New York County Lawyers Association

Committee on Tort Law
Committee on Supreme Court
Committee on Professional Ethics
Committee on Professionalism and Professional Discipline

Joint Comment on Proposed Litigation Funding Rule

Introduction

The New York County Lawyers Association's Committee on Tort Law, Committee on Supreme Court, Committee on Professionalism and Professional Discipline and Committee on Professional Ethics (collectively, the "Committees")[1] share the Office of Court Administration's view that litigation financing agreements with plaintiffs or their representatives in certain kinds of personal injury cases – those requiring court approval of any settlement -- should be disclosed to a Court when approval of that settlement is sought. However, it does not support the proposed amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules (the "Rules") for Supreme Court and County Court in their current form. Proposed alternate language is included with this statement.

Litigation funding agreements have become increasingly prevalent. They allow litigants and attorneys to "borrow" money against their interest in an anticipated future recovery. However, because of the way these transactions are structured, funding companies are permitted to charge interest and other fees that exceed, or fall outside of, applicable usury laws. In some cases, the rates can be exorbitant. As the Hon. Paul Marx noted in his opinion in *S.D., an infant by his mother and natural guardian, Jennifer Trelles v. St. Lukes Cornwall Hospital, et. al.*, 63 Misc.3d 384 (N.Y. Sup. 2019), some attorneys also have used litigation funding to pay disbursements in a case and then have tried to pass the interest charges on to their clients. And in *Echeverria v. Estate of Linder,* 2005 N.Y. Slip Op. 50675(u) at 4-5 (Sup. Ct. N.Y. Co. 2005), the Court criticized the high interest rates that a litigation funder charged to an impecunious plaintiff, noting that those additional costs made settlements more expensive and therefore more difficult to achieve.

The proposed rules would require disclosure of essentially any funding agreement relating to a given case in petitions for approval of settlements involving Estates, infants, and incapacitated persons. These Rules would cover both "client-side" and "lawyer-side" funding arrangements in these classes of cases—information proponents of the Rules believe judges need in determining whether to approve these settlements. We disagree. Though we believe disclosure of certain kinds of "client side" funding is appropriate, we do not agree the same is true of disclosure of "lawyer-side" funding or funding to potential distributees of Estates.

The proposed rule changes address wrongful death actions [22 NYCRR § 207.38] and infant compromises [22 NYCRR § 202.67]. The proposed amendments to the two Rules differ slightly, so we will address them separately.

Wrongful Death Actions

[1] The New York County Lawyers Association was founded in 1908 as one of the first major bar associations in the country that admitted members without regard to race, ethnicity, religion or gender. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence, including through the work of its many committees that provide in-depth analysis and insight into legal practice areas. The views expressed here are those of the Committees only, have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

In wrongful death actions, the proposed rules would require the Estate representative and attorney to disclose "the terms and documentation of any interest or any other fees charged to the personal representative of the decedent *or any person entitled to take or share in the proceeds of the settlement and any contingency or deferred payments agreement* and any money borrowed against anticipated settlement proceeds." (emphasis added). The italicized language is broad enough to cover lawyer-side funding, regardless of the form that funding takes and regardless of whether the funding relates to the one particular settlement or is part of a more complex arrangement regarding financing the lawyer's office overhead.

It is the Committees' view that this language is overbroad. We agree that any funding agreement which impacts the Estate's recovery – that is, anything taken out against proceeds otherwise allocable to the Estate – should be disclosed to the Court so it can evaluate the reasonableness of the settlement. Agreements reducing the ultimate Estate recovery can potentially bear on the fairness or appropriate size of the settlement, or may otherwise be of concern for the Surrogate. We also agree that no attorney should be allowed to charge interest to an Estate on disbursements without disclosing as much to the Court and seeking its explicit approval.

However, to the extent the rule requires disclosure of funding agreements taken out by an attorney and relating solely to the attorney's legal fee, the Committees do not support it. An attorney's personal financial affairs typically are not a relevant concern for the courts and whether an attorney has obtained funding has no bearing on the reasonableness of a settlement. An attorney is not a party to a case in which he or she merely represents a client and should not be required to disclose to a judge their internal financial arrangements simply because they take on a certain kind of personal injury matter. In any event, a wrongful death petition contains documentation of the terms of a settlement and requires an explanation to the Court of the reasons why it is in the best interest of the Estate to accept.

Nor is it relevant if a distributee who is not the Estate representative obtains funding. If a distributee borrows against monies he or she expects to receive from an Estate, it does not have any relationship to whether the Estate's recovery, prior to distribution, is fair under the circumstances.

Infant and Incompetent Compromises

The Committees have the same reservations about the proposed rules for infants and incompetent persons. The proposed rule requires essentially the same disclosure as the one applicable to wrongful death actions: attorneys and petitioners must "set forth and provide documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements and any money borrowed against anticipated settlement proceeds." This language would, like the wrongful death proposal, also require disclosure of agreements purely relating to the attorney's legal fee, which is unnecessary and does not reflect on the reasonableness of the infant's or incapacitated person's settlement. The Committees agree that any funding taken out which would affect the infant's or incapacitated person's financial interest, including the monetary amount ultimately to be recovered from the resolution of the lawsuit, are relevant to an evaluation of the reasonableness of the settlement and must be disclosed to the Court.

The proposal also would require a "statement that no other entitlement, benefit or fund is available to pay the proposed expenditures," apparently referring to the repayment of funding agreements. This language does not merely require disclosure, which is the asserted purpose of the proposed rule. It effectively codifies an affirmative mandate that an expenditure cannot be repaid from a recovery if there are other funds "available" to do so. This language could conceivably interfere with medical treatment paid for by funding. Sometimes, injured parties receive medical treatment from doctors who do not accept their insurance and then use litigation funding to pay the bill. This is a particular problem when the medical treatment is especially complex and specialized, and "in-network" doctors available to the plaintiff may not have the experience or expertise to do the work adequately. The proposed language about additional funding could lead a court to find in that situation that insurance was "available" to pay for medical treatment (no matter how otherwise inadequate) and deny repayment of funding. This would not necessarily be beneficial to injured parties, and certainly is beyond the scope of rules intended to ensure transparency. We do not view this mandate as necessary.

We are attaching proposed modified language, which would ensure that agreements bearing on the financial interests of an Estate, infant, or incapacitated person are disclosed, but addressing our concerns about overbreadth.

The Committees' support for limited disclosure of funding agreements in context of applications for court approval of settlements on behalf of infants, estates, and incapacitated persons also should not be construed to express any view concerning the discoverability of these agreements during the active phases of litigation. The discoverability of such agreements by adverse parties presents entirely different concerns, which are not before us here.[2]

Respectfully submitted,

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[2] There are aspects of some litigation funding agreements or their implementation that may present issues under the Rules of Professional Conduct. These potential issues are being studied and debated by various ethics committees or other groups, including NYCLA. These potential issues are unrelated to the purposes of the disclosure proposals on which we are commenting and therefore we do not address them here.

PROPOSED AMENDMENTS

A. Proposed amendments to§ 207.38:
Subdivision (b) of §207.38 is amended to read as follows:
(b) The petition also shall show the following:
(1) the age, residence, occupation and earnings of the decedent at time of death;
(2) the names, addresses, dates of birth and ages of all the persons entitled to take or share in the proceeds of the settlement or judgment, as provided by EPTL 5-4.4, or by the applicable law of the jurisdiction under which the claim arose, and a statement whether or not there are any children born out of wedlock;
(3) a complete statement of the nature and extent of the disability other than infancy, of any person set forth in (2) of this subdivision;
(4) the gross amount of the proceeds of settlement, the amount to be paid as attorneys' fees, and the net amount to be received by petitioner as a result of the settlement;
(5) any obligations incurred for funeral expenses, or for hospital, medical or nursing services, the name and address of each such creditor, the respective amounts of the obligations so incurred, whether such obligations have been paid in full and/or the amount of the unpaid balance due on each of said claims as evidenced by proper bills filed with the clerk;
(6) whether any hospital notice of lien has been filed under section 189 of the Lien Law, and if so, the particulars relating thereto;
(7) on the basis of the applicable law, a tabulation showing the proposed distribution including the names of the persons entitled to share in the proceeds and the percentage or fraction representing their respective shares, including a reference to the mortality table, if any, employed in the proceeding which resulted in the settlement or judgment, and the mortality table employed in the proposed distribution of the proceeds; [and]
(8) the cost of any annuities in compromises based upon structured settlements in wrongful death actions[.]; and
(9) the terms and documentation of ~~of any interest or any other fees charged to the personal representative of the decedent or any person entitled to take or share in the proceeds of the settlement and any contingency or deferred payments agreement and~~of any agreement relating to money borrowed against anticipated ~~settlement~~ lawsuit proceeds on behalf of the Estate or otherwise affecting the Estate's financial interest or the financial interest of the designated Estate representative.

Nothwithstanding the foregoing, any litigation funding agreement or other financial arrangement entered into solely for the benefit of the attorney and not affecting the financial interest of the Estate is excluded from this rule.

Subdivision (d) is amended to read as follows:
(d) A supporting affidavit by the attorney for petitioner must be filed with each petition for leave to compromise showing:
(1) whether the attorney has become concerned in the application or its subject matter at the instance of the party with whom the compromise is proposed or at the instance of any representative of such party;

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(2) whether the attorney's fee is to be paid by the administrator and whether any payment has been or is to be made to the attorney by any other person or corporation interested in the subject matter of the compromise;
(3) if the attorney's compensation is to be paid by any other person, the name of such person;
(4) the services rendered by the attorney in detail; [and]
(5) the amount to be paid as compensation to the attorney, including an itemization of disbursements on the case, and whether the compensation was fixed by prior agreement or based on reasonable value, and ifby agreement, the person with whom such agreement was made and the terms thereof[.]; Attorneys representing the petitioner may not charge or receive interest on disbursements without express approval of the court
; and
(6) The terms and documentation of any agreement relating to money borrowed against anticipated settlement proceeds on behalf of the Estate or otherwise affecting the Estate's financial interest or the financial interest of the designated Estate representative.
~~any interest or any other fees charged to the personal representative of the decedent or any person entitled to take or share in the proceeds of the settlement and any contingency or deferred payments agreement and any money borrowed against anticipated settlement proceeds.~~

B. Proposed amendment to § 202.67:
1. Subdivision (a)(7) is amended to read as follows:
(a) The settlement of an action or claim by an infant or judicially declared incapacitated person (including an incompetent or conservatee) shall comply with CPLR 1207 and 1208 and, in the case of an infant, with section 474 of the Judiciary Law. The proposed order in such cases may provide for deduction of the following disbursements from the settlement:
(1) motor vehicle reports;
(2) police reports;
(3) photographs;
(4) deposition stenographic expenses;
(5) service of summons and complaint and of subpoenas;
(6) expert's fees, including analysis of materials; and
(7) other items approved by court order.
Attorneys representing the Petitioner may not charge or receive interest on disbursements without express approval in the court order.
The order shall not provide for attorney's fees in excess of one third of the amount remaining after deduction of the above disbursements unless otherwise specifically authorized by the court.

2. Subdivision (b) is amended to read as follows:
(b) The petition or affidavit in support of the application also shall set forth the total amount of the charge incurred for each doctor and hospital in the treatment and care of the infant or incapacitated person, and the amount remaining unpaid to each doctor and hospital for such treatment and care, and shall set forth and provide documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements affecting the infant's or incapacitated person's financial interest, and any money borrowed against· anticipated settlement proceeds by or on behalf of the infant or incapacitated person. If an order be made approving the application, the order shall provide that all such charges for doctors and hospitals shall be paid from the proceeds, if any, received by the parent,

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guardian, or other person, in settlement of any action or claim for the loss of the infant's or incapacitated person's services; provided, however, that if there be any bona fide dispute as to such charges, the judge presiding, in the order, may make such provision with respect to them as justice requires. With respect to an incapacitated person, the judge presiding may provide for the posting of a bond as required by the Mental Hygiene Law.

3. Subdivision (d) is amended to read as follows:

(d) The affidavit or affirmation of the attorney for a plaintiff, in addition to complying with CPLR 1208, must show compliance with the requirements for filing a retainer statement and recite the number assigned by the Office of Court Administration, or show that such requirements do not apply. ~~Such affidavit or affirmation also shall set forth and provide documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements and any money borrowed against anticipated settlement proceeds.~~ Such affidavit or affirmation shall provide documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements affecting the infant's or incapacitated person's financial interest, and any money borrowed against anticipated litigation proceeds by or on behalf of the infant or incapacitated person or otherwise anticipated to be repaid from the infant's or incapacitated person's case. Nothwithstanding the foregoing, any litigation funding agreement or other financial arrangement entered into solely for the benefit of the attorney and not affecting the infant's or incapacitated person's financial interest is excluded from this rule.

4. Subdivision (t) is amended to read as follows:

(f) A petition for the expenditure of the funds of an infant shall comply with CPLR Article 12, and also shall set forth:
(1) a full explanation of the purpose of the withdrawal;
(2) a sworn statement of the reasonable cost of the proposed expenditure;
(3) the infant's age;
(4) the date and amounts of the infant's and parents' recovery;
(5) the balance from such recovery;
(6) the nature of the infant's injuries and present condition;
(7) a statement that the family of the infant is financially unable to afford the proposed expenditures;
(8) a statement as to previous orders authorizing such expenditures;
~~(9) [any other facts material to the application,] a statement detailing the relationships, if any, among the direct or indirect recipients of such expenditures;~~
~~(10) a statement that no other entitlement, benefit or fund is available to pay the proposed expenditures;~~
(11) any other facts material to the application, including but not limited to the complete terms and conditions of any agreement for litigation funding and fee arrangements affecting the infant's or incapacitated person's financial interest.
(12) any other facts material to the application.
(g) No authorization will be granted to withdraw such funds, except for unusual circumstances, where the parents are financially able to support the infant and to provide for the infant's necessaries, treatment and education.

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(h) Expenditures of the funds of an incapacitated person shall comply with the provisions of the Mental Hygiene Law.
(i) The required notice of the filing of a final account by an incapacitated person's guardian and of a petition for settlement thereof shall show the amounts requested for additional services of the guardian and for legal services. Prior to approving such allowances, the court shall require written proof of the nature and extent of such services. Where notice is given to the attorney for the Veteran's Administration, if the attorney for the Veteran's Administration does not appear after notice, the court shall be advised whether the Veteran's Administration attorney has examined the account and whether he objects to it or to any proposed commission or fee.