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# Letter to the Hon. Sen. Orrt (NYS Senate) Regarding Litigation Finance (Lawsuit Lending) (2018)

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# Letter to the Hon. Sen. Orrt (NYS Senate) Regarding Litigation Finance (Lawsuit Lending) (2018)

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Dear Hon. Sen. Ortt,

I would like to begin by thanking you for your question regarding how to support a specific minimum recovery requirement to protect consumers of litigation financing. I also, as an academic, humbly commend the desire to create principled and, where possible, data-driven statutory requirements. I divide my response below, in support of a 50% minimum recovery requirement, into two parts – one relating to the economics of consumer litigation finance, the other relating to the practice's normative dimensions.

***Economics: Will a Minimum Recovery Requirement of 50% Eliminate Litigation Financing in New York?***

As a preliminary matter, it is important to note that legal scholars have long known that, because of the unavailability of data as well as other methodological challenges "the behavior of the tort litigation system is… unknown[] or unknowable."[1] One commentator has used the following evocative metaphor to describe the resulting policy-making-in-the-dark: "Students of legal policy face an intellectual challenge comparable to that encountered by paleontologists and archaeologists. On the evidence of a few bones, a whole dinosaur must be extrapolated."[2] Data on litigation outcomes are hard to come by predominantly because most cases settle and, generally, settlement information is

[1] Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System -- and Why Not*?, 140 UNIVERSITY OF PENNSYLVANIA L. REV. 1147, 1149 (1992). Saks explains, at length, the reasons for the dearth of data on litigation generally and tort litigation specifically.

[2] Saks at 1149.

private (known to the parties, their lawyers, and, where relevant, insurers). Information about litigation finance is even harder to come by because the practice is new and the information is private as well. The dearth of data, it should be noted, makes it *equally* difficult to assess *each* of the options currently considered by the committee: a flat rate, a percentage cap, and a minimum fee requirement.

The minimum recovery needs to be not so high as to drive 'good actor funders' out of the market. Beyond that, there is no minimum recovery that is too high. Therefore, the question to ask is whether there is evidence that a minimum recovery requirement of 50% would drive litigation financing out of New York State. There is no such evidence and there is some evidence to the contrary. Below I discuss the two most relevant studies.

In their 2017 study of contingency fees in New York City (studying all contingency fee cases, not necessarily personal injuries or torts) Helland et. al, report that "about 84% of all [contingency fee] cases settled, 13% were abandoned, and less than 2% went to trial or were otherwise adjudicated."[3] In terms of recovery amounts they report, for all contingency fee cases, the following:

> "The average recovery among settled and adjudicated cases is remarkably similar, both around $90,000. The similar averages, however, mask large differences in distributions. Plaintiffs win only 29% of adjudicated cases, so most adjudicated cases result in no recovery for the plaintiff. In contrast, a settlement, by definition, involves some payment to the plaintiff. Most recoveries in the dataset are relatively small. Seventy-five percent of settlements are $37,500 or less, and 75% of adjudicated cases result in judgments of $6,000 or less. On the other hand, the distribution of adjudicated cases is dominated by the fact that over 70% of cases result in no recovery at all. If attention is restricted to adjudicated cases with nonzero recoveries, the seventy fifth percentile jumps to $148,153."[4]

Last but not least, Helland et. al report that "[p]laces with many claims per capita… such as Harlem and the Bronx, tend to be places with low per capita income… Conversely, places with relatively few

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[3] Eric Helland et al., *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971, 1982 (2017).

[4] Helland et. al. at 1985.

suits… such as the Upper East and Upper West Sides of Manhattan, tend to be places with high incomes."[5]

The second relevant study is Avraham & Sebok's 2018 empirical study of consumer litigation finance.[6] The authors report that their data was provided by "one of the largest consumer litigation financing firm in the United States"[7] namely, presumably, one of the 'good actors' the regulation does not seek to drive out of practice. This, in contrast with 'bad actors' which, the consensus of the Senators at the hearing appeared to agree, should be regulated into compliance or out of business in the State of New York.

From this study we can glean that the risk undertaken by funders should not be exaggerated. The presumptively 'good actor funder' in the study was selective; it reportedly rejected 52% of cases submitted to it for funding.[8] And the data suggests that only "12% of the consumers who received funding pay nothing for the advances they receive, either because they pay nothing to the funder at the resolution of their cases, i.e. a complete default (10%) or they pay only an amount that reflects all or some of the original advance [-the remaining 2%]."[9]

This is consistent with a widely held understanding that the riskiness of personal injury cases has decreased significantly as tort law has become better-calibrated to protecting victims.[10] Avraham &

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[5] Helland et. al. at 1991.

[6] Ronen Avraham & Anthony J. Sebok, *An Empirical Investigation of Third Party Litigation Funding*, 104 CORNELL L. REV. (forthcoming)). This "first large-scale empirical analysis of the pre- and post- contract underwriting behavior of the consumer TPF market," while extremely valuable, still looks only at a single firm that self-selected to provide data. *Id*. at 5-6. (In their literature review the authors note that "David Abrams & Daniel Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PENN. J. BUS. L. 1075, (2013) and Daniel Chen, *Can Markets Stimulate Rights? On the Alienability of Legal Claims*, 46 RAND JOURNAL OF ECONOMICS 23 (2015) are the only published empirical studies about the industry and they both use data from Australia and only about 113 funded cases. Id. at n. 26.)."

[7] Id. at 6.

[8] Avraham & Sebok at 10.

[9] Id. at 7.

[10] *See, e.g.* Lester Brickman, *Contingent Fees without Contingencies, Hamlet without the Prince of Denmark?*, 37 U.C.L.A. L. REV. 29, 89-94 (1989) (reforms of substantive tort law, such as the introduction of strict liability, have lowered the riskiness of cases); Richard L. Abel, *How the Plaintiffs' Bar Bars Plaintiffs*, 51 N.Y.L. SCH. L. REV. 345, 367-368 (2006) (documented selectivity of lawyers, even at the 'low end,' means cases are not as risky as lawyers justifying high contingency fees claim).

Sebok's description of the underwriting process also helps us to understand the level of risk undertaken by responsible funders: "The funder also records the injuries the client suffered, including whether he suffered fractures or needed any surgeries, the length of the medical treatment it [*sic*.] went through, and time the client was out of work. Following this preliminary investigation, the funder then collects data on the defendant's insurance carrier, its rating, and the scope of coverage the defendant holds. Lastly, the funder estimates the underlying case value including the lost wages and medical expenses involved."[11] At the end of this process, "[f]unders [plural in the original - MS] invest about 7% of the estimated case value."[12]

Further, according to this study "the median actual annual cost [of the funders' advance to the plaintiff] is approximately 44% of the amount funded, once one takes into account fees, defaults and haircuts."[13] The median advance is $2,250, a median duration of the financed phase of a litigation is 14 months, and the median amount paid back to the funder is $3,380 (a markup of 50%).[14]

Understanding the limitations of the available data and what conclusions one can draw from that data, one can nonetheless cautiously point out that 'good' funders should have plenty of room to make a comfortable profit with a 50% minimum recovery for plaintiffs in a standard case. Consider how this would play out in a case involving a $37,500 recovery (Helland et. al.'s seventy fifth percentile of settlements). The plaintiff, at a minimum of 50%, would receive at least $18,750. The attorney working on contingency could receive up to 33.3%, or $12,487.50. Finally the funder, at the remaining 16.7%, could recover up to $6,262.50. That is approximately 278% of the median advance of $2,250 over the course of a median 14 months.[15] With all of the necessary caveats about the dangers of extrapolating from two different studies of 'apples and oranges' (i.e., of all contingency fee cases versus of the cases of a single consumer litigation financier), this should nonetheless give us comfort

[11] Avraham & Sebok at 13.

[12] Id. at 7.

[13] Id. at 7.

[14] Id. at 13 – 14.

[15] This is, of course, not to endorse a 278% interest over 14 months, but rather to show that under what would seem like a non-outlier case, there is plenty reserved for financing with a 50% minimum recovery requirement.

that 'good actor funders' will likely not be regulated out of providing finance for a 'garden-variety' case.[16]

I wish to now turn to normative arguments favoring the 50% minimum recovery requirement.

***Normative Argument: New York's Longstanding Conception of Conscionability in Lending***

As noted in my written testimony, New York has long capped litigation finance of personal injury claims (by lawyers, the only lawful law lenders prior to the advent of third-party funding) at a third of recovery barring extraordinary circumstances. [17]

It is also worth repeating here that the CEO of the global leader in commercial litigation finance, Bentham IMF, has repeatedly taken the position that "We won't do a case [] where we don't think the client will get 50% of their recovery."[18]

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[16] Avraham & Sebok's finding, above, that funders "invest about 7% of the estimated case value" points in the same direction: a 50% minimum recovery requirement (leaving 16.7% for financing) would mean funders could recovery approximately 2.4 times the 7% advanced (2.385 x 7 = 16.7).

[17] More precisely, the rules capping contingency fees have been summarized as follows:

> "In New York… fee caps apply to "any claim or action for personal injury or wrongful death, other than one alleging medical, dental or podiatric malpractice." All of the New York rules provide that a contingency fee will be "deemed to be fair and reasonable" if it satisfies one of two schedules. One schedule, Schedule B, applies if the original agreement set a contingency fee "not exceeding 33⅓ percent of the sum recovered." … The other schedule, Schedule A, applies when there is no contract providing for a flat fee less than or equal to one-third. Schedule A requires a contingency fee to be less than or equal to the following tiered standard: "(i) 50 percent on the first $1,000 of the sum recovered, (ii) 40 percent on the next $2,000 of the sum recovered, (iii) 35 percent on the next $22,000 of the sum recovered, (iv) 25 percent on any amount over $25,000 of the sum recovered." Contingency fees that meet neither of these two schedules "constitute the exaction of unreasonable and unconscionable compensation."… all of the New York rules also allow the attorney to apply for higher fees. But in New York, attorneys can only seek higher fees in "extraordinary circumstances.""

*See* Monica Hughes, *Applying State Contingency Fee Caps in Multidistrict Litigation (MDL) Settlements*, 91 Tx. L. Rev. 961, 964-965 (2013).

[18] *See* Dylan Beynon, *From the Words of Litigation Funding Company Bentham IMF*, MIGHTY (July 10, 2015), https://www.mighty.com/blog/wordslitigation-funding-company-bentham-imf. Going on to report that "during its thirteen-year tenure in Australia, Bentham has seen its clients receive at least 65% of their settlements."; Charlie Gollow & Ralph J. Sutton, LITIGATION FINANCE THE FACTS – NOT THE FICTION, 1 (Bentham IMF, 2013), where Bentham IMF advertises that "IMF has recovered over $1.24B, of which more

The cap on contingency fees, like the criminal prohibition on usury and the traditional prohibition on the assignment of personal injury causes of action, is rooted in normative public policy preferences.[19] The history of New York's cap on attorneys' fees is described in Helland et. al.. The cap was instituted after the courts started requiring attorneys to file a retainer statement which disclosed the attorneys' compensation. These revealed that the majority of retainers specified that 50% of the judgment or settlement were paid to the lawyers. The reaction was the one-third cap (or sliding scale) we have today.[20]

The regulation also required lawyers to file with the court, within 15 days of receiving funds on behalf of the client, a "closing statement" which details, among other things: the gross amount of the recovery, the taxable costs and disbursements, the net amount of the recovery actually received by the client, and the amount of the compensation actually received or retained by the attorney.[21]

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than $800M has been returned to its many thousands of clients, small and medium businesses, charities and municipalities."; *Sharing Risk with Clients*, BENTHAM IMF, https://www.benthamimf.com/news/media/sharing-risk-with-clients. (Describing Bentham's 50/50 standard financing model, in which Bentham receives 20% of the recovery in a suit, the law firm involved receives another 20%, and the client would receive at least half, or up to 60%.).

Commercial litigation finance, as explained in my testimony, is different from consumer litigation finance. However, the normative reasons for ensuring a minimum recovery are stronger, not weaker, when dealing with tort claims and unsophisticated plaintiffs – the two distinguishing features of consumer litigation finance.

[19] *See* Madden v. Midland Funding, LLC, 237 F. Supp. 3d 130, 149-151 (collecting cites for the proposition that in New York, the usury prohibition is a matter of "fundamental public policy" and on that basis rejecting the parties' contractual choice of law selecting the law of Delaware, which has a more lenient usury standard). *See also* Schneider v. Phelps, 41 N.Y.2d 238, 243. ("Law-making authorities in almost all civilizations have recognized that the crush of financial burdens causes people to agree to almost any conditions of the lender and to consent to even the most improvident loans."). For a discussion of the assignment of a tort and personal injury claims, *see* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 127-128 (2010) (noting the traditional policy rationale for the prohibition on assignment of private law claims, arguing that such a prohibition emanated from a "relational" view of law); Patrick T. Morgan, *Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims*, 66 MO. L. REV. 683, 694-696 (2001) (claiming that both the humanitarian concern of sparing injured people the trauma of individuals looking to purchase their claim, and the potential high administrative costs, drove the ban on assignability of personal injury claims.)

[20] Helland et al., Part I "The regulations also required that the percentage that goes to the lawyer, whether a simple flat percentage or a percentage based on the sliding scale, must be computed "on the net sum recovered after deducting taxable costs and disbursements and expenses for legal, medical, investigative or other services properly chargeable to the claim."" Id. at 1975 quoting SPECIAL R. REGULATING THE CONDUCT OF ATTORNEYS AND COUNSELORS-AT-LAW IN THE FIRST JUDICIAL DEPARTMENT 4(c), reprinted in CLEVENGER'S ANNUAL PRACTICE OF NEW YORK 21- 10 (Jos. R. Clevenger ed., 1957).

[21] Id. at 1975 (reporting that "The First and Second Departments continue to require closing statements in much the same form, although the Fourth Department repealed its requirement in 2003. The First Department

Retainer and closing statements are confidential and information may not be divulged without a written order of the presiding justice of the Appellate Division of the Supreme Court.[22]

New York is not alone among the states in capping contingency fees for attorneys. In New Jersey, contingency fee caps are found under the New Jersey Rules of Court and utilize a sliding scale in which fees are capped at 33.3% of recovery on the first $500,000, and reduce from that point onwards.[23] Connecticut imposes a fee cap via statute.[24] This statute, similar to the New Jersey rule, imposes a sliding cap starting at 33.3% for the first $300,000, and declining thereafter.[25] Outside of the tri-state area, states such as Florida and Michigan also impose contingency fee caps, with Florida imposing varying fee schedules with caps ranging from 15% to 40% of recovery,[26] and Michigan imposing a general 33% fee cap.[27]

The history of capping the amount of contingency fees (lawyer litigation finance) reveals a strong underlying policy preference that injured plaintiffs not be forced to trade their monetary recovery for access to the courts. The same normative considerations should apply to third-party litigation finance.

***Conclusions and Recommendation***

In sum, there is no evidence that a 50% minimum recovery requirement would render lawsuit lending uneconomical and drive funders out of the state. What limited empirical data exists, in fact, points in the other direction. Such a requirement is also consistent with protections of plaintiffs that have existed in the state for decades and usury laws that go back to time immemorial.[28]

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regulations were modified periodically between 1957 and 2002. By 2002, the requirement to file retainer and closing statements had expanded to include tort cases involving personal injury, property damage, or wrongful death, as well as condemnation and change of grade proceedings.").

[22] Helland et. al. 1976 (reproducing a sample closing statement, at 1978).

[23] *See* Hughes at 963-964.

[24] Conn. Gen. Stat. § 52-251c (2016).

[25] *See* id.

[26] *See* Hughes at 965-966.

[27] Mich. Court Rules § 8.121.

[28] For example, major religions, particularly in the Abrahamic tradition, have long placed various restrictions on what has been deemed to be usury. *See e.g.*, in the case of Christianity and Judaism, Exodus 22:25; in the case of Islam, THE QURAN 3:130.

It would also be advisable to impose a requirement for lawyers to submit to the court a closing statement, similar to the one discussed above, which would include the following information: the gross amount of the recovery, the costs and disbursements, the net amount of the recovery actually received by the client, the amount of the compensation actually received or retained by the attorney, and the advance amount provided by the funder. Funders should receive a copy, but otherwise the closing statement should be confidential subject to a judicial order to disclose. Such a requirement will enable any future discussions of whether the law should be changed to be based on relevant data. In addition, such a requirement to submit a standard form will resolve the following potential concerns: (i) funders' concern about the availability and cost of obtaining data on recovery, which is needed in order to calculate whether and by how much funders need to adjust their contractual fees *ex post* in order to meet the requirement; (ii) lawyers' concerns about providing the full, underlying settlement documents to funders; and (iii) insurance companies' concerns about settlement information becoming public.[29]

Respectfully,

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[29] These three concerns have been raised with me, following the hearing, by a funder who did not object to the proposed 50% minimum recovery requirement but noted these mechanical considerations. Further, as to the first concern, it should be noted that, as Avaraham & Sebok report, it is already the case that "there is often a dynamic repricing of the [funding] after the resolution of the consumer's case." Avaraham & Sebok at 7, 33. As to the third concern, it should be noted that it is not clear that the insurance industry's desire to keep opaque the value of settlements should trump consumer protection efforts. To the contrary, transparency regarding settlement amounts can both shorten litigation time and help injured plaintiffs settle at a fair amount.