have settled sooner.

According to "The New York Times," federal prosecutors are currently investigating whether some of the existing relationships that lawyers have with the lenders constitute illegal kickback schemes.

For the above reasons, we urge members of the Committee to swiftly discharge S3911-A for consideration by the full Senate.

We also urge the Assembly and the Governor's Office to pass this legislation and sign it into

law.

Thank you for your consideration.

SENATOR JACOBS: Adam, before I allow you to speak, I just want to recognize, Senator Ranzenhofer is here.

And it was brought to my attention that Assemblyman Magnarelli is here in the crowd. And you are more than welcome to come up here.

ASSEMBLYMAN MAGNARELLI: (Inaudible.)

SENATOR JACOBS: Thank you very much.

Okay. Adam, thank you.

ADAM MOREY: Oh, that was our -- that's our full testimony.

SENATOR JACOBS: Do you have any questions at this point for Tom?

Senator Ortt?

SENATOR ORTT: Yeah, just, do you know what other states currently regulate lawsuit lending?

TOM STEBBINS: Yeah, several states have regulated lawsuit lending. And a few of them have actually subjected their -- the litigation financing, or lawsuit lending, to existing usury law.

And in one notable example, in Tennessee, where they were subject to those usury rates, which

are lower than New York --

New York is at 16 percent. I believe Tennessee is 10 percent.

ADAM MOREY: 10 percent, yeah.

TOM STEBBINS: -- all of the lawsuit lenders still registered in that state to do business.

So you may hear some testimony today that lawsuit lenders will not do business where the regulate -- where the interest rate is capped.

That is false. According to public records, they have registered to do business in the states where this has been regulated.

ADAM MOREY: And Arkansas is another one.

They have -- those are capped at 17 percent. We've seen -- there's been no reports that anybody pulled out there.

SENATOR ORTT: So -- because, obviously, there's like two issues here:

There's oversight, which is a general, you know, it can be a lot of different things;

And then there's caps, which can be part of oversight.

But both of these states you mentioned are -- or, I guess, would it be fair to say that a number of the states that do regulate, there are -- there

is some kind of a cap or set max rate they can charge, or is that -- would that be not true?

TOM STEBBINS: Some have their own caps. Some have caps to existing usury laws.

And that's what we're advocating for: a cap to existing usury law in New York State.

Existing usury law is 16 percent for civil. And anything above 25 percent is criminal loan sharking for which you would go to jail.

SENATOR ORTT: Thank you.

Senator Alcantara?

SENATOR ALCANTARA: Thank you, Tom, for your testimony.

What are the common victims of lawsuit lending?

TOM STEBBINS: Well, we see a number of victims.

I think the 9/11 first responders and the NFL settlement is most troubling because, what the lenders often say is, that these loans are risky, and that there's a certain amount of risk involved, that they need to charge these 100 percent, 85 percent, whatever it may be.

But in the case of the 9/11 first responders and the NFL concussion settlement, those were

settlements, they're making claims. There's no litigation risk there at all; and yet, in one of the cases, we saw an 83 percent increase in just 6 months.

So an 83 percent increase on a claim for which there is, essentially, no litigation risk, because it's made against a fund in this particular case, the 9/11 First Responders Fund.

But we've seen a lot of other cases, just consumer cases, where somebody takes out $5,000, and then, you know, over the course of three or four years, compounding interest on $5,000, they owe over $100,000. And they took that initial loan for their medical costs. But now, when they get paid for their injury, there's no money left.

And so we have these lenders using our justice system for -- as a profit center, and that's not what it should be for.

It should be for compensating victims.

SENATOR ALCANTARA: And what is the average interest rate in the state of New York?

TOM STEBBINS: Well, on a consumer loan, a regular consumer loan, as I said, the usury cap is 16 percent.

For these loans, I mean, we've seen it all

over the map.

I think that we've seen --

ADAM MOREY: There's been reports of 200-plus percent.

I think that's in the complaint about RD Legal Funding. One of them was, 250 percent was the rate that somebody was charged.

TOM STEBBINS: And I can't imagine the litigation risk, or the risk that any funder would be taking, to fund something that required a 250 percent return in exchange for that risk.

ADAM MOREY: And even if the average is around 50 percent, that's still, you know, double the criminal usury rate.

SENATOR ALCANTARA: And what is the length of time, normally?

Like, let's say I take out a $5,000 loan.

TOM STEBBINS: Well, generally, litigation can go from three to five years. So -- and it's compounding interest.

And one of the things you may hear today is that there was a deal with the attorney general back in, I believe 2005, that says that these lenders must disclose their loans, and they have a cover page that discloses the loans.

But, it's clearly not working.

All the media reports we've seen are from after 2005, and yet there's still so many people that are getting roped into these loans, that have no idea that they're going to be paying 150 percent, because sometimes these cover pages don't adequately show what actually the interest rate will be.

They'll talk about how it's compounded monthly, or something like that.

SENATOR ALCANTARA: And my last question: Do we have a region of the state where they make the most amount of loans -- of these type of loans?

TOM STEBBINS: No, and we've seen it all over the state.

Interestingly, "The New York Post" had a story about a person in Staten Island who has the Lawsuit Cash Truck. I mean, he drives around, throwing money out of a converted ice cream truck, essentially saying, that if you've got a lawsuit, he's got $10,000 for you.

What he, of course, doesn't say is the interest rate that's on that $10,000.

SENATOR ALCANTARA: Thank you.

TOM STEBBINS: Thank you.

SENATOR JACOBS: Senator Ranzenhofer, any questions?

SENATOR RANZENHOFER: Yes.

Yeah, thank you, Chairman.

Thank you for being here today.

Can you just tell me the basic difference between Senator Ortt's bill and Assemblyman Dilan's bill?

TOM STEBBINS: Caps.

Caps on the interest rate.

So one of the things you'll hear today is the need for transparency and the need for reporting, and all that.

And, absolutely, we need all those things.

But without an adequate interest rate cap there will be no adequate consumer protection.

SENATOR RANZENHOFER: So you agree with everything in the Dilan bill, with the exception of the fact that it doesn't have a cap?

TOM STEBBINS: Well, it also -- I mean, it connects it to existing usury law, and so there's a lot of protections within existing usury law beyond just the caps.

But, really, the most important thing here is the caps.

SENATOR RANZENHOFER: So you had mentioned the usury law, and you had mentioned 16 percent.

What is the -- I thought the credit card rate on a credit card right now is 1.5 percent.

So if I was --

TOM STEBBINS: So credit cards have a different lending rate. Those aren't considered loans. Those are regulated in a different way.

SENATOR RANZENHOFER: -- yeah, but that would be 18 percent annually?

TOM STEBBINS: I don't know what credit card interest rate is.

I believe it's 23? Is it 18?

I don't know. I honestly don't know.

SENATOR ALCANTARA: It depends on the company.

SENATOR RANZENHOFER: Okay.

SENATOR ALCANTARA: Some are as high as 32.

SENATOR RANZENHOFER: I try and pay off my balance I owe them. (Indiscernible.)

SENATOR ALCANTARA: Some are as high as 32.

SENATOR ORTT: Good answer, Mike.

SENATOR RANZENHOFER: Okay. But there are some -- so there is some other lending in the state, which, obviously, it's a different type of loan.

But there are some areas of the state, and other types of consumer transactions, whether it be credit card, or as Senator Alcantara just said, as high as 22 or 23 percent, up to, maybe, 32 percent.

And I know this is not your, you know, area, but is there something wrong with those type of rates?

TOM STEBBINS: Well, I mean, in the case of this particular kind of financing, litigation financing, there's a non-profit out of Buffalo, the Bair Foundation, which offers rates at 8 percent.

So to say that they can't do this kind of lending without rates that exceed the rate of criminal usury I think is absurd.

And, frankly, again, we've seen in states where the interest rate has been capped, that these lending outfits have registered with the secretary of state to do business in those states, and we presume that they are doing business in those states.

SENATOR RANZENHOFER: Okay. Has there been -- and I'm sure we'll hear from them.

You had said they're still doing business.

Obviously, there's competition among companies.

Has there been any reduction in the number of these businesses in these other states where there is a cap on the amount of interest?

So, in other words, before the cap, you know, was there 10 companies doing business, and after the cap, that same number continued to do business? Or, was there any dimunition (sic) in the number of companies that were involved?

TOM STEBBINS: I don't know. We have not done a time-lapse analysis of the -- of those --

SENATOR RANZENHOFER: That would be helpful, because I know, obviously, there's the "going out of business." And then there's the second aspect, of whether or not there's been a decrease in the number of companies and the effect of competition.

TOM STEBBINS: Well, if you can't -- if you can't make a go out of -- of it without 150 percent interest rate, I would argue you shouldn't be in business.

SENATOR RANZENHOFER: All right. So you have mentioned 150 percent interest rate, and you mentioned an 83 percent interest rate. And I don't think anybody would argue that those are exorbitant.

Is there a number that's higher than the 16 percent that would be reasonable in light of

other areas of consumer transactions that have higher rates?

TOM STEBBINS: Again, I would think anything over 25 percent, which is the rate of criminal loan sharking, is -- would be impossible for us to support, because, again, that is the rate of criminal loan sharking for which you would go to jail.

SENATOR RANZENHOFER: Okay. And I know I -- you know, I don't mean to put Senator Alcantara on the spot, but she had mentioned that there are some as high as 32 percent.

Obviously, that would be a crime if it was lending.

TOM STEBBINS: I don't know what kind -- was that credit card lending? Or --

SENATOR ALCANTARA: Some credit card lendings are pretty high --

TOM STEBBINS: Okay.

SENATOR ALCANTARA: -- at 32 percent.

SENATOR RANZENHOFER: So if you have credit card lending at 32 percent, and, again, I understand the difference in the type of transaction, you know, where -- you know, what is your opinion -- I know you had mentioned 25. But what's your opinion --

TOM STEBBINS: Not a big fan of 32 percent either.

SENATOR RANZENHOFER: -- I don't want to pay it either.

But, in terms of the legislation that we're talking about, I mean, where is your organization in -- if there's already that type of lending in the state at that rate, and, again, I'm not asking -- I'm not going to put you on the spot, I'm not asking you to endorse anything, but, you know, what would be your thought --

And, again, you know, you don't have to answer this right now.

-- on adopting a rate that is already being used in the state for other types of consumer transactions?

TOM STEBBINS: I mean, I think the problem with litigation in particular, is that it is going to go on a certain period of time; whereas -- and that is not the choice of the consumer as to how long that goes on.

A 32 percent interest rate, credit card rate, you know, somebody can, presumably, work to pay that off; whereas, on a lawsuit loan, you can't work to pay that off. It's not up to you as the consumer.

SENATOR RANZENHOFER: Okay.

You had mentioned, right now, it either should be, you can't have an interest in a law firm, and, also, a consumer-lending company.

I remember there was a pretty prominent law firm in my neck of the woods, which is western New York, where one of the partners of the law firm was -- he was disbarred or sanctioned because they had an interest in a lending company.

So, are there already provisions which make it, if not illegal, you could lose your license or your license could be suspended when you're doing that?

TOM STEBBINS: Well, frankly, I wish we had seen more from the bar association or the Trial Lawyers Association on this.

But the sad fact is, many of their members have commercial interests with these lenders.

And so, you know, while there may have been sanctions, I'm not exactly familiar with those particular instances, but, you know, we have not seen the legal community do a very good job of policing themselves on this.

And there was a "New York Times" story that I referenced, just two weeks ago -- or, I believe it

was --

ADAM MOREY: About a month ago.

TOM STEBBINS: -- about a month ago, that showed this -- these -- this interest of the law firm in the lender, you know, sending this -- sending the particular case to the lender.

And, frankly, that we don't think that relationship should exist.

ADAM MOREY: Yeah, and there's an investigation in the Southern District, the U.S. Attorney's Office, into some of these -- some of the lenders and what they're -- you know, what they're -- as reported by "The Times," with this.

SENATOR RANZENHOFER: I don't want to (inaudible), but I have one more question, and I'll turn it over to -- turn it back to Senator Jacobs.

Right now, if you're involved in consumer lending, and you're not successful in the lawsuit, would it be correct to say that you don't have to pay that amount back?

Is that --

TOM STEBBINS: That is correct to say.

But as I mentioned, in the case of the 9/11 fund, and those sorts of things, you're making a claim. You are not involved in a lawsuit.

SENATOR RANZENHOFER: I'm talking about in the lawsuits.

TOM STEBBINS: Right.

No, but in a lawsuit, that is -- I think that is the primary defense of the lender, is that they are not -- they don't have to get paid back if the case doesn't win.

SENATOR RANZENHOFER: Okay. So -- and I don't know if this is feasible.

So if a -- if someone is unsuccessful, and they did have to pay back a portion of it, would that be a fair exchange for a higher interest rate?

Because, obviously, there's some risk on a company, you know, maybe lending, you know, $5,000, $30,000, whatever, if the claim is not successful, you know, they're out.

So --

TOM STEBBINS: And then I would argue, you would just put that under existing commercial lending, or existing consumer lending.

SENATOR RANZENHOFER: Okay.

Well, thank you very much. I appreciate your taking the time to answer the questions.

Thank you.

TOM STEBBINS: Thank you.

SENATOR ALCANTARA: What is the percentage of people that default on their loans?

TOM STEBBINS: You would have to ask the lenders of that.

But as I said, in "Crain's New York Business," one of the largest lenders said that, and I'll quote them here: That they use strict underwriting screening rules to ensure that only about 4 percent of the cases they advance money are lost in court.

End quote.

SENATOR ALCANTARA: Okay. Thanks.

SENATOR JACOBS: If I -- Senator Ranzenhofer mentioned a case from our area, where an attorney was -- I think had his license suspended for a period of time because of having an ownership in an entity.

But -- so there must be a law on the books for that.

But my question is: If I had a lending operation, I was an attorney, and I -- and -- I guess this is part of the question, too, is it typical that, if I am seeking a loan, that I come to the lender first, and then get an attorney? Or is it usually the attorney that -- they've already gone

to attorney, and then they are seeking a loan?

TOM STEBBINS: I think it depends. I don't think there's any hard-and-fast rule.

I mean, certainly, you know, one of the things we've seen is the proliferation of online advertising in regards to these.

So, you know, obviously, personal-injury lawyers are already very, very vigorous in advertising.

And we're seeing the lawsuit lenders doing the same.

And I guess it just depends on which banner the consumer clicks on first.

SENATOR JACOBS: I guess my question was, if I was an attorney, but not practicing, let's say, but I had a lawsuit-lending operation, somebody comes to me for a loan, say, looks like a good case.

TOM STEBBINS: Right.

SENATOR JACOBS: I refer to Mike Ranzenhofer, and I get a referral as an attorney.

TOM STEBBINS: Right. And that's one of the things -- that's one of those conflicts of interests that we would like to control as part -- and is controlled in Senator's Ortt's bill.

SENATOR JACOBS: Oh, it is? Okay.

TOM STEBBINS: Yes.

SENATOR JACOBS: Okay.

Any other questions?

Thank you very much.

TOM STEBBINS: Thank you again for having us.

SENATOR JACOBS: And the next speaker is Kelly Gilroy.

Thank you for being here.

KELLY GILROY: Do I need to push anything?

SENATOR JACOBS: I think you're good.

KELLY GILROY: Thank you, Chairman Jacobs and members of the Committee.

I appreciate the opportunity to be here today.

My name is Kelly Gilroy. I am the executive director of the American Legal Finance Association.

ALFA is a trade association made up of companies that provide this level of funding around the country.

We were formed in 2004, and we're dedicated to ensuring fair, ethical, and transparent standards in this industry.

I just want to give you a little background and tell you where we stand on the issues, and then address a few points that were made in the previous

testimony.

Let me just quickly mention, first, who legal funding helps.

These are people who have already been injured through no fault of their own, have already filed a case or claim, have already hired an attorney.

This all happens before they are funded by one of my members, so these are existing cases.

This is not affecting the amount of litigation, and it's not affecting the amount of frivolous lawsuits. These are completely different things.

What's the money used for?

The money is used for life expenses. We're talking about rent payments, groceries, car payments, house payments, preventing foreclosure; different things like that.

This money is not needed or used for legal expenses.

People aren't calling up one of my members because they need help finding an attorney or because they want help filing a case.

They're calling because they can't pay their rent and they can't feed their kids, and they're

feeling the pressure.

In -- just to be clear, we have supported legislation, and we are -- we support and want legislation in New York, but it needs to be legislation that is appropriate for this product and it takes into effect its unique nature.

And all the legislation that we have supported across the country, and what is in the Dilan bill as well, prohibits any funds from being used to pay for legal expenses.

So that's just not part of the equation here.

In the states that we've supported, and worked with regulators to come up with commonsense regulations, none of those states have subjected this product to the usury law.

Arkansas is the only state that was mentioned that did. And no one in my association does business in Arkansas because the rate there is not something that they could possibly live with.

The other states that have regulation -- Oklahoma, Vermont, Tennessee, Indiana, Maine, Nebraska, and Ohio -- have a special carve-out for this industry, does not subject to usury.

Tennessee was mentioned a moment ago.

The rate in Tennessee is not 10 percent. The

rate is actually closer to 46 percent, so -- a year, is what's in the law.

And we worked with those states to come up with consumer protections: Prohibitions with the companies -- or, prohibitions for law firms, commonsense contracts, to make the industry be able to operate and still protect the consumers in those states.

We are committed to protecting these consumers and the process.

So when the bad actors that were mentioned in the testimony before me, some of the really egregious cases, we agree.

And we've been involved in several of those, in trying to find remedies, and speak out against the practices that we have -- that we think are egregious.

And, in fact, in the case that was mentioned, the RD Legal case that's happening right now, that was a joint case with the New York Attorney General and the CFPB, we were asked to submit an amicus brief for that, and we did.

So the kind of regulations we support:

We support strict licensure;

We support an appropriate bond so you know

you're getting a legitimate company;

Assessment of character and fitness;

Transparency in contracts.

A lot of times, when you've seen problems in this industry since it came into existence, it's been because people didn't understand the terms of their contract.

These kind of things, by standardizing the contracts, you take care of that immediately. You allow the consumer to be able to compare contracts from three or more companies, and find what -- the one that works best for them.

We support, you know, right of recision.

So, people take out this money, and then they change their mind, they can return it without having any penalty, without having to pay anything.

The Dilan bill does all of these things, and it also prohibits referral fees, all of those things that were mentioned before.

And I think -- based on the opening statements by Senator Ortt, I think there's so many things we agree on.

We agree about the bad actors.

We don't -- you know, at ALFA, we don't want those to be part of this industry either.

And it's not hurting -- it's hurting consumers, it's hurting the industry, it's hurting everything.

I just think we disagree on the right way to do it.

And, unfortunately, in the form that the bill is right now, subjecting these companies, and my members, to usury would just eliminate this from the state of New York. There aren't companies that can operate under that.

Basically, the bill treats this as a loan, and, in fact, it's very different.

Loans require a lot of things that are not -- that are not in existence here.

There are no credit checks.

There are no income or employment verification checks.

There's no collateral.

People aren't paying interest payments.

There's no fixed maturity date.

So, basically, when a person -- when a company funds someone, they don't know when, or if, they'll ever be paid back.

And in the event that they don't receive any money back, they don't -- there's nothing they can

do, there's no recourse.

They don't garnish wages. They don't repossess cars. They don't affect your credit. There's no debt creation here.

So it's a very different product, even though I understand why people kind of want to jump to call it "a loan."

It is a very unique, different product.

I think you know that, in this economy, if you walked in a bank and said, I need even a loan for $1,000, and you didn't have a job, you had horrible credit, and you didn't have anything you were going to put up for it, you didn't tell -- couldn't tell them when you were going to pay them back, and they couldn't do anything to you in the end, I think they would laugh you out of the -- out the door.

So a couple other things that were mentioned in the previous testimony that I think merits some discussion are the risks mentioned.

So, it was mentioned that a company said they have strict underwriting, and they do. And that's a good business practice, because -- and, that, I think, points to the fact that these aren't frivolous cases.

People are looking at them, and trying to find cases that have merit, and make sense.

But with all of that said, it's still a very risky transaction.

Companies don't know when they're going to get paid back, and they don't know if they will.

So even with all you can know, and how good a case can look, there are so many unknowns when you're dealing with litigation.

You could fund right today, and then in discovery it turns out that the injury that the client had was actually preexisting from something that happened 10 years before, and you might not get paid back.

There's a lot of unknowns, and the risk is very real.

Our members have reported that, sometimes, as high as, like, 10 percent of the time they can get nothing back at all.

But what happens often here, which is another thing you don't find in credit cards or loans or car payments, or anything like that, is that, when a person goes to settle, although that attorney is settling the case, they often reach out to the company and say, You know what? This is settling

for a lot less than we thought. There's not going to be enough to pay you back what was in the contract. Can we cut that down?

And that happens all the time.

So that's something else that makes it unique.

And something else I think is just kind of an interesting part of this discussion, especially when it seems like we agree on a lot of things about how to do it, but some of the methods are a little different, it was mentioned earlier that a lot of these cases go out for three to five years, and that that's not fault of the plaintiff.

And that is -- I couldn't agree more.

But what's happening here, is these plaintiffs are being sweated out by the people on the other side of the lawsuit.

They know you don't have money.

They know when you're going to run out.

They know you need to -- you might lose your house.

And they think you're gonna settle your case if you don't have something that's going to help you.

And what legal funding does, and what my

members do every single day, is step in and take the pressure off, and help level the playing field, and help them take care of those expenses, so they can make a -- the right decision with their attorney for when the case should be settled.

We are committed to regulation, as I said.

We are open to talking about any part of this process.

But, right now, the way it stands, the -- you know, Senator Ortt's bill would put us out.

And so we're leaning more towards the Dilan bill.

But we are happy to keep the discussion going, and talk to -- you know, work with any stakeholders to come up with a fair solution.

SENATOR ORTT: Thank you.

Senator, any questions?

SENATOR ALCANTARA: Yes.

Are you -- the members that you represent, are they non-profits?

KELLY GILROY: No.

SENATOR ORTT: Okay.

So I was interested, because, you know, Miss Gilroy, you come here and, you know, you say it's not a loan. It's just something out of -- you

know, like, from hearing your speech, it almost confused me with Catholic Charities, because now you guys make it sound like this is something so nice and cute you guys are doing for people.

You know, when, in reality, these -- if they're not loans, what are they?

KELLY GILROY: You know, it's just a different kind of financial product.

I mean, it is -- you're right, it is a financial transaction, and the companies are there to make money, they're for-profit things.

But the requirements of when you get a loan, those people know they're going to get paid back.

And a credit card, they're going to get their money back.

Like, that doesn't happen here.

If you walk away from the case, if you move, if you drop it, if you lose, they don't get any money back, not even the principal.

So in the case where you lose your case, you still got to keep the couple thousand dollars, or whatever it was.

SENATOR ALCANTARA: What percentage of the clients default on this loan?

KELLY GILROY: I can give you generalities

based on my members.

We have 43 members, and we have people, our members report, that, like, in 10 percent of the cases they don't get paid back at all. And, you know, in, probably, about 15 to 20 percent, they take reductions or they don't get paid back the full amount that's in the contract.

SENATOR ALCANTARA: But is -- what the normal interest rate for the companies, for the organizations, you represent?

KELLY GILROY: We don't -- we don't focus on interest rates because of antitrust laws for our association.

It's different for every company and every case.

But I will tell you, we were involved in the legislation that passed in Tennessee and in Indiana, that both have interest rate caps in them, and they're nowhere close to the rates that they disclosed.

Tennessee's is 46, and Indiana's is 42.

SENATOR ALCANTARA: I'm sorry, Miss Gilroy, but I -- you know, we need specific.

You know, you come here to testify.

This is my second question, and you're giving

me general answers.

KELLY GILROY: Well, I don't have --

SENATOR ALCANTARA: You know, if you are in the state of New York, I need to know specifically.

The young man that was before you, we ask him, was the average number of companies that default?

And he was able to tell me about 4 percent.

I'm not in Tennessee. I'm not in Texas.

I'm in New York.

So, I am sorry, I would like to know what percentage of your companies, what's the percentage of interest rate that they charge?

KELLY GILROY: Okay. I can -- we can -- I can get information from the companies I represent, and we can get back to you with more specifics.

But, all due respect to the gentleman before me, he was speaking generally about things that he -- I mean, those aren't -- that's not -- that wasn't evidence. That wasn't real -- those aren't real numbers. Those are things that are generalities, that there's -- there's not evidence to what he's saying.

SENATOR ALCANTARA: So he made it up?

KELLY GILROY: I mean, he could have read it somewhere. But that's not -- that's not -- like, this is not evidence-based.

Most of the things that that side is saying are anecdotal.

Like, "I read a horrible story."

And I read those horrible stories too, but that's not -- doesn't mean that that's exactly how it plays out. That's not the way it is every day in the business.

SENATOR ALCANTARA: Oh. And did he tell you that he picked up this information from out of the sky, or are you assuming?

Sorry.

You know, I just want to say, Senator Jacobs, I think we should be respectful of other people's information because, I was a union organizer for the nurses union. And I myself saw trucks outside of my hospital, giving people business cards, asking them to take out a loan for their injuries and so.

So, I would assume that, if he came here representing an organization, that he did, probably, a little bit more research than you do, because you don't even have any numbers for us, any percentage.

You are talking to me about Tennessee, and

all these other places, that they are nice places, but I don't live there.

So when you can come to me and tell me numbers, then we can argue about the information he gave us.

Thanks.

KELLY GILROY: May I just say something?

SENATOR ORTT: Sure.

KELLY GILROY: Just to be -- just -- I -- I think I was -- didn't -- wasn't clear in the way I said it before.

The only reason I mentioned the other states are because those are some of the only states that have laws.

I recognize it's very different from New York.

I'd be happy to find those numbers from you.

Someone standing outside and handing business cards, those are exactly the bad actors that we agree, Senator Ortt, Assemblymember Dilan, all the people agree, those are horrible business practices that my members don't do.

There are bad actors.

And we want to see regulation that will push those bad people out, so that the people who need it

have access to legitimate operating companies who are not there to take advantage of them, but are being clear and, you know, forthright in how they're handling this.

So I apologize, I wasn't clear about (inaudible).

SENATOR ALCANTARA: This will be my last question.

Your company, do you guys give out the loan information in any other language besides English?

KELLY GILROY: So for the trade association, our members, what they do, they -- that's the thing that we've supported in other regulation as well, that people get a contract in the language that they speak.

SENATOR ALCANTARA: Do they do that now?

KELLY GILROY: Yes.

SENATOR ALCANTARA: Okay. So if I am in The Bronx and I speak Spanish, I would get a contract in English -- in Spanish?

KELLY GILROY: If you are dealing with one of the ALFA members.

I can't speak to what some of these other companies, that are the ones who are -- are doing.

SENATOR ALCANTARA: Would you argue that

that's why we need some sort of regulation?

KELLY GILROY: Absolutely.

SENATOR ALCANTARA: Because we need to have a uniform --

KELLY GILROY: Absolutely.

SENATOR ALCANTARA: -- on how these companies operate.

And, last -- I'm sorry, Senator Jacobs. I don't want to hijack the -- but I'm an only child, so I talk a lot.

[Laughter.]

SENATOR ALCANTARA: My other question is:

You say that there might be a 10 percent default rate.

But, if some companies are charging about 100 percent interest rate, would they not make up the money in that?

And, also, I find it hard to believe that organizations that are non-non-profit, that you are taking a risk in lending people money, because this is what they are: loans.

They're not a gift. You know, they're not a present.

They're loans, because you are expected to pay them back.

That there has got to be a profit. This is a business. You know, there -- people are making money on this.

So if there were so many people defaulting on this, then you would not be representing 43 organizations, or companies. Correct?

KELLY GILROY: Well, it is a business.

And my point with the loss rate is that, it's one of the reasons that you -- it's hard to treat it like a loan. The rates are higher than a traditional loan for those exact reasons.

There's higher -- there's a higher risk, and all of those other things about the unknown.

There's no guarantee that you'll get paid back like there is with some other things.

SENATOR JACOBS: Senator Ortt?

SENATOR ORTT: Ah, yes.

Good morning -- or, afternoon.

So I want to start with a comment, a general statement, and then I'll go into some questions.

First of all, I agree with some of the things you said.

I think everyone here, I think the focus is to bring some oversight, some guidelines, some standard practices, to this industry, which,

clearly, there aren't. I mean, it's hard to argue there would be.

Right now you're sort of left to the ethics or guidelines of whatever individual lender you may have.

To Senator Alcantara's point, I think -- look, I think it's -- to me -- I'm not a lawyer, I'm not a banker. It's clearly a loan, because, to me, a loan is something that has to be paid back.

That's sort of the criteria that I would say.

If you don't have to pay it back, then you can come up with a lot of other names for it.

But if it's a -- if there's an expectation of payment, to some degree, then I would say it's a loan.

Now, to your point, obviously, the criteria for it are very different than if you went into a bank. Right?

And maybe it is a unique product.

That might be a fair point, that there is a uniqueness to this lending, or to this type of loan, that would maybe necessitate some other rate or structure or guidelines.

But I wanted to ask you: So what is the criteria?

So they're not -- we know they're not financial, like if you went in for a loan. There's no credit checks, you said, all those kinds of things.

But there surely must be some criteria, because I'm certain that some people might be turned away, and some people might be loaned a certain amount.

So what are the criteria that go into whether you loan to somebody or not?

KELLY GILROY: Well, as I mentioned earlier, they have to have already had a claim or case --

SENATOR ORTT: Right.

KELLY GILROY: -- they already have to have an attorney; it's already in the process. And then they reach out to the companies.

The companies want to know what the liability was. You know, what are -- the insurance, you know, what are the limits on it. And that kind of thing.

And that's what they're looking at.

They're not looking for privileged information when they -- when they do that kind of a thing. But they're looking for, you know, is there good potential that is going to -- that is going to settle?

That being said, there's still a lot of unknowns that make it where you don't know if it's going to settle, or if it's going to settle for a lot less.

SENATOR ORTT: Okay. But, I mean, from a -- I guess, maybe from a legal standpoint, they're looking at, obviously, the likelihood that it will settle and there will be some ability for that person to then pay them. Right?

So there is still some criteria, I would argue, that goes into the decision to loan.

KELLY GILROY: Absolutely.

SENATOR ORTT: Obviously (indiscernible) -- right.

And so it might not be financial. It might be more of a legal criteria that goes into it.

And, obviously, there's still an expectation, if that settled, there will be a payback.

Are there standard practices that your association puts out to its members?

KELLY GILROY: Yes, our members adhere to best practices when they join the organization.

And the attorney -- the New York Attorney General agreement that was agreed to many years ago, is one of the things that was mentioned, and that

was with the founding members of my organization.

So the people who join ALFA follow those best practices. And we have strengthened -- based on the New York Attorney General agreement, but those have strengthened over time as we've passed other laws in other states.

But it's ALFA members who are -- who are adhering to those practices.

Other companies, and there are a lot of companies that I don't even -- I'm not even aware of because they're small companies, and there's other companies, that don't adhere to those.

SENATOR ORTT: Sure.

KELLY GILROY: So that's why you need some regulation to.

SENATOR ORTT: No question.

And I think that goes to the concern that I have, and I think a point that was made earlier was, there -- certainly, there's always, in Albany, and in any form, I guess, any capital, any governmental body, there's always the debate, I believe, is to, how do we get there?

We all like to think that we're trying to get to the same spot, but maybe we have different ways of getting there.

But I think, to your point, without some structure on the rate, I think you're really -- you're not putting enough teeth to getting the bad actors out.

So that's where I come from, and, certainly, my -- my -- my position has been, I think that a lot of the other stuff you mentioned in the other piece of legislation sponsored by Senator Dilan, a lot of good things in there, and I think a lot of things that can be part of a possible piece legislation that comes through.

But I think without some -- you know, and we can argue about the rate or argue about how it's structured. But I think some type of rate structure, where someone that goes in has some idea of what they might have to pay back.

I know of companies that say, Here's the money. And after it's settled, when you come back, then we'll talk about what you have to pay us.

Now --

KELLY GILROY: Right.

SENATOR ORTT: Now, I'm not saying that's any of your members.

I don't know if we know, but I know that's not your -- certainly, that's not your best

practices, and I get all that.

But I know that's happening.

When we made phone calls to some of these companies, you know, you've heard of the high rates. I'm sure there's lower rates.

But the fact of the matter is, to me, if I'm going in, whether -- whatever the criteria might be, if somebody loans me an amount of money, I should have some sense of what that payment, amount, schedule, all of that, would be. And I think, anything less than that, we're still going to be having some of these same discussions after the fact.

You know what I mean?

So the goal is to try to get this right, as best we can, out of the gate.

Do you -- now -- and I'm going to run through just two more questions, and you may have answered them or you may discussed it with Senator Alcantara.

We talked about:

Factors that go into deciding a case.

Percentage of cases that you finance. I know it's hard to -- or maybe you do know that.

Do -- do you -- the amount of cases that -- like, as far as cases that might come in the door,

versus cases that actually may receive financing, even if you could provide me a rough estimate.

KELLY GILROY: There is a person who is going to testify --

SENATOR ORTT: Later?

KELLY GILROY: -- after me who I think has that.

SENATOR ORTT: Who has that?

KELLY GILROY: I just wanted to mention that.

SENATOR ORTT: Okay. Good. That's perfect. I will save that, then.

And then, do you see -- and I'm guessing the answer is yes, but I'm going to ask it anyways: Do you see any possible conflict, or do you understand, I guess, the concern between law firms and lenders, possible steering of clients to one particular lender over another, and, specifically for me, which I've kind of recently learned, with regard to surgical funding, and surgical-funding products, and selective surgeries?

I mean, can you understand the concern there, or do you see a conflict there?

KELLY GILROY: I understand the concern.

And, you know, I think that what legislation that we have supported, and that we support now, an

attorney -- this was kind of asked earlier -- but the attorney can't have an interest in a company that's funding their clients.

SENATOR ORTT: Okay?

KELLY GILROY: So that's not to say that they couldn't have a company. But they couldn't have an interest in one that's funding their own clients.

SENATOR ORTT: Okay.

KELLY GILROY: And kind of -- whether -- whatever the money is being used for, and whether, depending on the -- whatever kind of case it is, I mean, we want the same things.

We want consumers who are coming in to know what they're getting into.

We want it to be really clear.

We want the terms to be crystal-clear so there's no question.

And we want to know that there were no referral fees between the attorney and the funding company or any other medical providers, or anything else.

And when you were asking me about the rate, and saying about people's need to understand, I think we need to point out to you, I think the Dilan bill requires a schedule.

And that's one of the things that we have seen, that we've done in other places, and my members do this.

I mean, it would say, that you would include a schedule. On the first page of the contract, it would say, in very clear terms: How much money you're getting. Any fees associated with it. And it would say, in points of time, how much you would pay back.

So it would say: Today I took out, you know, this amount of money. And if you pay it back between today and six months, you owe X. If you pay it back between six months and a year, you owe Y.

And so the bottom number on that schedule would be the most you would ever be expected to pay back, and it oftentimes could be, and would be, less.

So it's not like a chart that shows you, like, this is how much you pay every month, because, like a traditional loan, you make monthly payments.

In this you don't.

So it would just say: All right. I'm settling my case. It's been a year and a half.

You would pull down to where that is on the chart, and that number is what you will you pay

back. And the very bottom number would be for the entire life of the contract, the most it could possibly be that you would ever owe.

So there would never be a point where you would go to settle your case, and you would go, I had no idea that I owed this.

And that's something that happened in some of the cases that have been in the media, and mentioned before, and some of the things before the New York Attorney General agreement.

So, I mean, we agree, people need to, when they take this out, know in the most basic, clear, commonsense terms, "I'm taking out this amount money, and this is the most I could pay back," so they can make that decision, because maybe this isn't the right thing for them, because it's not for everyone, and it's, certainly, not for every case.

But, in the cases where people really need it, it's a very valuable tool that I think that has been a good lifeline for them.

SENATOR ORTT: Thank you.

SENATOR JACOBS: Mike, do you have --

SENATOR RANZENHOFER: Yes.

First question I wanted to ask: You had mentioned that, I think, there were 37 members of

your association?

KELLY GILROY: 43.

SENATOR RANZENHOFER: 43. Okay.

I should have written that down and I would have remembered.

So of your 43 members, how many businesses are there in the state that engage in the practice, so I can figure out how many are members of your association, and what's the total number?

KELLY GILROY: I can't speak to the number of companies that are not part of my association, because there are companies that are small, that are one person, that are not people that we would be aware of.

But, I mean, we make up a -- we make up a pretty sizeable portion of it, I would say, because we have some very large members that are based here.

SENATOR RANZENHOFER: I mean, would you -- would you be able to give us an estimate?

Are there 5 other companies? 50 other companies?

I mean, do you have any inkling of how many other companies that are out there?

KELLY GILROY: I mean, I would say there's probably -- there is probably more than 20 --

there's more than 20 other companies.

SENATOR RANZENHOFER: Okay.

So it appears, from Senator Ortt's questioning, that there is some agreement in terms of the need for regulation.

And to Senator Alcantara's point, you know, making sure that a contract is in the language that the person speaks.

And to Senator Ortt's point, to have a schedule so the person knows exactly what they have to pay.

It appears to me, and I'm going to come back to this, because this is what I was asking the previous individual that testified, is, you know, if this company -- you know, this type of company or service is going to exist in the state of New York, really, what's the trade-off between, you know, having a fixed rate or not a fixed rate, versus a consumer being able to avail himself or herself of the products?

So, you had mentioned that one of the things they don't look at, is they don't look at a consumer's assets, they don't look at a consumer's ability to pay, because, obviously, they're hoping for a settlement and be able to get paid that way.

So -- I mean, I see the difference in the type of product because, you know, if you default on a car loan or you default on a bank loan, you know, they can come after you and seize your assets, and you would have to file bankruptcy in order to avoid that.

Here, if you don't pay, you know, the company is just out of luck. They have no recourse against you.

So it seems to be, to me, that you had mentioned, in other states -- and, again, I know this is, Tennessee and Indiana are not New York -- you know, in other states they have interest rates that are in the 40s. I think 42 percent and 46 percent were mentioned.

You know, to me, it seems the question is:

If we want to have this service in the state of New York, and to allow consumers to avail themselves of the service, and not have the risk of having to pay, so maybe you could have a lower rate, but then, you know, you'd have to make the consumer qualify for it. So there would have to be a financial background check. Or, maybe, if the consumer lost his case, maybe that consumer would still have to pay back.

You know, I think that has to be reflected in the rate discussion.

So, I do -- you know, I am very, you know, happy by the fact that everybody agrees that there are some basic ground rules that have to be in place with respect to consumer protection.

And it seems to me, I mean, the issue that really is at the forefront is: What are we doing about an interest rate versus, you know, companies being able to do business in the state?

And, if we're going to -- you know, if we're going to make this service less available to consumers, to protect them, then what do you do with respect to the interest rates?

So -- I didn't really have any questions.

I mean, that's just the way -- that's the sense I get from this hearing.

I'm sure we're going to hear from more speakers, although I have another committee meeting I got to go to.

But, thank you, as I thanked Mr. Stebbin, for your testimony today.

KELLY GILROY: Thank you.

SENATOR ALCANTARA: Hi, Miss Gilroy.

My -- I have two more questions.

When Senator Ortt asked you about the best practice, that you guys have a sheet that your members distribute out to consumers, can the Committee get a copy of the best practice?

KELLY GILROY: Oh, we can get you a copy of our best practices, yes.

SENATOR ALCANTARA: Okay. Great.

And my -- oh, the last question: What percentage of the New York market does your 43 company -- what percentage of the market in New York do you guys dominate?

KELLY GILROY: I can really only speak to the number of -- the people that I represent, because there's companies I don't know about.

SENATOR ALCANTARA: That's all right.

KELLY GILROY: I would assume it's probably the larger part of it, though, because, if there were very big companies operating here, we would know about those.

And I think they're mostly, the ones who aren't members, are smaller players.

So -- I mean, I would -- over half, I would -- that's my assumption.

SENATOR ALCANTARA: So your 43 companies, they all operate in the state of New York?

KELLY GILROY: They don't all operate in the state of New York.

They are -- some of them are big companies that operate all across the country. Some are smaller companies that might only work in one state, here and there.

SENATOR ALCANTARA: So out of those 43, how many operate in New York?

KELLY GILROY: We have about a dozen that are based in New York, that are, like, New York companies.

SENATOR ALCANTARA: No, that do business in New York.

KELLY GILROY: Oh. Probably 38.

SENATOR ALCANTARA: Okay. Thank you.

Thank you.

SENATOR JACOBS: Two quick things.

The -- these best practices, I was just wondering, is there a standard contract that members in ALFA adhere to?

KELLY GILROY: Yes. We actually have a -- we have a model contract that we have been working on that has -- is being implemented right now.

We worked on it in conjunction with some of the work we were doing with the CFPB and others, to

make sure that the contracts are up to the highest standards and clearer disclosures that we can get.

SENATOR JACOBS: Okay. And I just wanted to give you an opportunity to explain, just briefly, you answered him why you couldn't tell what the interest rate, when you say "antitrust."

I just wanted you to elaborate why that --

KELLY GILROY: So, as a trade association, we don't discuss pricing. Like, at our meetings, we don't say, How much are you guys charging? You can't charge more than this.

We talk about other business practices --

SENATOR JACOBS: Got you.

KELLY GILROY: -- and those kinds of things.

SENATOR JACOBS: I just thought that would be important to be clear.

SENATOR ORTT: Can I just ask just one last?

Are there any incentives, you know, for -- to refer a client to a lender, that are out there?

I mean, is there any incent -- what is the incentive, I guess, for a referral --

KELLY GILROY: I mean, I think that attorneys would refer people to specific companies because they worked with them in the past and they know them. They like the way they do business. They get

it done fast, or they -- things like that, just a general preference.

SENATOR ORTT: Okay.

KELLY GILROY: But I think, a lot of times, and very oftentimes, the consumer comes to the company, finds the company, and then tells their attorney, I want to work with this firm.

SENATOR ORTT: Okay.

SENATOR JACOBS: All right. Thank you very much.

KELLY GILROY: Thank you.

SENATOR JACOBS: And now I'm going to -- and thank you, Senator Ranzenhofer. I know you need to go.

SENATOR RANZENHOFER: Thank you for letting me ask questions about -- on the Committee.

SENATOR JACOBS: Absolutely, absolutely.

And now, Professor Steinitz.

Whenever you're ready.

PROF. MAYA STEINITZ: Thank you very much.

SENATOR JACOBS: Thank you.

PROF. MAYA STEINITZ: Good afternoon, Chairman Jacobs and members of the Committee.

I thank you for giving me the opportunity to provide feedback on the pending legislation.

My name is Maya Steinitz, and I'm a professor of law at the University of Iowa College of Law, and a visiting professor at Harvard Law School.

Third-party litigation financing is one of my main fields of expertise as an academic.

I have published papers relating to third-party funding, and have recently taught a course on the subject at Harvard.

Third-party litigation finance is a service with great potential if harnessed in the correct way.

Litigation financing can help indigent plaintiffs access justice in their (indiscernible) mediations for harms; however, like all financing, it's open to abuse.

Everyday consumers are particularly vulnerable, and an appropriate consumer protection regime needs to be put in place.

The pending bills, therefore, are to be commended.

My comments will focus on three main suggestions in reaction to the current bills.

First, I wish to note that the Assembly bill does not, strictly speaking, regulate litigation finance; rather, it would regulate financing of a

consumer's costs while the litigation is pending.

Specifically, the bill forbids litigation-finance companies from paying court costs or attorney's fees, and requires the borrowers to have a contingency-fee arrangement with an attorney in place.

The Senate bill lacks this prohibition and would allow the financing of the actual litigation.

Such financing, if allowed, can create competition for financing vis-a-vis contingency fees, and may, therefore, reduce the cost of litigation finance for consumers.

It's, therefore, in my view, preferrable to permit it. And if it is permitted, it should be covered by the protections contemplated by the bills.

My second suggestion is to define the scope of protection by focusing on the characteristics of the plaintiff rather than on the amount of financing.

The Senate version of the bill exempts contracts offering non-recourse financing of more than half a million dollars from its scope, while the Assembly version provides no such exemption.

In my opinion, the Senate version of the bill

represents the correct direction, in the sense that the Senate bill's attempts to focus its protection on those individuals who are less-sophisticated litigants by exempting high-dollar litigation-financing contracts from its (indiscernible).

Nonetheless, it would seem that a dollar amount is an imperfect way to capture the difference between the different kind of litigation-finance consumers.

I, therefore, suggest protecting unsophisticated plaintiffs.

In making this suggestion, I'm drawing from the field of securities litigation, where the law distinguishes between sophisticated investors and unsophisticated investors.

My third suggestion is to ensure appropriate plaintiff recovery by setting a statutory minimum recovery requirement.

It's critically important that third-party litigation finance does not lead to a drastic reduction in plaintiff's recovery.

The concern is that the combination of the compensation of third-party funders and the attorney's contingency fees would, separately or

combined, leave the wronged or injured plaintiff without meaningful recovery in remediation.

To achieve this goal, the bills focus on the methodology through which the funder's return is calculated.

The Senate bill sets a limit on the percentage of the return, and the Assembly bill requires a flat rate.

I propose that, rather than focusing on the financier's return formula, the statute directly guarantees a minimum return to the plaintiff.

In order to guarantee this minimum return, the focus will need to broaden to include both the contingency fees of attorneys and the litigation finance -- funder's return, and ensure that the return of both lawyer financiers and third-party financiers, combined, do not exceed the plaintiff's minimum recovery requirement.

Currently, generally speaking, in personal-injury cases, the return on lawyer's litigation finance, with contingency fee, are capped in New York at a third of the total recovery, barring extraordinary circumstances.

If funders are allowed, as the bills currently envision, funding living expenses and

similar expenses, which lawyers are prohibited from advancing to their clients, the combined minimum return to all financiers, the lawyers and the funders, should be somewhat higher than a third.

But to keep the spirit of the current limitation, on return on litigation finance should probably not exceed half of the recovery.

Therefore, if my suggested approach is adopted, the statute could ensure, for example, a minimum recovery for the plaintiff of no less than 50 percent, barring extraordinary circumstances.

Thank you very much for offering me this opportunity, and I welcome your questions.

SENATOR JACOBS: Any questions?

SENATOR ALCANTARA: Yes, a point of clarification: Which of the Senate bills were you speaking of: Dilan or Senator Ortt?

PROF. MAYA STEINITZ: Which of the Senate bills?

SENATOR ALCANTARA: Yes, ma'am.

PROF. MAYA STEINITZ: The ones that I have been provided.

I hope I'm reading the right number, 3911-A.

SENATOR ALCANTARA: Okay. Thank you.

SENATOR JACOBS: Well, of course,

I apologize. I had to step out.

The kid's got to eat. Right?

So -- but I missed part of your testimony.

It sounded like, as I came in --

And I thank you for being here, by the way. Especially with your credentials, I'm sure you can add a lot to this discussion.

-- so were you suggesting that there be, essentially, whatever is ultimately determined, that the key is to make sure that whatever is paid out does not exceed the award?

Did I hear that correctly?

PROF. MAYA STEINITZ: Actually -- well, that's -- I'm offering something more generous to the plaintiffs.

SENATOR ORTT: Of course.

PROF. MAYA STEINITZ: But, that's the way I'm thinking about it.

So I'm thinking, what we're trying to do here, I think, is to ensure that, at the end of the day, the plaintiff, who has gotten injured, actually keeps a substantial amount of their recovery.

SENATOR ORTT: Yes, yes.

PROF. MAYA STEINITZ: And so the most direct way do it, is to just stay a minimum recovery

requirement in the statute, and say, at a minimum, the plaintiff needs to recover 50 percent.

SENATOR ORTT: Okay.

PROF. MAYA STEINITZ: And then the formula, of whether funders use a flat rate or a percentage becomes less important, once we are actually, directly, ensuring what it is, I think, the concern is about.

SENATOR ORTT: Okay. Thank you.

SENATOR ALCANTARA: I have a couple of questions when you finish.

SENATOR JACOBS: Okay. I just wanted to, while you were out, Senator Ortt, there were several compliments to your legislation.

So, you know.

SENATOR ORTT: That's great.

SENATOR JACOBS: Yeah.

But I was curious, you were saying that the -- Senator Ortt's legislation allows for funding of legal costs, and you felt that was a good thing because it could spur competition in terms of the legal costs that lawyers are pursuing clients, charging?

Is that what --

PROF. MAYA STEINITZ: Yeah, I think it's a

good idea to allow litigation financiers to actually fund the litigation costs, to pay for lawyer's fees, as well as the court costs, testimony costs, et cetera, because, that way, they're directly competing with contingency-fee lawyers for what it is that lawyers currently fund.

So, right now, or, before litigation finance sort came into the -- into existence, really, lawyers had a monopoly over financing litigation.

And I can't think of a good reason why we should let lawyers sort of monopolize that form of financing.

SENATOR JACOBS: I mean, do you have any sense that lawyers in -- when -- if I had an injury and I go to a law firm, that they -- it seemed to me, from my experience, the third is so standard.

Or, do they every say, Well, if you come with me, I'll only take 25 percent if you win?

PROF. MAYA STEINITZ: I don't have empirical knowledge of that, but my understanding from one, sort of, academic study that was conducted in the '90s, and I think it was in Wisconsin, so with all of those qualifications, that, actually, there's a range. It's not actually a fixed 33 percent. But it does range from, you know, 20 percent to

50 percent.

And my understanding is -- again, I don't practice in this area as an attorney -- but with many personal-injury cases, there's -- there's no real question that the plaintiff is going to get paid.

I mean, if they were maimed or hurt, sort of, like, we know they're getting paid.

We maybe don't know exactly how much, and at what time frame. But, lawyers sort of tend to know what that is, and so the risk may actually be less than what is sometimes portrayed.

SENATOR JACOBS: And in your suggestion that you would have a minimum of 50 percent -- that the plaintiff would get 50 percent of the suit, basically, if 50 percent, and a third, that's leaving about 16 percent for the lender.

Your sense that's -- still would enable that market to exist, that the lender --

PROF. MAYA STEINITZ: Here's what I think of it: All of the questions that have been presented to my predecessors here, I think have an underlying theme, which is: We don't have data. We simply don't.

But funders have data.

And my understanding from academics who have tried to access that data is that it's private data, of course, and funders say, no, we don't want to provide it.

So I think that the onus should be on the party that has data to produce it. And if they're not producing it, then I think, I would want to see sort of leaning in favor of protection of consumers.

SENATOR JACOBS: Sure.

And one other, it's really unrelated to the legislation we're talking about.

I was just curious, on your testimony, that the growth in portfolio financing.

PROF. MAYA STEINITZ: Yes.

SENATOR JACOBS: And so this is a law firm basically saying, we have this group of loans -- or, group of cases, and we believe we're going to get X amount. We'd like to loan on that.

PROF. MAYA STEINITZ: Yes.

SENATOR JACOBS: That's fair -- is it a new phenomena that that is happening?

And I guess I'm wondering, is there any concern that that could start to alter the attorney's judgment on the merits of the case, and pursuing the case, on whether settling or not,

because they may be getting caught in a situation with a loan?

PROF. MAYA STEINITZ: Yes.

Yeah, I do think that it raises its own set of concerns.

And one new set of concerns it raises, is lawyers doing trade-offs between cases within the portfolio.

And another concern is that the clients may not know that their cases are being funded.

And so the lawyers may be receiving this funding under some arrangement in which, how much they themselves pay, depends on the duration of the litigation. And so that might affect how long they want to -- sort of, what kind of strategy they want to pursue, whether they recommend taking a settlement early, et cetera.

So it just raises its own set of considerations that are sort of worth considering.

SENATOR JACOBS: Senator, did you have any --

SENATOR ALCANTARA: Yes.

Professor, thank you for being here. I know you've come from far and away.

How would you characterize these payments?

Would you characterize them as loans? Or

what -- would you -- how would you characterize these payments that are made?

PROF. MAYA STEINITZ: I think that there is a good argument to be made that they're not a loan.

I wonder, though, whether the question about what we call them makes a difference, because the concerns are very similar to the concerns that we're seeing in relation to loans and lendings.

So, that's my view.

SENATOR ALCANTARA: Okay.

Number two: Out of the states that have regulations on these lending institutions, have you seen a drop in business?

PROF. MAYA STEINITZ: I don't know either way because I have no data.

SENATOR ALCANTARA: There's no data? Okay.

And do you -- what is the average interest rate in other states for these type of loans?

PROF. MAYA STEINITZ: I -- also, I don't have that data, and that's why I made my general comment.

The parties who have the data should either make it available, or, I think we should just be more protective, since the parties with the data are not releasing it.

SENATOR ALCANTARA: Okay. And I know, you

know, you have said it over and over again that there's no data.

But, again, have you seen a pattern in the type of folks that seek out these type of loans?

PROF. MAYA STEINITZ: Who are the plaintiffs seeking the loans?

SENATOR ALCANTARA: Yes.

PROF. MAYA STEINITZ: Patterns?

I'm not aware of patterns.

SENATOR ALCANTARA: Okay.

And would we argue that the reason that they're not showing us any data is because there's might be information?

I know as an attorney you cannot -- you know, but I would argue that the reason why they don't provide us with the data is because there's stuff in there that maybe they don't want us to see, because, if there's nothing to hide, show me the money. I mean, like, show me the information.

So, I just want to say that.

SENATOR JACOBS: Questions?

I had one more.

Just your -- you had suggested using the unsophisticated plaintiff/sophisticated plaintiff.

And how -- what would be -- I guess you said

you were referring -- you were gleaning that from securities regulation.

What is an "unsophisticated plaintiff"?

PROF. MAYA STEINITZ: I wish I had more time to put this written testimony together because, then, I would have looked at the jurisprudence and what kind of factors there are.

So I don't have that at my fingertips.

SENATOR JACOBS: But it's something they've used for a while, and --

PROF. MAYA STEINITZ: Oh, yeah, there's a lot of jurisprudence on that, a lot of scholarship on that.

And, basically, the idea is to have a multifactor test that allows regulators and judges, at the end of the day, to exercise judgment and reason to say: This individual needs protection. This individual, not so much.

So level of wealth, and access to assistance from lawyers or financial advisors, is an example of the kinds of things that are being looked at.

SENATOR JACOBS: Anymore questions?

Professor, thank you very much; thank you so much for coming.

PROF. MAYA STEINITZ: Thank you for having

me.

SENATOR ALCANTARA: Thank you.

SENATOR JACOBS: Next, another professor, Anthony Sebok.

PROF. ANTHONY SEBOK: Good afternoon.

My name is Anthony Sebok.

I teach law at Cardoza Law School in New York City. I also am a visiting law professor at Cornell.

And a colleague and friend of Maya Steinitz, so I respect greatly.

And, like her, I am one of the few people who have been studying this for a long time.

Now, I want to make four points today.

The first point is that, until now, no one really knew the true cost of consumer litigation funding.

This is a question which has been asked over and over again so far.

And journalists, for example, are journalists. They just grab what they see. They have anecdotes.

And, actually, the actual contracts are, weirdly, not telling the whole story either.

So with a colleague, I studied, 15 years,

100,000 cases that were funded.

We got access to the largest litigation funding company in the United States, doing business across the country, including New York.

The cases they had were typical of the whole country.

New York's cases, which I can tell you we saw, but I didn't break out for this hearing, just because my article, which I published, and coming out in "The Cornell Law Review" in the fall, talks about this phenomenon nationally.

But I think the results we have can be projected on to New York pretty well.

We looked at 100,000 cases over 15 years.

Of those 100,000 cases:

We saw how much was being charged up front;

We saw how much was actually being recovered by the funding company at the end;

We saw what kind of cases were being funded;

We saw a lot.

Now, there are a lot of wrong numbers floating around, and this is, like, you hear this from academics all the time: Well, only we know the numbers.

But, I mean, I feel like we do have at least

better knowledge now than we did before this study.

This is the first large-scale study that's ever been done. I think it's a good study.

I can't reveal who gave us access.

It's a big company.

I'm happy to describe our methodology, and I think it's reliable.

Now, the reality, I mean, you hear numbers, like, 100 percent per annum interest. Right?

I mean, when you look at what the actual bottom-line cost to this funder was of their funding, first of all, the average length of funding was 14 months for the median case.

Not every case, the median case, 14 months from date of funding to resolution.

By the way, the average period of time before the applicant went to get funding, and there was an incident that they claimed they are going to get compensation for, was 10 months.

So the median consumer waited 10 months before they approached the funder.

We don't know what they did in those 10 months. But, I teach tort law, I teach legal ethics. There's a good chance that they spoke to a lawyer before they spoke to a funder.

Now, what did we discover?

We discovered that, again, the median, the median recovery, for the funder was 44 percent per year.

50 percent total, because it was a 14-month period. 44 percent per annum.

Not 120 percent. Not 180 percent.

Are there 108 percent deals out there? Maybe.

I can tell you one thing, there are contracts out there that might say we're going to get 120 percent after 14 months.

But what we discovered, is that almost half of the cases, the funder came back and gave a haircut.

The funder came back and said, We don't take as much as we legally could. We recognize -- and this goes back to Professor Steinitz's point -- that maybe that would leave you too little.

That's an interesting result.

In almost half the cases which resulted in a positive amount that the funder could collect, the funder didn't take all they could.

So in the end, if you ask somebody, What are you going to expect is going to be your cost?

If you look at our study and trust it, I can't promise you it's going to be 44 percent. There's a huge variability, lots of factors.

But the expected cost, beforehand, is 44 percent per annum.

Now, the other thing we discovered, which is interesting, is that in 12 percent of the cases of those, approximately, 50,000 cases that were funded, 12 percent of them were net losses for the funder: 10 percent total loses. 2 percent they didn't get back what they put in.

Also, of the 100,000 cases where they got applications, they rejected more than 50 percent.

They took 48 percent. They rejected 52 percent.

So those are the three things I want to tell you, but I have a fourth point.

And my fourth point, and I say this respectfully, is that the figure "16 percent cap" equals zero.

I'm going to tell you, from my experience studying this business, that if you impose a 16 percent cap, you are going to have zero litigation funding in the jurisdiction.

Now, I'm going to talk about Points 1

through 3 a little bit more, and then I'm going to talk about Point Number 4 later. Okay?

So what does this tell us, what I've learned?

Well, first of all, as a lawyer, as a law professor who's done studies of stuff, I can tell you that this is a consumer product that deserves consumer protection.

But, it's not a consumer credit product.

It doesn't walk or talk or quack like a credit product.

The price paid by the funder is highly variable and many factors.

It's not a fixed interest rate that is being offered to the consumer, especially if you think about the ex post haircuts afterwards.

There is no risk of increasingly indebtedness. It's not like a payday loan. You don't have a cycle of indebtedness, which is one of the hallmarks of why we have usury law.

And just to get pedantic, if I may, because I'm a professor, there are six court opinions that say that this is not a loan, this is not debt, because there's a legal definition of "a loan" in New York State.

There are four New York State opinions and

there two federal court opinions, they go through the law.

Other states may have different definitions of "loans," but there's a definition in New York.

Now, maybe we don't need to care about technical terms.

We should talk about practical questions.

What is it we want to do for our consumers?

And this is to answer a question that was asked, and I apologize if I mispronounce the name, it's Senator Alcantara?

SENATOR ALCANTARA: Alcantara (pronouncing).

ANTHONY J. SEBOK: Alcantara (pronouncing). Sorry.

There's a technical word for what this is. It's not a word that people use. It's a word that's used in the commercial litigation funding area, where people hire lawyers to write very big contracts.

But what they do in the commercial litigation area, where they do exactly the same thing for millions of dollars, the consumer's doing for thousands of dollars, and that is, they're selling a contingent right to proceeds from a lawsuit.

And that is defined as a "general

intangible." They are selling a general intangible.

The UCC has a definition for it.

Now, I realize that the average person doesn't realize that that's what they're doing, but we have a category for it, and it's not a loan.

It doesn't mean, however, that a consumer who is selling a general intangible shouldn't be protected.

I think a consumer should be protected, not because it's a loan, but because they're vulnerable.

But when we have vulnerable consumers, according -- in the marketplace, we have different ways of protecting them.

In my submitted testimony I talk about this.

We don't often use price controls to protect consumers when they're selling something.

I don't think we should use price controls here.

I think we have other ways of protecting them. I can talk about those later.

Now, I want to talk about my fourth point, which is, perhaps, the most aggressive.

Despite what you heard earlier, Arkansas does not have consumer litigation funding anymore.

They're not -- I mean, there may be

registrants, but there are no contracts being offered.

Tennessee does, but Tennessee doesn't have the rate that you were quoted.

Tennessee has a much higher rate, as Miss Gilroy said: 36 plus 10.

Okay?

Now, I don't like the idea of picking a number.

I'm here to tell you we shouldn't pick a number. There should be other ways of protecting consumers.

But I can tell you, if you go to 16, you're gonna get a zero.

A further point about the bill, with all due respect, for the life of me, I cannot understand why the bill prohibits the assignment of the litigation funding asset.

I mean, I just don't see it; I don't see it for two reasons:

I don't see how that protects the consumer;

And I also know that it is in the teeth of the UCC in New York, because New York actually favors assignment, and it specifically says, you know, under -- under our UCC, that, you know, you

have to specifically prohibit assignment of the contract.

All right?

So I don't understand why we are diverting or carving out from the Uniform Commercial Code this anti-assignment provision, other than, to put a hurdle; to put a hurdle up in front of these companies.

I don't think, that putting a hurdle up in front of these companies, it doesn't help the consumer.

I don't think that putting a cap, that's basically going to make it impossible for them to reach the returns which they seem to be achieving in the marketplace, is going to help the consumer.

I think there are other ways of helping the consumer.

I think transparency in the contract, simplicity in the contract, and more importantly, publicity about what's actually being charged for these assets, will help a marketplace grow.

And that's what I would like to see.

Thank you.

SENATOR JACOBS: Do you have any questions?

SENATOR ALCANTARA: Yes, I do.

Thank you, Professor, for being here and testifying.

You know, I understand that there have been six court opinion saying otherwise.

But, you know, English is not my first language.

And when somebody gives me something and I have to pay them back, I call it "a loan," you know, regardless of what the court says.

I mean, this is not Catholic Charity giving me $100 to help me with my rent for this month, or, the City -- or, HRA and the City of New York giving me a one-shot deal and I don't have to pay them back.

Obviously, I have to pay this back.

And, you know, what the court says, you know, at one time the court said that slavery was legal.

But we all know now that it was wrong.

So, that's all I have to say in regards to that.

Do you have any information on what type of folks come out and seek these loans?

PROF. ANTHONY SEBOK: So, interestingly, the company doesn't take that information.

I can tell you what kind of cases they're

using them for, if that would help you?

SENATOR ALCANTARA: Thank you.

ANTHONY J. SEBOK: Okay.

So, the vast majority are for motor vehicle accidents.

You wouldn't be surprised that, then, there's a big drop off from that for slip-and-falls and premises liability.

And then, you know, a very vanishingly small amount is for the kind of cases that a lot of people are worried about, products liability, we're talking about a few percentage points.

Medical malpractice, a few percentage points.

Really, we're talking about the kind of work -- I teach torts in New York City.

My students, a lot of them, I used to teach at Brooklyn Law School, my students went out and did what you do when you open up a shingle on Court Street: Car accidents, slip-and-fall on someone else's property, and then premises liability on your own.

That's the -- that's really the bulk of this.

And then there's a few scaffold cases, scaffold -- you know, under the scaffold law.

But, that's it. That's -- it's the sort of

the stuff people have happen to them every day.

If it was a medical-malpractice case, I've looked into this, why isn't there more litigation funding of medical malpractice?

And I can tell you, the litigation funders tell me that they shy away from them, because they find that they are extremely difficult for them to evaluate efficiently.

And you have to understand that this is, to go back to your point, a business.

SENATOR ALCANTARA: Uh-huh.

ANTHONY J. SEBOK: This is a volume business, and the companies are trying to make a profit any way they can.

One way they cut corners, so to speak, is they don't want to spend a couple of days going through a case. They want to spend a couple hours going through a case.

Med-mal, it's too expensive for them to actually underwrite them.

I wish they did, personally.

SENATOR JACOBS: Senator Ortt?

SENATOR ORTT: Yes.

Professor Sebok, thank you for being here.

I certainly appreciate the figures, because

I think the data is very important as we're having this discussion.

I mean, our conclusions on what to do with that data may vary, but I think having some starting point or some baseline that's based on some empirical research is important.

So I thank you for sharing some of those things with us.

Would you agree with your -- with the predecessor, your colleague, you know, she kind of came at it from an end approach, of making sure that they keep a certain percentage or volume of the -- do you agree with that notion?

PROF. ANTHONY SEBOK: So we didn't talk before we appeared here today.

SENATOR ORTT: That's good.

PROF. ANTHONY SEBOK: And I was intrigued by that proposal, which I heard for the first time today.

So I immediately thought to myself, well, how's that going to work, given what I know about the data?

Now, what I know about the data is that the average advance is approximately 2250 -- $2,250.

Now, we don't know, because I couldn't get

this data, what the average, sort of, resolution was at trial, which we know never really happens, or, settlement, if it does happen.

But we actually do have a sense that it's a lot more than $2,250.

So if you say, well, we don't know what it is.

Let's say, the valuation of these cases that they put down, the company does that, is, median, $37,000, that's a very, very soft figure.

I don't know if you know much about the way personal-injury law works.

SENATOR ORTT: I don't.

PROF. ANTHONY SEBOK: But it's very hard to evaluate a case walking in the door. Right?

But let's say that number, "37,000," is right.

Take a third off of 37,000, okay, what is that?

You're left with approximately twenty-four, twenty-five thousand?

If my numbers are right, the 2250 turns into, approximately, 3670. You still have a big amount of money easily meeting Professor Steinitz's requirement of at least 50 percent of whatever

resolution there was to the case.

So my initial response is, this fits with what I've been told in the field.

In the field I've been told by reputable funders that they never want to advance more than 10 percent of what they think is the value of the case, because they know what's going to happen.

They know what's going to happen is, first of all, after resolution, the funded party is going to be very, very upset about giving up too much of what they recovered. There's going to be a fight.

Maybe you'll get a haircut.

Maybe that's why we're getting the haircuts.

And, also, the funded party who controls settlement --

Their lawyer doesn't control settlement. The funder doesn't control settlement.

It's plaintiff who controls settlement.

-- may refuse what everyone thinks is a reasonable settlement, because they're worried about giving too much over to the funder.

Now, that's why funders, if they're thoughtful, and I believe that the ones who are making money are thoughtful, have rules of thumb, like, no more than 10 percent of the expected value.

So I think we can find a way of reconciling Professor Steinitz's recommendation with the current industry, with proper, smart regulation, without a cap.

SENATOR ORTT: You said you were funded by -- or, I'm sorry.

You said the -- you can't provide the company that cooperated, or the company that --

PROF. ANTHONY SEBOK: Yeah.

If they gave me permission, I would.

SENATOR ORTT: -- that's fine.

But can you tell us who funded the study?

PROF. ANTHONY SEBOK: Oh, yes. It was the Israeli Science Foundation (the ISF), who my co-author teaches, in Israel; also at the University of Texas.

But, they were our primary funder.

SENATOR ORTT: Is release?

ANTHONY J. SEBOK: Israeli.

Like the National Science Foundation, it's the Israeli Science Foundation.

SENATOR ORTT: Israeli Science Foundation.

ANTHONY J. SEBOK: Yeah.

So their version of the National Science Foundation gave us funding, gave him funding.

And then the rest of the funding came from my law school, Cardozo.

SENATOR ORTT: You talked -- you mentioned 44 percent.

ANTHONY J. SEBOK: Yeah.

SENATOR ORTT: That was the per annum.

PROF. ANTHONY SEBOK: That's the per annum that we got on the median.

SENATOR ORTT: And that was from -- that was -- of course, that's being extrapolated from this one lender, obviously, a very large lender?

ANTHONY J. SEBOK: Yeah.

SENATOR ORTT: Okay.

But I think it's fair -- and you mentioned this, fair enough to point out, obviously, one of the concerns today is that there are a number of actors --

We don't even know how many. You still don't have that amount of data.

-- who are operating outside of what may be an established practice by a large and reputable lender?

PROF. ANTHONY SEBOK: Yeah.

SENATOR ORTT: And so I think that that's certainly a concern that I have, is how to bring

those folks to heel.

I also, you know, the -- and you're right, the anecdotes that -- that the -- there's a lot of figures out there that can be pulled out of context.

I see it all the time here in Albany.

But, I do think that, I've also seen where you have a study. Right?

And then someone will present another study that says the exact opposite --

ANTHONY J. SEBOK: Yep.

SENATOR ORTT: -- of what, you know, sometimes, sometimes, you know, the study tells you what you want it to tell you.

Sometimes. Okay?

But I do think your figures, the debt are important; the length of time I think is important, the 14 months; knowing that is critical.

You know, 44 percent, I guess the question becomes, still:

If 44 percent is what they're normally getting, maybe -- maybe it's a matter of a number --

I know you're not a price-control guy when it comes to this.

-- maybe it's what Professor Steinitz mentioned, because I think that is, certainly, a

focus up here, is making sure, whatever you want to call it, there's still -- in my view, there's still an aspect of predatory or predation in this area.

Right away, everybody wants to talk about predatory lending, or whether you want to call it "predatory intangible," whatever, "general intangibles."

I don't know what you want call it, but like in any industry, especially, you know, folks who are in need of money to pay their mortgage, you know, there can be an aspect of predation.

And so I think what we're trying to do is eliminate that, get those folks out of the industry.

No one wants to ban the industry.

That's not what I intend to do.

Every bill, I would tell you, is based on -- you know, we base on the usury rates here in New York.

You know, we're trying to have a discussion.

We may end up in a different spot.

I've already said that I think that this is a very unique area, but I do think it's important to not have some type of, sort of, end result; meaning, you're either going to keep a certain percentage of your settlement, or, it's based on a rate, or, some

knowledge of that person going in, I think is very important to eliminate that -- the predatory, I'll call it, "lending." I know it's, legally, maybe it's not a lending.

And I understand what you're saying, and I can appreciate that there's a legal classification for it, certainly.

But I just -- I do think, still, you know, the figures are very helpful to me.

You know, the 16 percent, the fact that it's zero, that it would be gone.

I think there are people who may need this funding, you know.

And so this is helpful to have this data, because you're the first speaker that provided any data to us, as far as real figures based on some empirical research.

So I very much appreciate that.

And I -- hopefully, we can take that into consideration, as we move forward, from a legislative standpoint.

SENATOR JACOBS: Professor, just again, the study you did was one lender -- one lender?

PROF. ANTHONY SEBOK: One firm.

SENATOR JACOBS: One firm.

ANTHONY J. SEBOK: Yes.

SENATOR JACOBS: And you said one of the largest in the --

SENATOR ORTT: It is the largest.

SENATOR JACOBS: Okay.

ANTHONY J. SEBOK: The second largest might not like it when I say that.

SENATOR ORTT: Yeah. And probably very reputable, I would think.

ANTHONY J. SEBOK: (Nods head.)

SENATOR JACOBS: Yeah.

And I just -- one other question, and this is the legislation you mentioned, that the assignment of litigation-funding asset, why is that important to have, in your mind?

ANTHONY J. SEBOK: So I think this is an interesting issue, right, in the following sense: there's two questions.

One is, why do I think the funders want it?

And the other is, why would someone want to take it away?

Okay?

Now, burden-of-proof arguments, I learned a long time ago, are the lowest form of argument.

I mean, I don't know whether I should put the

burden on the other side and say, why do you want to take it away, especially given what I know about commercial law in this state?

But I can say this: The reason why the funders want it, is because they themselves are borrowers. And if they're going to enter into the credit markets, they need to point to a security interest that they can identify for a lender.

Now, I want to be clear about one thing:

When I saw that word "assignment," I was wondering whether or not there was an ambiguity here about whether or not the assignment was of the claim itself, or just the proceeds after the claim has been resolved.

There's a big difference.

I mean, in New York, for example, you cannot assign a personal-injury claim.

You can assign the proceeds from a personal-injury claim.

This is a very important distinction that a lot turns on.

If we got rid of the second, we would do terrible damage to the ability of insurers to operate in this state.

Okay?

So the assignment of the proceeds, right, of a claim, is something which people can pledge all the time, and the reason they do so is because it is a secured interest, which creditors like to be able to look to, if worst comes to worst, there's insolvency.

SENATOR JACOBS: Uh-huh.

ANTHONY J. SEBOK: So if you take that away from these companies, you're basically saying, you're not like any other company, first of all; and second of all, good luck trying to get commercial credit.

SENATOR JACOBS: Got you.

Do you see that -- that -- if there is the assignment which they have now, I mean, do they -- are these sold off --

PROF. ANTHONY SEBOK: I don't think they're being securitized right now.

I think they're being pledged for credit --

SENATOR JACOBS: Got it.

ANTHONY J. SEBOK: -- I mean, for commercial-lending purposes.

I don't know for sure.

I mean, there may be securitization going on out there.

I try my best to keep up on the industry, but people don't tell me everything.

SENATOR JACOBS: Thank you.

Any other questions?

SENATOR ALCANTARA: I have a question.

I'm sorry, can you repeat again who funded the study?

PROF. ANTHONY SEBOK: Yes. It was funded by the -- well, there were two authors.

I'm an author.

I received all my funding from my university, which is Yeshiva University, the Benjamin N. Cardozo School of Law in New York City.

I have a co-author who teaches at the University of Texas, and also at Tel Aviv University. And he applied for a grant from the Israeli government, which he received. And as far as I know, all the funds were used for his research assistants to crunch these numbers, because, I have to admit, I'm not really a quantifiable -- I'm not "quant" person. I'm not good with numbers. I'm good with law.

He's is a real economist, and he crunched the numbers. And he had some research assistants.

And then I also spent some time working with

him, so that paid for my hotel room.

SENATOR ALCANTARA: What was the criteria of the Israeli government for funding this study?

Out of curiosity.

PROF. ANTHONY SEBOK: It's just general academic merit.

It was a good study, that they compete -- you know, there's a competition for grant money.

SENATOR ALCANTARA: Okay.

PROF. ANTHONY SEBOK: As far as I know, I didn't -- I signed the -- I signed a letter, saying that I agreed with everything he was saying in his application.

SENATOR ALCANTARA: I was just curious, why would a foreign government be interested in funding studies about paid-loan institutions --

PROF. ANTHONY SEBOK: There are so many academics in the United States who have joint appointments with Israeli universities, that they're always doing studies outside their own country.

SENATOR ALCANTARA: No, I totally understand that. But I would figure that they do, like, other kind of, like, scientific research, but not on paid-lending institution.

I was just curious.

And my last questions:

In the study that was conducted, did you guys speak to some of the people that have gotten these type of loans?

PROF. ANTHONY SEBOK: No. And that was a study I wanted to do, but I haven't gotten funding for that yet.

SENATOR ALCANTARA: Okay. Great.

ANTHONY J. SEBOK: I do have a study on tap, and I actually have a bit -- I have a model for that.

SENATOR ALCANTARA: So this -- so everything that was based on the study was on the research that you are obtained from that institution?

PROF. ANTHONY SEBOK: And most importantly, it was totally anonymized. We know nothing about the names of any of the files we had.

SENATOR ALCANTARA: You told me.

But there has been no study on the individuals that go out and seek --

ANTHONY J. SEBOK: I wanted --

SENATOR ALCANTARA: -- these type of loans?

PROF. ANTHONY SEBOK: -- I still want to do that. I still want to do a granular, qualitative, not quantitative, study of the reasons why people

apply, and their experiences, because one of the hypothesis that had been floated, which I think is a worthwhile hypotheses to take seriously, is that, in addition to being necessitous, which is why we care, these people need money.

And they either can go and max out their credit cards, or they can do some other form of raising funds, or they can do this.

But in addition, there's an additional thing that's very different than other forms of consumer credit going on here.

And for this you really have to be in the trenches of personal-injury law, like I am.

Because one thing that I think is really important to understand, is these consumers can always get money for their claim.

There's always someone out there willing to buy their claim, other than, say, the litigation funding company who wants to buy a tiny piece of it.

The insurance company of the defendant they're suing will always put a check on the table to settle a claim.

And that's buying a claim. Right?

So you have to understand, litigation funding adds a new competitor in the settlement equation.

That's what I believe.

And I would love to be able to demonstrate that, in fact, there is, subjectively, in the minds of the consumer, that I'm going to hold out and see if I -- if my lawyer -- my lawyer tells me we have a good case, but they're offering this check now. Maybe I'll hold out. Maybe that check will get bigger.

You talk to PI lawyers, they'll tell you all the time, that's the dynamic.

I understand, that from the defense (indiscernible) point of view, that's not a good thing, because that means the insurance company pays more.

But I'm not interested here, primarily, in worrying about insurance companies.

SENATOR ALCANTARA: Okay. Thank you.

SENATOR JACOBS: Thank you very much, Professor.

PROF. ANTHONY SEBOK: Thank you; thank you very much.

SENATOR JACOBS: Okay. Next, Anthony Coehlo.

HON. ANTHONY COEHLO: Thank you.

SENATOR JACOBS: Congressman, thank you for being here.

HON. ANTHONY COEHLO: Thank you, Mr. Chairman.

Thank you for pronouncing my name correctly.

I get so many different ways to pronounce it.

It's a pleasure to be here, and thank you very much for having this hearing.

My name is Tony Coehlo, and I'm pleased to present my testimony to your Committee.

I would like to thank the Committee for the decision to hold this hearing, and for the opportunity to testify in support of consumer litigation funding.

I served in the United States Congress, representing California's 15th District, for 10 years, including 3 years as majority whip of the House.

During that time, I consistently advocated for the rights of disabled Americans.

Most notably, I was the author of the Americans With Disabilities Act of 1990, better known as the "ADA."

Over the past 28 years, it has been extraordinarily gratifying to see this law help disabled Americans enter the workforce, access public spaces, and fight back against

discrimination.

According to the U.S. census, one in five Americans suffer from a disability.

That includes me.

I had epilepsy for most of my life, a disease that causes unpredictable seizures and other health problems.

I've had seizures for the last 60 years, and still have some.

I'm sure many of you have friends and relatives who experienced or are currently living with some type of a disability.

Imagine, if you will, that you are confined to a wheelchair, sitting in front of a door that you cannot open.

Others can pass through that door freely, but you cannot.

Also imagine that there is a federal law in place that says you should have the same ability to open that door as anyone else.

What can you do?

Your only recourse is through the court, but bringing a lawsuit can be a long and difficult process that can involve significant financial pressure for the individuals who take it upon

themselves to enforce the law through the courts.

And that's why I'm here today.

As all of you today I'm sure understand, the passage of legislation is only the beginning of a long process, leading to public acceptance and widespread compliance.

That has certainly been the case with the ADA, which was just the first step in establishing rights for disabled Americans.

Since then, disabled Americans have had to turn to the courts to enforce and find justice under the ADA.

Laws are not enforcement.

Enforcement is critical to make laws real.

That's where legal funding comes in.

Presettlement advances can provide immediate financial relief to plaintiffs who are struggling with day-to-day expenses, enabling them to stay the course in cases that are critical to enforcing compliance with the law.

While most individuals with disabilities are capable of much more than people understand in the workplace, some are unable to work as a result of injuries they have sustained because of someone else's negligence or malice.

Legal funding is critical to those victims as they seek an appropriate outcome for their ordeal.

Disabled or not, plaintiffs in complex litigation can be vulnerable.

And some in the marketplace employ deceptive and brassive (ph.) (sic) practices.

That is why New York needs strong protections for legal-funding consumers.

Legal funders should be licensed by the State, and transparency for the consumer regarding the terms of the advance should be mandated by law. It must be clear exactly how much the recipient will owe.

However, well-intentioned approaches that rely on interest-rate caps, instead of robust regulation, in my view, are misguided.

Interest-rate caps threaten to make presettlement advances unsustainable for funders; and, therefore, reduce or eliminate the access for plaintiffs.

To someone like me who cares deeply about the disabled, and the enforcement of ADA, this is highly concerning.

ADA violations are serious and widespread, and the pushback that these suits continue to

receive is dangerous.

Access to legal funding will help disabled Americans defend themselves and uphold the law of this great land; yet interest-rate caps are the preferred solution of insurance companies and other corporate interests driving the tort-reform movement.

They would like to eliminate legal funding, for the simple reason, that it reduces their ability to extract low-ball settlements from plaintiffs who, because of the harm that they have experienced, lack the financial resources to get by in their daily lives during the long pendency of a case.

Legal funding is not a panacea for the challengers who -- that disabled Americans face, but it's one tool that is available, and, it works.

It ensures individuals have a chance to seek justice when they have been harmed, regardless of financial circumstances.

With strong regulations mandating transparency, clear contracts for consumers, and robust oversight of funders, legal funding will be a safe alternative for victims who need financial support while they see their cases through the process.

Legal funding is important to the cause of we disabled Americans who still need the courts to enforce the equity under the law.

In closing: I want to reiterate my hope that this Senate will embrace effective regulation of the industry and preserve legal funding for your constituents.

And I thank you for your time.

SENATOR JACOBS: Thank you very much, Congressman.

Any questions?

Senator Ortt?

SENATOR ORTT: Congressman, thank you for being here.

HON. ANTHONY L. COEHLO: Thank you.

SENATOR ORTT: As you may be aware, I'm the Chair of the Mental Health and Developmental Disability (sic) Committee in the Senate, so I have a shared interest in protecting that community, as I'm sure, and I know, you do, because of your previous service and your authorship of a landmark legislation.

So I want to thank you for your work with that community.

Because I care about it, and since

percentages is a big topic here today, do you have any idea what the percentage of the disability community that takes -- that, you know, tries to take advantage, I guess, of legal lending?

HON. ANTHONY L. COEHLO: I really don't know, Senator, but I can tell you that one case is too much.

And it's my ministry, it's my passion.

I believe very strongly, in that, that if anybody is getting -- I won't use that word -- if anybody is getting treated wrongly, that should be corrected.

And so I do know the specifics of individuals, but I have no idea of numbers.

SENATOR ORTT: Okay. And I ask because, one of the concerns I think that we've heard today is about folks who are vulnerable, meaning anybody who's, obviously coming, looking for funding, is, obviously, in a -- probably, a significantly vulnerable position.

If you were to add to that, they have a, you know, developmental disability, that could be even -- I mean, now we're really talking about a vulnerable population in and of itself.

Because, to your point, the ADA certainly has

to be enforced all the time -- you know, they have to go to court and try to enforcement that law.

HON. ANTHONY COEHLO: They have to enforce it.

Let me make one point as well, is that the ADA, I always say, is an insurance policy for those of you on the podium that I don't think have disabilities.

If you end up with a disability, because of an accident, or because of whatever, the ADA covers you.

And so it's a question, people always talk about somebody with a severe disability, implying that they're the only individual.

People are -- you know -- every day, more -- and as we get older as a society, the more and more people will qualify as someone who is disabled.

And so it is -- and it's an ongoing problem.

And I really believe strongly -- I was intrigued with the testimony of the individual just before me, and I don't know any of these folks, so the -- the -- I was intrigued with what he was saying about what needs to be done.

And I really strongly believe that regulation is the answer.

And I think that -- I know that -- and I'm not negative about insurance companies, but they have a business as well. And they have lots of lawyers that fight those of us who have claims.

And the lawyers that represent us don't have the resources that the insurance companies have.

And so I think it's important to keep all this in balance, and that's what I preach about, talk about.

I'm 75, and still my ministry, it's what I strongly believe in.

And as I say to you, I don't know how many, but I do know it happens, and one time is too many.

SENATOR ORTT: And I was asking because, as Chair of this Committee, and as sponsor of this bill, I've never heard the nexus.

No one from that community has come to me and said, This is a big issue for me, or for my family, or my loved one, or...

So that was -- this is a first-time nexus for me.

Not to say that (indiscernible) --

HON. ANTHONY COEHLO: But let me tell you, I was, in part of my life pursuing disabilities, I was chairman of the Epilepsy Foundation of

America.

SENATOR ORTT: Okay.

You are still, or you were?

HON. ANTHONY COEHLO: No, I was.

I'm on the board.

SENATOR ORTT: Okay.

HON. ANTHONY L. COEHLO: I'm not chair anymore.

And lots of examples there of these type of cases.

I was chair of the American Association of People with Disabilities.

I can give you examples there.

SENATOR ORTT: Okay.

HON. ANTHONY L. COEHLO: I'm chair of Partnership to Improve Patient Care.

A lot of -- this is what I strongly, I'm committed to.

And I can give you examples of people who have -- as a result of their disability, have gotten some help. And others who, basically, got mistreated as a result of what occurred.

And so it's -- I can help you in that regard.

I'm not sure I can give you exact numbers, but I can give you examples if you need them.

SENATOR ORTT: Well, and I think that's important, because I think -- I want to -- I want to create -- or, I want to address something you said, but also many other speakers have said, and I certainly make no attempt to speak for my colleagues.

No one is talking about trying to -- certainly on the intent, to eliminate this from people who need it.

We're talking about regulating it.

HON. ANTHONY COEHLO: And you're also talking about eliminating the bad actors --

SENATOR ORTT: Oh, absolutely.

HON. ANTHONY L. COEHLO: -- which I'm hopeful.

SENATOR ORTT: Yeah, yeah, if they're gone, that's a good thing.

HON. ANTHONY L. COEHLO: Yeah.

SENATOR ORTT: And so the question is: How do we do it, and how do we do that in an effective way?

And how do we make sure that people who are successful and get a claim, keep the bulk of that claim?

So that's really what this attempts to do.

And I think, I would imagine, that's what all the other states have tried to do.

This has nothing to do with tort reform, of which I am a supporter. But that isn't -- that is not why we're talking about this today.

And I am certainly no defender or no water-carrier of the insurance industry.

HON. ANTHONY L. COEHLO: Good.

SENATOR ORTT: You know, we all have to have insurance, and they have a business model.

And -- but, you know, no one up here, this bill is not an attempt to kill.

The real -- the goal is:

Because you said "one is too many much."

And before we heard, you know, on average, 44 percent, you know.

But we also know there's rates that are higher than that.

And I would say, that just because the average might be "this" number, the fact that we have rates significantly higher, we shouldn't just say, eh, that's not the majority.

That's -- you know, so there still is the real prospect of predation lending, predatory lending, or predatory characteristics in this

industry. And there is no oversight today, as you have acknowledged.

And so I think trying to get to, you know, how will we get there?

Whether it's a hard rate, or what that number is, or whether we come up with, you know, additional transparencies and regulations that companies have to follow, or maybe it's something like the other -- the one professor said about, you know, ensuring that plaintiffs, you know, that there's a certain amount of their award they have to -- that has to be kept for them.

However you do that, I think having something hard at the end.

You know, I'm kind of a bottom-line person, and I realize you can't always do that.

But I'm sort of a bottom-line guy, and that's what we're trying to get to, or what I'm trying to get to, with the legislation.

And, obviously, your testimony, as it relates to this, epilepsy, you know, folks who have developmental disabilities, or intellectual disability, who may become that way or are born that way, I think is important, because those are very vulnerable New Yorkers, every single day.

And we surely don't want to do anything that's going to increase their vulnerability.

HON. ANTHONY L. COEHLO: I know a lot of New Yorkers that fit that category --

SENATOR ORTT: I'm certain.

HON. ANTHONY L. COEHLO: -- and I work with them.

But let me -- I'm going to do something I shouldn't do. As a former legislature, I'm going to make a suggestion.

It seems to me that, in this industry, the problem is, there's no regulations. There's really no data. There's -- and for you to try to come up with something without those basics is difficult.

It would seem to me that what you should be doing is looking at, how do you regulate it, and enforce it?

And you develop data as a result of that.

And then it might be, that as a result of the data that you get, that then you have to do something else to prevent the bad apples from doing what they're doing.

But, there's no regulation.

SENATOR ORTT: Right.

HON. ANTHONY COEHLO: And -- and -- and

I know a lot of these funders, because of what they do, and so forth.

But it seems to me, regulation first, get facts, and then make adjustments where needed.

SENATOR ORTT: If I could add --

HON. ANTHONY L. COEHLO: And that's -- that's --

SENATOR ORTT: -- no, that's a -- it's a -- from a former Congressman, it's a worthy suggestion.

I would just add, and you probably could appreciate this, if there wasn't a bill in, none of us are sitting here today.

Let's not kid ourselves.

HON. ANTHONY L. COEHLO: Oh, I agree.

SENATOR ORTT: If there wasn't something to bring people to the table and put some fire on people, and bring them to heel, you know, because somebody is making money off of this.

And if they can get whatever rates they can get, great for them.

That's going to be their attitude. Right?

HON. ANTHONY L. COEHLO: It's the American (indiscernible).

SENATOR ORTT: Right.

So if you don't -- somehow, you have to start

somewhere to get people into the room, because we've had this discussion, at least in New York, for the past two or three years, since I've been here in the New York Senate.

And this is the first time we've even moved.

And a lot of that is because there's media coverage in major media outlets. There's legislation. There's people who are interested in this.

And so, you know, such is the nature of lawmaking, but I think we can certainly try to get to a point where we have -- (indiscernible) a zero-sum game.

There's no regulation in New York.

So some regulation, and some consumer protection, to me, is where we're trying to get to here.

So I appreciate your testimony, though, Congressman.

HON. ANTHONY COEHLO: Yeah, I would just close by saying that we've got to remember that the people that are involved here.

Generally, it's poor folks.

Generally, it's people who have disabilities.

It is people who have no other recourse.

And what is taking place today is a recourse for them.

Now, if we were to regulate it, and we get data, we could then control some things that are wrong.

But we need to regulate it. It needs to -- we ought to get to that point, if that's the compromise that can be made, to start that process.

And it shouldn't only be here in New York.

It should be all over.

There are abuses all over the country.

And the fact that you are holding hearings, Senator, I appreciate it, because it -- it is maybe a way to get this process started, to do what needs to be done for this community.

SENATOR ALCANTARA: Thank you, Congressman, for being here.

And I want to thank my colleagues, Senator Ortt, for bringing this, and Senator Jacobs for hosting this Committee.

And just to echo what Senator Ortt said, you know, we are having this meeting, we are having this hearing, because, obviously, there have been a lot of publicity about it.

And like you stated before, none of us want

to put anyone out of business, because, when business thrive in New York, we hope that that means that there are people that have those jobs, there are people that are making money, and invested in the local economy.

But we also want to make sure that vulnerable New Yorkers -- the poor, victims of domestic violence, immigrants -- that they are protected from any kind of harm, because we do know that people that seek out these type of loans --

I mean, you know, the court of appeal can call it whatever they want.

I'm going to call it "a loan," you know.

-- there are people that need this.

There are people that are poor.

Somebody that lives in Fifth Avenue and 59th Street is not going to go and get one of these loans.

Somebody that lives in Scarsdale, in Westchester County, probably has friends, or probably access to a bank.

So we just want to make sure, the reason why we're having this, is because we believe in transparency, and we believe that, when you are not doing anything wrong, you should have no problems

with some type of regulations.

And we want to make sure that people don't lose their homes. That people are not taking advantage of.

And that's why we are here, is not to try to put anyone out of business.

We believe in business, that everybody, you know, is part of the American Dream, and that you become a successful business.

But we also know what can happen, and who pays the price when there are no regulations and there are no transparency?

You know, and we hope that, from this day, on, and the next time we meet with some of these companies, that they can provide some type of data for us.

Like, for example, what is the income level of people that seek out these loans?

What part of the state do they come from?

And that they can provide us with real document, so we can see, and we can read, and we have time -- and we can have time to digest this.

But I just wanted to say that, and I'm going to be excusing myself out.

And, again, thank you for having this.

I think this is something very important.

But, you know, New York has been the pioneer on a lot of things.

And I think this is a way for New York to say:

Hey, we don't care what anybody else has in another state. We want to make sure that the people that live in our district in the state of New York are protected.

Thank you.

SENATOR JACOBS: Thank you.

You good?

SENATOR ORTT: Yeah, I'm good.

SENATOR JACOBS: Congressman, thank you very much for your time.

HON. ANTHONY COEHLO: Thank you, Chairman; appreciate it.

SENATOR JACOBS: And next, Lev Ginsburg.

LEV GINSBURG: Thanks, Senator.

SENATOR JACOBS: Good afternoon.

LEV GINSBURG: How are you?

SENATOR JACOBS: Thank you for being here.

LEV GINSBURG: My pleasure.

So now that you've heard from the experts, you can hear from me.

And I studied torts, actually, at the Benjamin Cardozo School of Law.

But, Professor Sebok is not to be blamed. I don't think he was a professor there at that point.

I want to thank you on behalf of The Business Council, and our more than 2300 members in the state of New York who employ over a million New Yorkers, businesses, large and small, across the state.

And I wish to submit these comments into the record as part of the Committee's hearing on third-party lawsuit lending in the state of New York.

I will keep my comments relatively brief.

As the state's largest statewide employer-advocacy organization, we often address issues impacting the state's economic competitiveness, including business costs driven by state policy actions and New York's profoundly litigious environment.

By many measures, New York's business climate lags far behind that of many other states.

New York has higher taxes, higher labor costs, higher energy costs, and more regulations than most states.

New York also has a vast array of laws making it advantageous to be a plaintiff and a plaintiff's attorney at the expense of defendants.

Since businesses are so often the defendants in lawsuits, this paradigm leads to higher risks and higher costs of doing business in New York.

One cause of the ever-growing litigation docket in New York's courts is the proliferation of third-party lawsuit lenders in the state.

While many of us are familiar with banks and firms that provide bridge money to bankroll long-running, complex commercial litigation, many of us are less familiar with the cottage industry that has developed, offering non-recourse lawsuit loans, loans at exorbitant interest rates, for common tort claims.

These loans, which are becoming more documented, thanks to investigations around the country, charge as much as 200 percent, and often leave a consumer-plaintiff with little or no money at the completion or settlement of their lawsuit.

Lawsuit-lending outfits have been able to circumvent regulation and usury laws because the loans are contingent on the plaintiff winning or successfully settling a case.

It's also difficult to fully quantify the impact -- and we've heard this -- and pervasiveness of the problem, because such presettlement loans need not be filed with any court, and as a result, no public record of these loans exist.

That said, these loans have a profound negative impact on our legal system and on the very plaintiffs that they purport to help.

Much of the industry, founded by personal-injury lawyers, but now heavily financed by hedge funds and other investors, relies on plaintiffs' lawyers to send business.

Often, the same lawyers receive a finder's fee or a referral fee for these loans.

Prosecutors in New York, and beyond, have been investigating the business relationships between the lenders and the trial lawyers as to whether these financial arrangements between the parties constitute illegal kickbacks.

Whether these financial arrangements are technically legal or not, they demean the legal profession and have a serious appearance of impropriety, while inserting a third-party's interest into the important attorney-client relationship.

Instead of truly helping plaintiffs in need, often, these third-party lenders prey on the most vulnerable people with aggressive advertising on television and the Internet, much like other get-rich schemes, psychic readers, and class-action lawsuits.

The advertising offers quick cash with no mention of triple-digit interest rates.

Many plaintiffs are left with almost nothing after their awards or settlements after paying back these usurous loans.

Such a reality, once realized by a plaintiff, also has repercussions on the outcome of the lawsuits themselves.

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

This shift away from reasonable settlements greatly and needlessly increases litigation costs for businesses across New York.

As a direct result of this lending, settlement discussions are often upended.

This push towards litigation further crowds already-stressed court dockets, and slows down the process for all cases, taking up valuable court time and judicial resources.

Sadly, this reality does not help defendants, and it does not help plaintiffs.

Once plaintiff attorneys are paid, and after lawsuit loans get repaid, with their high interest rates, there is often little left in the settlement or judgment for a plaintiff to make them whole.

Lawyers and lenders are the only winners in this new reality.

While my primary concern in this arena is the interest of my members, I'm also deeply concerned as an attorney and as a citizen of New York.

As a representative for employers in the state, I'm concerned that third-party lawsuit lending leads to evermore baseless litigation against employers, and stymies reasonable settlements, one of the cornerstones of our almost system.

As an attorney, I'm deeply troubled by what these loans, and the inappropriate relationships

between plaintiff lawyers and the lenders, do to the reputation of a good, necessary, and honorable profession.

These actions diminish our collective professionalism and trustworthiness.

Finally, as a New Yorker, it's abundantly clear that these lenders pray on the weakest among us.

There's no consideration for fairness or decency, and just an unbridled grab at easy money, leaving the vulnerable with no money and no recourse.

It isn't often that I testify in favor of more litigation and regulation.

While it's rare, when there's a clear injustice that needs correction through law, the business community and The Business Council do not shy away from calling for the appropriate action.

In this case, at the very least, these lawsuits must be made -- these lawsuit lendings must be made subject to usury laws to limit the outrageous rates that they -- that some of them charge.

Beyond that, further transparency, licensing, and reporting are definitely in order.

I appreciate the opportunity to share my thoughts on this important issue.

And on behalf of The Business Council and our members, I thank the Committee for investigating the important subject on behalf of New York's consumers.

SENATOR JACOBS: Thank you very much.

Any questions?

SENATOR ORTT: Yeah, Mr. Ginsberg, I appreciate you coming in.

Not everyone else did it, because they seemed to have all left before you spoke.

LEV GINSBURG: That's the way it goes.

SENATOR ORTT: That's okay.

But, I appreciate your testimony.

And, you know, what do you -- so I -- I share -- or, at least I -- you know, I always had the feeling that, to me, one of the costs -- you hear about people talking about New York State a high cost of doing business.

One of those costs, you know, it's not just taxes. It isn't just -- it's the cost of, whether it's policies, or what have you, because of a high liti -- you know, New York State seems to be highly litigious state.

LEV GINSBURG: Sure.

SENATOR ORTT: What do you say -- you know, one of the previous testifiers said, Well, this money just goes to their living costs. It doesn't go to -- you know, in other words, it doesn't really play a part in the length of the suit or in the lawsuit being taken, or anything like that.

So I guess, what would you say to that in response?

LEV GINSBURG: Well, I think a couple of things.

I mean, first of all, money is fungible.

So, you know, first dollar in, first dollar out -- first and last dollar out.

Money is money.

So whether it's going directly towards litigation or other living expenses, I think the end result is about the same.

SENATOR ORTT: Okay?

LEV GINSBURG: I also think that, you know, part of the -- I think one of the biggest problems for me, is that, if I have a client -- if I'm an attorney and I have a client, and that client is facing, you know, an enormous fee to a lender, there's no way they're going to settle for a reasonable amount.

So we're going to extend the length of just about every case, because, you know, a settlement might come at 18 months, or some of the times that we heard earlier.

But if the case ends up going to trial, because that plaintiff is sort of desperate for a bigger payday in order to pay off the loan, and then have something left over, I think that no matter what the loan is going for, the net result is, you know, a longer process and, frankly, more money that goes into the hand of the lender.

SENATOR ORTT: Sure.

Gee, I had so many more questions, but it's late in the day.

Let me add this:

You know, I am also not someone that normally is in favor of more regulation, because I certainly think New York State is also a very highly-regulated state.

But to your earlier point, I do think it's important, you know, where there's -- we regulate so many other areas, and yet, this one, you know, there's really nothing. Right? I mean, it just almost seems -- it seems strangely odd, you know, that there's no regulation.

I guess my last question would be, or my last comment, maybe you can speak to this:

Would it be your estimation, or your -- The Business Council's estimation, if I understand correctly, that this type of third-party financing, especially with these rates, really are -- you know, extend lawsuits, extend the time, because you're waiting for that bigger payday you're trying to get?

You know, so there's more hands in the till, whether it's the attorneys, whether it's the lenders, whoever it might be, and that really just drives up the costs and time for everybody?

LEV GINSBURG: Sure.

I mean, you know, if you go to legal ethics --

And I'm not an expert on legal ethics. I'm bound by them, but not an expert.

-- I know that one of the main tests, if you will, when dealing with whether an attorney can get into a financial relationship, a business relationship, with a client, which I would argue that this is some form of business relationship, is -- is the interest of the client different than the interest of the attorney?

Right?

So, in this particular case, if I'm an attorney, and I'm bringing my client to a lawsuit lender, who happens to pay me a finder's fee, my interest is, of course, I've gotten paid already, if you will.

So my client's interests is, they need more money at the end of whatever this particular case is.

And my interest as their attorney may no longer be identical. I may no longer be married to, you know, going the distance in a trial when I have a decent settlement on the table.

Right?

So -- and I'm not saying -- that there's always differences of opinion. Right?

A lawyer can only give the advice. The client can or cannot take it.

But, I actually may have a different interest. I may want the case over at settlement, and that client may very well need me to go to trial.

And I really worry that we're really putting plaintiffs at a disadvantage.

Now, I also worry about the defendant, obviously, because I represent several of them, in

many cases.

So I'm worried that, once again, we're pushing, and as the gentleman who testified a moment ago indicated, you know, we're sort of, insurance companies, payers, defendants, whomever, have an interest, obviously, in mitigating their own losses, as they should.

But that's where settlement comes in.

And that's why everybody, you know, weighs and measures the costs, and the opportunity costs, and the BATNA, if you will (the best alternative to negotiated agreement), and all of those things.

This adds another element to the table. It puts another thumb on the scale, if you will.

And I think it's, in many respects, inappropriate.

I'm not saying that the entire industry is inappropriate.

SENATOR ORTT: Sure.

LEV GINSBURG: You know, if people need that bridge, I do understand it.

But, to operate outside of the usury rates is -- is -- I don't want to get too dramatic, but it's almost obscene, some of the numbers that, you know, we've all read in various reports in the news,

and so forth.

And I think that, you know, we heard testimony -- excuse me -- that if we bring it to 14 percent, it might as well be zero.

No one actually said bring it necessarily to 14 percent, you know.

Your colleagues, you all discuss these things, and there's always a magic number, right, and it's always a bit arbitrary, but there's a number that makes sense.

And, certainly, if Tony Soprano would go to prison for that number, it's too high.

SENATOR ORTT: Right, right.

LEV GINSBURG: You know, it's as simple as that.

SENATOR ORTT: Do a lot of your members get a 44 percent per an annum return?

LEV GINSBURG: They're not paying me a dividend.

I'm going say no.

SENATOR ORTT: Okay. I just -- I thought so.

Thank you very much, Mr. Ginsburg.

SENATOR JACOBS: You had just mentioned that, hedge funds, is that -- are getting involved in this.

LEV GINSBURG: I don't have intimate knowledge, but I've certainly read about it.

I mean, "The New York Times" did an expose a while back, and there were a few other articles that I've read in some national newspapers, that have said that there's a lot of money being made; and, therefore, a lot of money being poured in for investment purposes.

SENATOR JACOBS: Thank you very much.

LEV GINSBURG: My pleasure.

Thank you, all; appreciate it.

SENATOR JACOBS: James Copland from The Manhattan Institute.

SENATOR ORTT: Last, but certainly not least.

SENATOR JACOBS: Not at all.

We're here.

JAMES COPLAND: Someone has to be last; right?

SENATOR JACOBS: Well, this is being taped, so we --

JAMES R. COPLAND: That's the good thing.

I testified once in the House, and I was on the panel behind Newt Gingrich. And once he got up and left, the entire -- it was empty. I was speaking to the chairs.

SENATOR JACOBS: That's what happens with Rob Ortt. He said he had to leave by three, so...

JAMES R. COPLAND: So I do want to thank you, Chairman Jacobs, Ranking Member Alcantara, Senator Ortt, other members of the Committee, for your time, and the thought that's gone into Senate Bill 3911, the opportunity to speak.

It's particularly nice for me to be able to speak to something.

I'm accused often -- I've, for 15 years, directed The Manhattan Institute's legal-policy program, and, you know, I've been accused by the National Trial Lawyers organization as being a well-known defender of corporate negligence and malfeasance.

I always say that's not totally fair. I'm not really very well known.

But -- but I do often sort of take the side of a corporate defendant.

And so it's nice to sort of be attacking an unscrupulous set of corporations, and I don't mean to suggest they all are, and defending consumer rights here.

Senator Ortt, you said -- but -- but as I start here, and I just want to emphasize, I've

given my written testimony here to the staff on the Committee, so I'm going to assume that that's incorporated here by reference --

SENATOR JACOBS: Yes.

JAMES R. COPLAND: -- and don't want to go through 2500 words with multiple footnotes here in front of you, and would, rather, just sort of summarize those points, and respond to some of the things the other panelists have talked about here today.

And I do want to emphasize at the outset, just like Professor Sebok's not speaking for Cardozo Law School, I am not speaking for The Manhattan Institute in the sense that, The Manhattan Institute doesn't take institutional positions on any legislation.

So I'm just here in my individual capacity.

That being said, I -- I -- I want say, I mean, Senator Ortt, you said no one here is saying to get rid of all this.

You know, I'm going to say, well, I am.

I'm not so sure I wouldn't say that in an optimal situation.

I'm not so sure I wouldn't bring back robust champerty and maintenance rules which are the old

common-law legal rules I talk about in some of my written testimony, that forbade sort of the sponsorship of litigation.

But I do admit, that that's water under the bridge.

We can all watch TV and see "1-800, J.G. Wentworth, Need Cash Now."

This industry does exist.

There is a lot of money, there is financing for it, as you talked about, Chairman Jacobs.

And, understandably, I don't mean to suggest the hedge funds are doing anything wrong, because this is, relatively, uncorrelated with the markets, so it's an alternative asset class that they want to invest in.

But it's a big business at this point.

It does exist there, and I do think that there's a strong case here for regulations.

So in my remarks I call this "a modest proposal."

It's not outlawing the industry, and it's -- it's only really this consumer part of the industry.

So there is another large industry in terms of commercial litigation financing. Outfits like Berther Capital, that pays Professor Sebok a

retainer to advise them, are out there and doing big-dollar claims.

That's really kind of different than what we're talking about here, where we're talking about two- or three-thousand-dollar average advances to small-fry consumers paying exorbitantly high interest rates, or implicit interest rates, on those sorts of arrangements.

And so the Senate bill exempts at 500,000.

That's actually consistent with the Safe Harbor, under the New York Champerty law, which still exits in Section 489.

So it has some logic to it.

And I actually sort of like that better than -- it was an interesting idea that Professor Steinitz posited, with a qualified-investor standard, or something like that.

I'm also not sure how that works here, though.

I mean, the qualified-investor standard that the SEC generates, which is investing in initial public offerings and risky sorts of investors -- investments, 140 -- 4A's, and what have you. I mean, that's individuals with one million in net liquid investable assets.

I don't think any of them are taking out lawsuit loans with implicit rates of interest of 44 percent per annum.

I just -- so I just don't -- I don't know how that really fits here.

I understand that the "500,000" is kind of arbitrary, and that may have said, Wow, that's kind of arbitrary.

Well, it is, but it's also consistent with another section of the New York law.

And the same thing with the lawsuit caps that you've got in the bill, they're just a direct reference of New York usury law, at least as I read the draft that I've been circulated here.

You're not just coming up with some number out of the sky, or saying, well, this is consistent with other areas of law.

So I do think Professor Sebok's work with (indiscernible) Abraham, I know both of them. They're both outstanding professors.

I do think it's really interesting, and I don't have any reason to question the data. It's a dataset that I'm not privy to, so I couldn't if I wanted to.

But I sort of infer different things from it

than Professor Sebok.

I mean, he's saying that there's an average recovery -- median recovery, 50th percentile recovery, of 44 percent per year.

That's a really, really, really high rate of recovery on these sorts of financial situations.

And he's saying that it's a bit more than $2,000, on average, that's advanced.

So these are people take -- these are pretty desperate people.

I mean, let's -- let's -- let's be real here, these are pretty desperate people taking out these loans.

And he says it's a volume business.

As someone who studies litigation in the aggregate, and has been doing it for some time, that raises my eyebrows when I hear "this is a volume business."

So, while I think these are useful situations, I mean, I don't know what it's really saying, to say, well, the median's 44 percent, not 120 percent.

They're both extremely high interest rates here. And, he finds a 12 percent drop rate.

That's showing that, you know, there is risk,

but 88 percent of the time they're getting a payout.

So there's risk, but it's a fairly noble risk, and it's a noble risk when you start building a portfolio of cases, which is the whole point here.

And so, sure, you're going to have risks, just like if you have a high-interest bond, you're going to have a risk. But it's not the same as equity.

So we can say it's not a loan, and, technically, it's not under New York law, but neither is it equity.

The contingent fee is like equity.

The lawyer is getting a third of the payout at the end, upside (indicating). Downside, zero.

Here, the downside's zero, just like with any risky sort of debt instrument.

But the upside is a set payout. It's not a percentage take. It's a -- it's an interest rate.

And the implicit interest rate that you're going to expect to get is 44 percent.

So the question is: Is that right or the wrong number?

And as I sit and think about this, and started thinking about this in preparing this testimony, which, again, I go into a lot of

historical detail and things in here, the way to think about this for me is from two perspectives, and both of them mentioned by the other folks testifying here today.

One is: What do we think about with consumers?

And that's one of the charge of this Committee: How are we thinking about protecting these consumers?

And the second is: What does this matter for society at large?

How is it going to change the way the litigation system operates? Or how is it changing the way the litigation system operates?

And they're two sort of separate questions, but I think they're both important.

Now, when it comes to consumers, I'll admit, just like Mr. Ginsburg, my normal bias is to have a lot of transparency, a lot of disclosure, and let people sort of decide after that.

And -- and -- I'm not a big fan, in general, of broader usury laws, which New York and other states have.

I certainly wouldn't be a fan of Arkansas' usury law. You know, it was alluded to, well,

Arkansas's got the wrong rate.

Well, yeah.

Their usury law in Arkansas is 500 basis points/5 percentage points above the federal reserve discount rate.

So that's 200 basis points above the primary right now.

That's an absurd usury.

So, yeah, I mean, you could set the wrong usury. Even if you wanted to say, we want to have a usury standard, you could set the wrong rate.

I do think what we're talking about here, though, is something a bit different than your ordinary usury case.

A paradigm case that comes in for high-interest lending, and it's one that's been in the crosshairs of the federal regulators at the CFPB recently, is -- and in Washington, otherwise, is payday lending. Right?

Now, payday lending rates can be quite high. They're very short-term interest rates set, and they're usually people who are kind of desperate to make a payment, they need to make the payment.

And rather than not get health care or not default on a mortgage, et cetera, they're going to

take out a high-interest loan for a short basis.

But, by and large, the individual taking out the loan has full understanding of the likelihood that they're going to get paid on their payday.

They may get fired in the interim, but they have a pretty good idea, and almost certainly can decide, well, you know, I'm going to get paid in a week. I need the money now.

The individual who's contracting with an attorney on a lawsuit is not aware of what the odds are that they'll collect on their suit; also not aware of how much they're likely to get; and not aware of how much the attorney is going to have to do to collect it.

The attorney, on the other hand, and businesses full of attorneys evaluating these claims, which is what we're talking about, is able to look at the case and say, Yep, this is a policy-limit case.

That's a no-risk case.

If the insurance company's going to pay out the policy limit on this case, it's no risk.

Now, the attorney's still going cut it -- get a third cut in most of these cases.

I mean, not always a third, but there's no

price-shopping here, because there's no way to really price-shop.

There's not much price-shopping in real-estate agents -- for real-estate agents.

No one's price-shopping for plaintiffs' attorneys, because nobody wants to get the cut-rate attorney to handle their case, and nobody is able to really evaluate it.

So there tends to be a pretty standard rate here. I mean, this is how this is done.

And we've chronicled, and we've got Manhattan Institute papers we've published, going way back from ethicists like Richard Painter, and Lester Brickman who recently retired at Cardozo, who have gone through this, come up with reform proposals on the contingent fee itself, because there's all sorts of opportunities for the lawyer to exploit the client, because the lawyer has a lot more information than the client.

And, if the lawyer's going to take a third for a case that involves no work, that's just a windfall to the lawyer.

Well, you know, the lawyer at least, though, is subject to legal-ethics rules.

The lawyer, at least, could be sued for legal

malpractice.

The lawyer, at least, could be disbarred for unethical behavior.

Right now, there's nothing protecting the consumer from these sorts of litigation-lending shops that may very well know this is a no-risk case, and still take these massive interest rates out.

The consumer has no way of knowing that, which is why disclosure alone, to me, probably isn't enough in this context.

The other reason why I think disclosure of loan isn't enough in this -- in these contexts, is that our legal system creates incentives for meritless litigation, abusive litigation.

And this is somewhat by historical accident; right?

I mean, we, unlike most of the developed world, don't have a "loser pays" rule, where, if you lose your case, you have to reimburse the other side's expenses.

And that's one reason why we have contingent fees, is because it's really the only -- without -- without that, I mean, that's about the only way to get people without means to be able to pay their

lawyer.

But because -- but because of that, you have subsets of cases, nuisance cases, which have settlement value, because the value to litigate the case for the defendant is real, and they're going to pay you to walk away.

And then you have lottery cases; cases where the probability of payout is very, very low, but the expected return across a portfolio of cases, if you are a plaintiffs' firm with a number of lawyers and a number of cases, there's -- is high.

So if you take cases with 10 percent chance, and, you know, 9 out of 10 fail, but the tenth one bumps you up to 200, you made a big, big profit, even though you've lost 9 out of your 10 cases, depending on what your cost structure is to work these cases.

So, why I bring this up is that, litigation finance can very well facilitate this type of abusive litigation, and, in particular, this sort of the lottery-case examples, because what they're doing is, is creating bounties for a portfolio of cases.

Now -- so what this ultimately is going to do, and, again, there is a derth of evidence in

terms of how exactly this is happening, other than the fact that it's extremely high interest rates, or implicit interest rates.

But -- but -- but -- but what you could do, again, is take a bunch of really weak cases with high payouts, and aggregate them together, and then get payouts at the end.

Now -- now I -- Professor Sebok's evidence suggests this is not happening in the worst regard, and the reason for that is, the drop rates are actually low.

So, by and large, it's more the consumer protection than a -- a -- a lottery-case model at this point.

But there's nothing in an unregulated market to prevent someone from trying to aggregate, roll up, a bunch of bad claims, and -- as long as they can predict that there's a high possible payout on some of these cases.

And so this would facilitate, precisely, that sort of situation.

And then the individuals in question are, more likely than not, losing their case, and taking out extraordinarily high-interest loans on that case.

So -- so it's -- you know, it's -- it could happen, but it doesn't seem like it's happening that much if 88 percent of them are being upheld.

So let's go, though, to the notion of the interest rate, and why we might think of this a little different than your normal sort of usury case.

I mean, (a) you've got the information imbalance.

So, you know, New York has usury laws.

But -- but, if there's a case of usury laws in an ordinary case, there's certainly one here where there's an information imbalance.

The second is the legal-ethics rules -- the second reason here, is the legal-ethics rules, and Mr. Ginsburg talked about this, you're basically severing ties.

If these aren't done properly, you're severing ties and creating conflicts of interests between the lawyer and the attorney.

And then the third sort of situation here is, you can create odd incentives.

And one is what Mr. Ginsburg talked about, and that's really messing with settlement incentives.

And -- and -- and, you know, this is my concern, and, again, I haven't thought about it much, because I didn't know she was going to say it either, Professor Steinitz' suggestion on this, on making it sort of a recovery-based situation.

My concern on that is it could really influence the motivation of parties in settlement negotiations, make it much harder to settle claims, and increase legal costs in the aggregate.

I'm not sure that it's not better just to have a sort of fee cap that's a usury fee.

And, again, without comment on what the right rate should be, or whether New York's got the right rate in other context, but what you know you're going to have with that is, you may or may not squeeze out some of this litigation financing.

But my attitude would be is, you're squeezing out the worst of it. Right?

You're getting rid of the worst of it with those fees, and preventing lottery-type situations from, potentially, being generated by this.

And I don't think the cost is that high.

There are other opportunities to get for individuals who are desperate to get money at exorbitant interest rates.

And -- but I do think that, you know, we shouldn't necessarily wipe out this entire industry.

But if we're going to do it, we really need to be careful about how we're regulating it, because there's a lot of perverse effects.

So, lots of stuff there, and I'm happy to answer any questions.

SENATOR JACOBS: Thanks.

Senator?

SENATOR ORTT: Yeah, just very quickly.

So, you know, I'm hearing your comments.

Would it be fair, despite the argument as always, these are high-risk loans; ergo, that's why we charge high rates?

JAMES R. COPLAND: Yeah.

SENATOR ORTT: But, yet, the evidence that was given even today, which seemed to be certainly in favor of the industry, or a study that seemed certainly to, was that they're really not nearly as high risk as they would have you believe, because 88 percent have some payout.

Is that -- is that your takeaway --

JAMES COPLAND: Well, 44 percent is the median payout.

SENATOR ORTT: So half of them --

JAMES R. COPLAND: You could do the basic --

SENATOR ORTT: -- are higher than 44 percent?

JAMES R. COPLAND: -- right.

You could do the basic math. Right?

I mean, prime rate is 4.75 percent.

Add, you know, three-point -- 325 basis points to get 8 percent. Right?

You borrow at 8 percent, you know, and cover your costs with some of that surplus there, you can lose a lot more than 12 percent of your cases if your median case is bringing in 44 percent.

That's an extraordinary return.

One more point, if I may, just on -- because I didn't address Congressman Coehlo's comments.

I do want to point out to the Committee, because this wasn't something I necessarily anticipated to put in my written comments, while I very much am sensitive to the need for legal protection for those with disabilities, you know, it's the case for a reason, that the Americans With Disabilities Act did not include a private right of action for that.

Now, we do see certain private rights of action here in New York, most prominently in his native state of California, and those tend to be

abusive lawsuit-mill situations. Right?

They're not a bunch of disabled people who need $2,000 a piece.

You usually have repeat litigants, who are called "vexatious litigants," eventually by the courts, who are on retainer with attorneys that file a portfolio of claims, arguing that ordinary mom-and-pop businesses don't have the signs at the right level, or the right inches between the lines, for their handicapped parking places, and things like that.

And they send out letters and basically say, Give us $30,000 and we'll go away.

And the defendant mom-and-pop business, because of the nature of no-loser fees -- the loser pays for fees in the United States, says, Well, it's going to cost us a hundred grand to litigate this. We'll give them the $30,000 to go away.

We've documented this in a report.

It's a November 2014 update of our "Trial Lawyers, Inc." series, "Wheels of Fortune," focused on disability law. It has a number of these examples.

But I certainly wouldn't hold that area of law out as an example for one to buttress this sort

of consumer lending.

I think it cuts it exactly the opposite direction.

SENATOR JACOBS: Just, you had mentioned, I can't remember exactly, an insure -- a situation where there's an insurance claim, where you -- you -- you -- was it a minimum that you need, that, essentially, it's guaranteed that that liti -- the plaintiff would get something?

JAMES COPLAND: Yeah, we -- we -- I mean, the lawyers basically know what a good claim and a bad claim is. I mean, not with 100 percent certainty.

But, I mean, this is the various situation in the fact pattern that we've done in our contingent-fee work.

And Lester Brickman and Richard Painter both worked this out for us in two separate papers.

But Professor Brickman's point is this:

If -- if -- there doesn't have to be 100 percent certainty, but if you've got a case as a plaintiff's attorney, and you know, with 95 percent certainty, the insurance company, because you know how they behave, you see these repeat cases all the time, this is a volume business again.

Professor Sebok says, most of these are

auto-accident cases and slip-and-fall cases.

These are repeat cases, they're relatively simple, you know what you're going to get.

If you're the plaintiff's attorney, and you know, with 95 percent certainty, you're going to get the insurance policy limit on the case, and that's the payout, well, one-third fee to sign on for that, you have to do, virtually, no work.

You send a letter, you know, you get your name on the (indicating) board, and you've got a massive return.

I mean -- and this is under an ordinary contingent-fee situation.

That's part of our problem with ordinary contingent-fee arrangements in the law.

This sort of situation is the same thing, except, that instead of getting an equity stake, you're getting a high-interest loan on a low-risk case.

And, you know, given the drop rates, a lot of these are low-risk cases they're taking.

And so you're, basically, just exploiting the ignorance of the claimant in this case, the plaintiff in this case, and getting an extraordinary return from that plaintiff by virtue of this.

So -- so -- so it's -- it's precisely the sort of thing I think we ought to worry about, you know, as regulators, particularly, because, I mean, let's be clear on this:

I mean, yes, there are some ways the contingent fees and these structures, you know, are market-based, in a sense. But the underlying vehicle here isn't an exchange of two parties in the market.

The only vehicle here is that you have a court system, which is the State, that uses the State's monopoly of the use of force, that comes in there and says, We're going to take from you and give to you.

Now, we need that court system.

There's a good reason for our tort system.

There's a good reason for recovery from accidents, and things like this.

But, we want to make sure that it's not abused.

SENATOR JACOBS: Thank you very much.

Any other questions?

SENATOR ORTT: Thank you.

SENATOR JACOBS: Well, I want to thank everyone who participated today in today's hearing.

I certainly found it very beneficial.

I hope my colleagues did as well.

I want to thank Senator Ortt for being here, and Assemblyman Magnarelli for being here in the audience, for the entirety of this hearing.

Again, thank you very much, and this concludes today's hearing.

(Whereupon, at approximately 2:47 p.m., the public hearing held before the New York State Senate Standing Committee on Consumer Protection concluded, and adjourned.)

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