

2023-2024 Regular Sessions

IN ASSEMBLY

<(Prefiled)>

January 4, 2023

Introduced by M. of A. MAGNARELLI, SIMON, SAYEGH, BUTTENSCHON, COOK, WILLIAMS, GUNTHER, DINOWITZ, DICKENS, STIRPE, WALLACE, JACKSON, GONZALEZ-ROJAS, BURGOS, HEVESI -- read once and referred to the Committee on Consumer Affairs and Protection

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

<The People of the State of New York, represented in Senate and Assem-

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<bly, do enact as follows:>

- 1- 1 Section 1. Short title. This act shall be known and may be cited as
- 1- 2 the "consumer litigation funding act".
- 1- 3 § 2. Legislative intent. In an effort to promote consumer protections
- 1- 4 related to consumer litigation funding transactions, this act estab-
- 1- 5 lishes that such transactions should be subject to state regulation and
- 1- 6 sets forth requirements regarding disclosure, licensing, funding company
- 1- 7 and attorney responsibilities and limitations, violations and other
- 1- 8 items.
- 1- 9 § 3. The general business law is amended by adding a new article 39-H
- 1-10 to read as follows:
- 1-11 <ARTICLE 39-H>
- 1-12 <THIRD PARTY LITIGATION FINANCING>
- 1-13 <Section 899-ccc. Definitions.>
- 1-14 <899-ddd. Contract requirements; right of rescission.>
- 1-15 <899-eee. Prohibitions and charge limitations.>
- 1-16 <899-fff. Contracted amounts.>
- 1-17 <899-ggg. Disclosures.>
- 1-18 <899-hhh. Violations.>
- 1-19 <899-iii. Assignability; liens.>
- 1-20 <899-jjj. Effect of communication on privileges.>
- 1-21 <899-kkk. Registration.>
- 1-22 <899-lll. Reporting.>

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

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- 2- 1 <899-mmm. Severability.>
- 2- 2 <§ 899-ccc. Definitions. As used in this article, the following terms>
- 2- 3 <shall have the following meanings:>
- 2- 4 <1. "Advertise" means publishing or disseminating any written, oral,>
- 2- 5 <electronic or printed communication or any communication by means of>
- 2- 6 <recorded telephone messages or transmitted or broadcast on radio, tele->
- 2- 7 <vision, the internet or similar communications media, including audio>
- 2- 8 <recordings, film strips, motion pictures and videos, published, dissem->
- 2- 9 <inated, circulated or placed before the public, directly or indirectly,>
- 2-10 <for the purpose of inducing a consumer to enter into a consumer liti->
- 2-11 <gation funding.>
- 2-12 <2. "Charges" means the amount of money to be paid to the consumer>
- 2-13 <litigation funding company by or on behalf of the consumer, above the>
- 2-14 <funded amount provided by or on behalf of the company to a New York>

2-15 <consumer pursuant to this article. Charges include all administrative,>  
2-16 <origination, underwriting or other fees, including interest, no matter>  
2-17 <how denominated.>  
2-18 <3. "Consumer litigation funding" means a non-recourse transaction in>  
2-19 <which a consumer litigation funding company purchases and a consumer>  
2-20 <assigns to the company a contingent right to receive an amount of the>  
2-21 <potential proceeds of a settlement, judgment, award, or verdict obtained>  
2-22 <in the consumer's legal claim.>  
2-23 <4. "Consumer litigation funding company" or "company" means a person>  
2-24 <or entity that enters into a consumer litigation funding contract of no>  
2-25 <more than five hundred thousand dollars with a consumer. This term shall>  
2-26 <not include:>  
2-27 <(a) an immediate family member of the consumer;>  
2-28 <(b) a bank, lender, financing entity, or other special purpose entity:>  
2-29 <(i) that provides financing to a consumer litigation funding company;>  
2-30 <or>  
2-31 <(ii) to which a consumer litigation funding company grants a security>  
2-32 <interest or transfers any rights or interest in a consumer litigation>  
2-33 <funding; or>  
2-34 <(c) an attorney or accountant who provides services to a consumer.>  
2-35 <5. "Consumer" means a natural person who has a pending legal claim and>  
2-36 <who resides or is domiciled in New York.>  
2-37 <6. "Funded amount" means the amount of monies provided to, or on>  
2-38 <behalf of, the consumer in the consumer litigation funding. "Funded">  
2-39 <amount" excludes charges.>  
2-40 <7. "Funding date" means the date on which the funded amount is trans->  
2-41 <ferred to the consumer by the consumer litigation funding company either>  
2-42 <by personal delivery or via wire, ACH or other electronic means or>  
2-43 <mailed by insured, certified or registered United States mail.>  
2-44 <8. "Immediate family member" means a parent; sibling; child by blood,>  
2-45 <adoption, or marriage; spouse; grandparent; or grandchild.>  
2-46 <9. "Legal claim" means a bona fide civil claim or cause of action.>  
2-47 <10. "Resolution date" means the date the funded amount, plus the>  
2-48 <agreed upon charges, are delivered to the consumer litigation funding>  
2-49 <company by the consumer, the consumer's attorney or otherwise.>  
2-50 <§ 899-ddd. Contract requirements; right of rescission. 1. All consumer>  
2-51 <litigation funding contracts shall meet the following requirements:>  
2-52 <(a) a contract shall be written in a clear and coherent manner using>  
2-53 <words with common, everyday meanings to enable the average consumer who>  
2-54 <makes a reasonable effort under ordinary circumstances to read and>  
2-55 <understand the terms of the contract without having to obtain the>  
2-56 <assistance of a professional;>

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3- 1 <(b) the contract shall be completely filled in when presented to the>  
3- 2 <consumer for signature;>  
3- 3 <(c) the contract shall contain, in twelve point bold type font, a>  
3- 4 <right of rescission, allowing the consumer to cancel the contract with->  
3- 5 <out penalty or further obligation if, within ten business days after the>  
3- 6 <funding date, the consumer returns to the consumer litigation funding>  
3- 7 <company the full amount of the disbursed funds;>  
3- 8 <(d) the contract shall contain the initials of the consumer on each>  
3- 9 <page;>  
3-10 <(e) a statement that there are no fees or charges to be paid by the>  
3-11 <consumer other than what is disclosed on the disclosure form;>  
3-12 <(f) in the event the consumer seeks more than one litigation funding>  
3-13 <contract from the same company, a disclosure providing the cumulative>  
3-14 <amount due from the consumer for all transactions, including charges>  
3-15 <under all contracts, if repayment is made any time after the contracts>  
3-16 <are executed;>  
3-17 <(g) a statement of the maximum amount the consumer may be obligated to>  
3-18 <pay under the contract other than in a case of material breach, fraud or>  
3-19 <misrepresentation by or on behalf of the consumer; and>  
3-20 <(h) clear and conspicuous detail of how charges, including any appli->  
3-21 <cable fees, are incurred or accrued.>  
3-22 <2. The contract shall contain a written acknowledgement by the attor->  
3-23 <ney retained by the consumer in the legal claim that attests to the>  
3-24 <following:>  
3-25 <(a) the attorney has reviewed the mandatory disclosures in section>

3-26 <eight hundred ninety-nine-ggg of this article with the consumer;>  
3-27 <(b) the attorney is being paid on a contingency basis pursuant to a>  
3-28 <written fee agreement;>  
3-29 <(c) all proceeds of the legal claim will be disbursed via either the>  
3-30 <trust account of the attorney or a settlement fund established to>  
3-31 <receive the proceeds of the legal claim on behalf of the consumer;>  
3-32 <(d) the attorney is obligated to disburse funds from the legal claim>  
3-33 <and take any other steps to ensure that the terms of the litigation>  
3-34 <funding contract are fulfilled;>  
3-35 <(e) the attorney has not received a referral fee or other consider->  
3-36 <ation from the consumer litigation funding company in connection with>  
3-37 <the consumer litigation funding, nor will the attorney receive such fee>  
3-38 <or other consideration in the future; and>  
3-39 <(f) the attorney in the legal claim has provided no tax, public or>  
3-40 <private benefit planning, or financial advice regarding this trans->  
3-41 <action.>  
3-42 <3. In the event that the acknowledgement required pursuant to para->  
3-43 <graph (c) of subdivision two of this section is not completed by the>  
3-44 <attorney or firm retained by the consumer in the legal claim, the>  
3-45 <contract shall be null and void. The contract shall remain valid and>  
3-46 <enforceable in the event the consumer terminates the initial attorney>  
3-47 <and/or retains a new attorney with respect to the legal claim.>  
3-48 <4. Notwithstanding paragraph b of subdivision three of section 5-501>  
3-49 <of the general obligations law, no prepayment penalties or fees shall be>  
3-50 <charged or collected on consumer litigation funding. A prepayment>  
3-51 <penalty on consumer litigation funding shall be unenforceable.>  
3-52 <§ 899-eee. Prohibitions and charge limitations. 1. Consumer liti->  
3-53 <gation funding companies shall be prohibited from:>  
3-54 <(a) paying or offering to pay commissions, referral fees, or other>  
3-55 <forms of consideration to any attorney, law firm, medical provider,>  
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4- 1 <chiropractor or physical therapist or any of their employees for refer->  
4- 2 <ring a consumer to the company;>  
4- 3 <(b) accepting any commissions, referral fees, rebates or other forms>  
4- 4 <of consideration from an attorney, law firm, medical provider, chiro->  
4- 5 <practor or physical therapist or any of their employees;>  
4- 6 <(c) intentionally advertising materially false or misleading informa->  
4- 7 <tion regarding its products or services;>  
4- 8 <(d) referring, in furtherance of an initial legal funding, a customer>  
4- 9 <or potential customer to a specific attorney, law firm, medical provid->  
4-10 <er, chiropractor or physical therapist or any of their employees;>  
4-11 <provided, however, if a customer needs legal representation, the company>  
4-12 <may refer the customer to a local or state bar association referral>  
4-13 <service;>  
4-14 <(e) knowingly providing funding to a consumer who has previously>  
4-15 <assigned and/or sold a portion of the consumer's right to proceeds from>  
4-16 <his or her legal claim without first making payment to and/or purchasing>  
4-17 <a prior unsatisfied consumer litigation funding company's entire funded>  
4-18 <amount and contracted charges, unless a lesser amount is otherwise>  
4-19 <agreed to in writing by the consumer litigation funding companies,>  
4-20 <except that multiple companies may agree to contemporaneously provide>  
4-21 <funding to a consumer provided that the consumer and the consumer's>  
4-22 <attorney consent to the arrangement in writing;>  
4-23 <(f) receiving any right to, or making, any decisions with respect to>  
4-24 <the conduct of the underlying legal claim or any settlement or resol->  
4-25 <ution thereof. The right to make such decisions shall remain solely with>  
4-26 <the consumer and the attorney in the legal claim;>  
4-27 <(g) attempting to obtain a waiver of any remedy or right by the>  
4-28 <consumer, including but not limited to the right to trial by jury; and>  
4-29 <(h) knowingly paying or offering to pay for court costs, filing fees>  
4-30 <or attorney's fees either during or after the resolution of the legal>  
4-31 <claim, using funds from the consumer litigation funding transaction.>  
4-32 <2. An attorney or law firm retained by the consumer in the legal claim>  
4-33 <shall not have a financial interest in the consumer litigation funding>  
4-34 <company offering consumer litigation funding to that consumer.>  
4-35 <3. Any attorney who has referred the consumer to his or her retained>  
4-36 <attorney shall not have a financial interest in the consumer litigation>  
4-37 <funding company offering consumer litigation funding to that consumer.>

4-38 <4. The attorney may only disclose privileged information to the>  
4-39 <consumer litigation funding company with the written consent of the>  
4-40 <consumer.>

4-41 <5. Notwithstanding any provision of law to the contrary, charges paid>  
4-42 <to a consumer litigation funding company by or on behalf of a consumer>  
4-43 <under this article shall not exceed twenty-five per centum per annum or>  
4-44 <its equivalent rate for a longer or shorter period. Any contract which>  
4-45 <exceeds such rate shall be considered usurious as defined by section>  
4-46 <5-501 of the general obligations law.>

4-47 <§ 899-fff. Contracted amounts. The contracted amount to be paid to the>  
4-48 <consumer litigation funding company shall be a predetermined amount>  
4-49 <based upon intervals of time from the funding date through the resol->  
4-50 <ution date, and shall not be determined as a percentage of the recovery>  
4-51 <from the legal claim.>

4-52 <§ 899-ggg. Disclosures. All consumer litigation funding contracts>  
4-53 <shall contain the disclosures specified in this section, which shall>  
4-54 <constitute material terms of the contract. Unless otherwise specified,>  
4-55 <such disclosures shall be typed in at least twelve point bold type font>  
4-56 <and be placed clearly and conspicuously within the contract, as follows:>

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5- 1 <1. On the front page under appropriate headings, language specifying:>  
5- 2 <(a) the funded amount to be paid to the consumer by the consumer liti->  
5- 3 <gation funding company;>

5- 4 <(b) an itemization of one-time charges;>

5- 5 <(c) the maximum total amount to be assigned by the consumer to the>  
5- 6 <company, including the funded amount and all charges; and>

5- 7 <(d) a payment schedule to include the funded amount and charges, list->  
5- 8 <ing all dates and the amount due at the end of each one hundred eighty>  
5- 9 <day period from the funding date, until the date the maximum amount due>  
5-10 <to the company pursuant to the contract is paid.>

5-11 <2. Pursuant to the provisions set forth in this section, within the>  
5-12 <body of the contract: "Consumer's right to cancellation: you may cancel>  
5-13 <this contract without penalty or further obligation within ten business>  
5-14 <days after the funding date if you return to the consumer litigation>  
5-15 <funding company the full amount of the disbursed funds.">

5-16 <3. The consumer litigation funding company shall have no role in>  
5-17 <deciding whether, when and how much the legal claim is settled for,>  
5-18 <however, the consumer and consumer's attorney must notify the company of>  
5-19 <the outcome of the legal claim by settlement or adjudication prior to>  
5-20 <the resolution date. The company may seek updated information about the>  
5-21 <status of the legal claim but in no event shall the company interfere>  
5-22 <with the independent professional judgement of the attorney in the>  
5-23 <handling of the legal claim or any settlement thereof.>

5-24 <4. Within the body of the contract, in all capital letters in at least>  
5-25 <twelve point bold type font contained within a box: "THE FUNDED AMOUNT>  
5-26 <AND AGREED UPON CHARGES SHALL BE PAID ONLY FROM THE PROCEEDS OF YOUR>  
5-27 <LEGAL CLAIM, AND SHALL BE PAID ONLY TO THE EXTENT THAT THERE ARE AVAIL->  
5-28 <ABLE PROCEEDS FROM YOUR LEGAL CLAIM. YOU WILL NOT OWE (INSERT NAME OF>  
5-29 <THE CONSUMER LITIGATION FUNDING COMPANY) ANYTHING IF THERE ARE NO>  
5-30 <PROCEEDS FROM YOUR LEGAL CLAIM, UNLESS YOU HAVE VIOLATED ANY MATERIAL>  
5-31 <TERM OF THIS CONTRACT OR YOU HAVE COMMITTED FRAUD AGAINST (INSERT NAME>  
5-32 <OF CONSUMER LITIGATION FUNDING COMPANY).">

5-33 <5. Located immediately above the place on the contract where the>  
5-34 <consumer's signature is required, in twelve point bold type font: "Do>  
5-35 <not sign this contract before you read it completely. Do not sign this>  
5-36 <contract if it contains any blank spaces. You are entitled to a>  
5-37 <completely filled-in copy of the contract before you sign this contract.>  
5-38 <You should obtain the advice of any attorney. Depending on the circum->  
5-39 <stances, you may want to consult a tax, public or private benefits plan->  
5-40 <ning, or financial professional. You acknowledge that your attorney in>  
5-41 <the legal claim has provided no tax, public or private benefit planning,>  
5-42 <or financial advice regarding this transaction. You further acknowledge>  
5-43 <that your attorney has explained the terms and conditions of the consum->  
5-44 <er litigation funding contract.">

5-45 <6. A copy of the executed contract shall promptly be delivered to the>  
5-46 <attorney for the consumer.>

5-47 <§ 899-hhh. Violations. 1. Any consumer litigation funding company>  
5-48 <found in willful violation of any provision of this article in a specif->

5-49 <ic funding case: (a) waives its right to recover both the funded amount>  
5-50 <and any and all charges, as defined in subdivision two of section eight>  
5-51 <hundred ninety-nine-ccc of this article, in that particular case; and>  
5-52 <(b) shall be liable for a civil penalty of not more than five thousand>  
5-53 <dollars for each violation, which shall accrue to the state of New York>  
5-54 <and may be recovered in a civil action brought by the attorney general.>  
5-55 <2. Nothing in this article shall be construed to restrict the exercise>  
5-56 <of powers or the performance of the duties of the New York state attor->  
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6- 1 <ney general, which he or she is authorized to exercise or perform by>  
6- 2 <law.>  
6- 3 <§ 899-iii. Assignability; liens. 1. The contingent right to receive an>  
6- 4 <amount of the potential proceeds of a legal claim is assignable by a>  
6- 5 <consumer.>  
6- 6 <2. Only attorney's liens related to the legal claim which is the>  
6- 7 <subject of the consumer litigation funding or medicare or other statuto->  
6- 8 <ry liens related to the legal claim shall take priority over any lien of>  
6- 9 <the consumer litigation funding company. All other liens shall take>  
6-10 <priority by normal operation of law.>  
6-11 <§ 899-jjj. Effect of communication on privileges. All communication>  
6-12 <between the consumer's attorney in the legal claim and the consumer>  
6-13 <legal funding company as it pertains to the consumer legal funding shall>  
6-14 <fall within the scope of the attorney client privilege, including, with->  
6-15 <out limitation, the work-product doctrine.>  
6-16 <§ 899-kkk. Registration. 1. Unless a consumer litigation funding>  
6-17 <company has first registered with the state of New York pursuant to this>  
6-18 <article, the company may not engage in the business of consumer liti->  
6-19 <gation funding in this state.>  
6-20 <2. An applicant's registration must be filed in the manner prescribed>  
6-21 <by the secretary of state and must contain all the information required>  
6-22 <by the department of state to make an evaluation of the character and>  
6-23 <fitness of the applicant company. The initial application must be accom->  
6-24 <panied by a five hundred dollar fee. A renewal registration must include>  
6-25 <a two hundred dollar fee. A registration must be renewed every two years>  
6-26 <and expires on the thirtieth of September.>  
6-27 <3. A certificate of registration may not be issued unless the depart->  
6-28 <ment of state, upon investigation, finds that the character and fitness>  
6-29 <of the applicant company, and of the officers and directors thereof, are>  
6-30 <such as to warrant belief that the business will be operated honestly>  
6-31 <and fairly within the purposes of this article.>  
6-32 <4. Every registrant shall also, at the time of filing such applica->  
6-33 <tion, file with the department of state, if the department of state so>  
6-34 <requires, a bond satisfactory to the department of state in an amount>  
6-35 <not to exceed fifty thousand dollars. In lieu of the bond at the option>  
6-36 <of the registrant, the registrant may post an irrevocable letter of>  
6-37 <credit. The terms of the bond must run concurrent with the period of>  
6-38 <time during which the registration will be in effect. The bond must>  
6-39 <provide that the registrant will faithfully conform to and abide by the>  
6-40 <provisions of this article and to all rules lawfully made by the admin->  
6-41 <istrator under this act and to any such person or persons any and all>  
6-42 <amounts of money that may become due or owing to the state or to such>  
6-43 <person or persons from the registrant under and by virtue of this arti->  
6-44 <cle during the period for which the bond is given.>  
6-45 <5. Upon written request, the applicant shall be entitled to a hearing>  
6-46 <on the question of the applicant's qualifications for registration if:>  
6-47 <(a) the department of state has notified the applicant in writing that>  
6-48 <the application has been denied, or>  
6-49 <(b) the department of state has not issued a registration within sixty>  
6-50 <days after the application for the registration was filed.>  
6-51 <6. A request for a hearing may not be made more than fifteen days>  
6-52 <after the department has mailed a written notice to the applicant that>  
6-53 <the application has been denied and stating in substance the department>  
6-54 <of state's findings supporting denial of the application.>  
6-55 <7. Notwithstanding the prior approval requirement of subdivision one>  
6-56 <of this section, a consumer litigation funding company that registered>  
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7- 1 <with the department of state between the effective date of this article>

7- 2 <or when the department of state has made applications available to the>  
7- 3 <public, whichever is later, and one hundred eighty days thereafter may>  
7- 4 <engage in consumer litigation funding while the company's registration>  
7- 5 <is pending approval with the department of state. All funding agreements>  
7- 6 <entered into prior to the effective date of this article are not subject>  
7- 7 <to the terms of this article.>  
7- 8 <8. No consumer litigation funding company may use any form of consumer>  
7- 9 <litigation funding contract in this state unless it has been filed with>  
7-10 <the department of state in accordance with the filing procedures set>  
7-11 <forth by the secretary of state.>  
7-12 <9. The secretary of state is hereby authorized to adopt rules and>  
7-13 <regulations to implement the provisions of this section as needed.>  
7-14 <§ 899-lll. Reporting. 1. Each consumer litigation funding company that>  
7-15 <engages in business in the state shall submit a report to the department>  
7-16 <of state no later than the thirty-first of January of each year specify->  
7-17 <ing:>  
7-18 <(a) number of consumer litigation fundings by the company;>  
7-19 <(b) summation of funded amounts in dollar figure; and>  
7-20 <(c) annual percentage charged to each consumer where repayment was>  
7-21 <made.>  
7-22 <2. The department of state shall make such information available to>  
7-23 <the public, in a manner which maintains the confidentiality of the name>  
7-24 <of each company and consumer, no later than ninety days after the>  
7-25 <reports are submitted.>  
7-26 <§ 899-mmm. Severability. If any provision of this article is, for any>  
7-27 <reason, declared unconstitutional or invalid, in whole or in part, by>  
7-28 <any court of competent jurisdiction, such portion shall be deemed sever->  
7-29 <able, and such unconstitutionality or invalidity shall not affect the>  
7-30 <validity of the remaining portions of this article, which remaining>  
7-31 <portions shall continue in full force and effect.>  
7-32 <§ 4. This act shall take effect on the one hundred eightieth day after>  
7-33 <it shall have become a law; provided, however, it shall not apply or in>  
7-34 <any way affect or invalidate any consumer litigation funding previously>  
7-35 <effectuated prior to the effective date of this act.>