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Advocate's VIEW

Personal injury plaintiff non-recourse loans: The issues

Many plaintiffs' personal injury attorneys face the situation of a client seeking a non-recourse loan from a private lending company while a personal injury case is pending.

In the United States, the lawsuit cash advance and loan industry is worth \$100 million a year. Such loans raise serious concerns for the practitioner representing the plaintiff. First, the loan agreements typically charge astronomical interest rates.

For example, in a case that is currently pending in New York State Supreme Court in Brooklyn, Joseph Gill received two loans from LawBuck\$ totaling \$4,000, but ultimately, when his case settled 5 years later, the loan company wanted an astonishing \$116,000 under the terms of the agreements.

One loan contract charged an interest rate of 58 percent and the other charged interest at 70 percent, compounded monthly. The underlying action settled for \$500,000 and after attorneys' fees, the plaintiff was to receive around \$350,000 — but under the terms of the loan agreements almost a third of that amount would have to be paid to LawBuck\$ for its \$4,000 investment.

One issue that such loans raise is whether the attorney for the plaintiff in the personal injury action is obligated to read the terms of the loan agreement carefully and counsel their client about the repayment obligations, assuming the attorney knows about the agreement prior to the client entering the contract. Some agreements require the plaintiff's attorney to actually sign a document representing that he or she has reviewed the contract and counseled the client about its terms. Presumably, this is for the lender's protection later on if the plaintiff seeks to avoid the repayment obligations. Furthermore, the payment terms often require the lender to be paid first before any payment to the plaintiff.

Why would the attorney take on such additional obligations and risk? The overriding concern is likely that the attorney wants to keep the injured person as a client and the client is pressing for the cash that the loan will provide.

While the attorney may not be obligated to represent the

injured person with respect to the loan agreement — especially since the attorney may not concentrate his or her practice in the area of commercial agreements — caution would suggest that at a minimum the practitioner should warn the client about the consequences of entering into such agreements, how it may negatively impact the ability to resolve the case, provide for any recovery to the plaintiff at the end of the litigation, and encourage the retention of independent legal counsel.

In Gill's case, his counsel took on the added representation of Gill in a court proceeding after the settlement in an attempt to set aside the agreements. Brooklyn Supreme Court Justice Ellen Spodek is yet to decide what she will do with the agreements, but she has suggested that the contracts are usurious, and if not usurious, unconscionable.

LawBuck\$ initially indicated it would settle for \$90,000 but withdrew its offer and according to public information, is insisting on full payment.

How do these companies avoid the laws of usury? Apparently, the answer lies in the non-recourse nature of the loans. In other words, if the plaintiff does not recover anything, then the loan company is contractually obligated to forgo payment.

Some companies also structure the agreement in terms of a purchase agreement, describing the loan as the purchase of a part of the "property" of the lawsuit proceeds. Some go so far as to suggest that a UCC-1 will be filed. By purchasing a portion of the proceeds, the companies contend that the agreement is not a traditional loan subject to regulation for usurious rates.

In 2010, Bill 7891-B was introduced in the New York State Assembly attempting to regulate non-recourse civil litigation advance contracts by requiring the injured party's attorney to certify that the loan agreement was reviewed with the client and the repayment terms explained. The legislation did not pass as written and in 2011 a similar bill was introduced without much activity.

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By LAURIE A. GIORDANO

Daily Record
Columnist

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The New York State Bar Association reviewed the 2010 bills and the Committee on the Tort System issued a Memorandum in Opposition in June 2010, opposing the bill on grounds including that the legislation would place the attorney in the middle of a lending transaction between the lender and the plaintiff and exposes the attorney to liability. Further, it advised that any legislation would be incomplete without addressing the usurious rates that are charged.

The New York State Attorney General's Office has also reviewed the practices of civil litigation non-recourse loan companies and in 2005 it reached an agreement with the following entities: BridgeFunds Limited; Magnolia Funding, LLC; New Amsterdam Capital Partners, LLC dba LawMax; Oasis Legal Finance Co., LLC; Plaintiff Funding Corporation dba LawCash; Plaintiff Support Services, Inc.; Pre-Settlement Finance, LLC; Quickcash, Inc. and Whitehaven Group, LLC.

The agreement provides, among other things, that loan docu-

ments must conspicuously disclose fees and interest rates, the total amount to be repaid over 36 months broken down in 6 month intervals, as well as a notarized acknowledgement from the plaintiff's attorney that the contract has been reviewed and explained to the client.

What more can be done? Short of legislation to regulate or prohibit the current practices of companies loaning to plaintiffs, the courts will be asked to address this issue as it is raised by individual plaintiffs facing the prospect of paying exorbitant interest rates on their original loan amounts to such companies.

As of the submission of this article, a decision has not been published in Gill's case, but counsel should watch for its impact once the decision is released.

Laurie A. Giordano is a founding partner of the Rochester litigation law firm of Leclair Korona Giordano Cole LLP. She concentrates her practice in the areas of insurance law, commercial and personal injury litigation and can be reached at lgiordano@leclairkorona.com or via www.leclairkorona.com.