



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

HON. JOSEPH A. ZAYAS
CHIEF ADMINISTRATIVE JUDGE

HON. NORMAN ST. GEORGE
FIRST DEPUTY CHIEF ADMINISTRATIVE JUDGE

DAVID NOCENTI
COUNSEL

MEMORANDUM

To: All Interested Persons

From: David Nocenti

Re: Request for Public Comment on proposed amendments to Section 202.67 and Section 207.38 of the Uniform Civil Rules for the Supreme Court and County Court relating to litigation financing agreements

Date: April 12, 2024

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The Administrative Board of the Courts is seeking public comment on proposed amendments to Sections 202.67 and 207.38 of the Uniform Civil Rules for the Supreme Court and County Court (22 NYCRR §§ 202.67 & 207.38), to require disclosure of information relating to litigation financing agreements in certain circumstances.

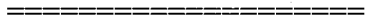
As noted in the attached memorandum from the Advisory Committee on Civil Practice (Exhibit A), litigation financing agreements (also known as “litigation loans”) are arrangements through which an entity agrees to cover all or a portion of the non-litigation expenses of a party (usually a plaintiff in a wrongful death or personal injury action), with repayment contingent on the outcome of the litigation. These agreements have been the subject of substantial public discussion in recent years, with proponents arguing that the agreements allow parties to maintain lawsuits that they otherwise would not be able to pursue, and opponents asserting that the agreements often include exorbitant interest rates, fees and other charges that vastly reduce the recovery of injured parties.

There have been a variety of legislative proposals on this topic going back at least to 2017.¹ Unlike the legislative proposals, which often propose to place restrictions on the use

¹ Bills currently pending in the State Legislature on this topic include A.115 (Magnarelli), A.2702 (Dilan), S.2594 (Comrie), and A.7655-A (Walker)/S.4146-A (Cooney).

and/or scope of these agreements, the amendments being proposed by Advisory Committee on Civil Practice instead simply require disclosure of such arrangements in a limited set of cases – most notably, requests for judicial approval of settlements in wrongful death actions, and in personal injury actions involving an infant or a judicially-declared incapacitated person.

The proposed amendments to the Uniform Civil Rules are attached to the Advisory Committee memorandum.



Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: David Nocenti, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 10th Fl., New York, New York, 10004. Comments must be received no later than May 24, 2024.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

MEMORANDUM

TO: Hon. Joseph Zayas

FROM: George Carpinello, Chair, Advisory Committee on Civil Practice Law and Rules

CC: David Nocenti

SUBJECT: Proposed Amendments to Uniform Rules 202.67 and 207.38 to require disclosure of litigation financing and other financial agreements

DATE: February 23, 2024

I. BACKGROUND

In recent years, the use of litigation funding to pay for disbursements incurred during the litigation has increased.¹ The Legislature has considered, but not yet passed, the Consumer Litigation Funding Act, which was first introduced in the 2017–2018 legislative session and has been reintroduced each subsequent legislative session.² If passed, the proposal would limit interest rates, restrict fee-sharing, require disclosures, set penalties, define how litigation loans would impact attorney-client privilege and require registration and reporting. In addition to litigation funding or disbursements, there are other funding arrangements that affect a plaintiff's recovery.

While the Legislature is considering proposed statutory changes, the Advisory Committee on Civil Practice ("Advisory Committee") is recommending revisions to Court Rules §§ 202.67 and 207.38 to require the disclosure of litigation financing agreements in all applications seeking leave to compromise a wrongful death action, or a personal injury action involving an infant or a judicially declared incapacitated person including an incompetent or conservatee.

Currently, the above said Rules do not require disclosure to the court of litigation funding, assignments, or other financial agreements that may diminish the net settlement proceeds.

The need for disclosure was discussed at length in the decision rendered by Hon. Paul I. Marx in the matter of *S.D., an Infant by his Mother and Natural Guardian, Jennifer Trelles v. St. Luke's Cornwall Hospital et. al.*, 63 Misc.3d 384 (Sup. Ct., Rockland Co. 2019). The matter was before Judge Marx in the context of a Rule §202.67 petition to compromise the second portion of a medical malpractice settlement obtained on behalf of the infant, S.D. During the course of the

¹ New York's Unregulated Litigation Lending Industry - New York State Bar Association (nysba.org), October 13, 2023

² Consumer Litigation Funding Act S4146A-A7655A Bill Text and Memo

compromise proceedings, it came to light that the amount of claimed disbursements included significant "Assumption of Risk" fees charged by a lending company pursuant to a non-recourse funding agreement. The assumption of risk charges began at 65% of the amount advanced if not repaid within the first six months after the advance was made and then increased by 1.5% per month thereafter. Further, it was learned that the funding company was owned by the brother of the attorney for the plaintiff. This information was not disclosed to the court which approved the first portion of the settlement and was learned by Judge Marx only after extensive probing. There was a further financial arrangement that was not initially disclosed to the court, namely an agreement whereby appellate counsel charged one fee if unsuccessful, and another, 400% of that amount, if successful. At the end of his decision, Judge Marx respectfully suggested that Court Rule § 202.67 be amended to require disclosure of any litigation financing agreements used to finance disbursements in personal injury and medical malpractice claims involving infants and to require full disclosure of all terms of the agreements and relationships between counsel and the financing companies, financial and otherwise, be disclosed to the court in connection with any application for leave to compromise such cases. "Only where such information is presented to the court can a fair evaluation of the propriety of fees and disbursements be made." 63 Misc.3d at 418.

The proposed amendments herein seek to implement and broaden the disclosure suggested by Judge Marx. There is clear justification to amend the existing Rules for all petitions seeking court approval of a settlement, including not only infant compromises but also matters involving incapacitated persons or wrongful death compromises, to require full disclosure by the petitioner and counsel for the petitioner of any financial arrangement affecting the settlement funds.

The language proposed by the committee is intended to be broad enough to encompass not only financing agreements affecting disbursements or attorney fees but also other financial agreements that adversely affect the recovery by the injured plaintiff. An example would be an arrangement whereby a physician or other medical provider defers the payment of medical bills until the end of the case but is then reimbursed an inflated amount far exceeding standard and customary fees. Further, the language is intended to require disclosure where a portion of the proceeds have been assigned, sold, pledged or otherwise transferred to a person or entity other than the named plaintiff. The proposed amendments would change existing law and practice by requiring full disclosure by both the plaintiff and the plaintiff's attorney of information that is not currently required but which is clearly germane.

Requiring disclosure of this additional information to the courts being asked to approve such settlements is necessary in light of the proliferation of litigation funding arrangements in recent years and the potential impact that such arrangements may have on the value of settlements to the persons receiving the settlements. In summary, the amendments would require full disclosure to the court of any funding agreement, deferred payment, assignment of money or other financial agreement which adversely impacts the recovery of an infant, incapacitated person, or beneficiary of an estate.

II. SUMMARY PROPOSED AMENDMENTS

A. Amending N.Y. Ct. Rule § 207.38. Compromises. To Add Subsections (b)(9) and (d)(6).

N.Y. Ct. Rule § 207.38 governs applications for leave to compromise a claim for wrongful death or personal injuries or both. Subsection (b) delineates the information required to be set forth in the petition. Subsection (d) delineates the information required to be set forth in the supporting affidavit of the attorney for petitioner.

1. Amending N.Y. Ct. Rule § 207.38 (b)

The amendment adds: (9) 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.

2. Amending N.Y. Ct. Rule § 207.38(d)

The amendment adds: (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.

B. Amending N.Y. Ct. Rule § 202.67 Infants' and Incapacitated Persons' Claims and Proceedings subsections (a)(7), (b), (d) and (f).

N.Y. Ct. Rule § 202.67 governs (with reference to CPLR §§ 1207 and 1208, and Judiciary Law § 474) the settlement of an action or claim by an infant or judicially declared incapacitated person and petition for expenditure.

1. Amending N.Y. Ct. Rule §202.67 subsections (a)(7).

The amendment adds to (a)(7): "Attorneys representing the petitioner may not charge or receive interest on disbursements without express approval in the court order." While there is no statutory or ethical bar to attorneys charging a reasonable amount of interest on disbursement payments advanced by the attorney, the Committee recommends this language to underscore that the appropriateness of interest on disbursements and the reasonableness of the amount is a matter for the court's scrutiny.

2. Amending N.Y. Ct. Rule §202.67 subsection (b)

The amendment adds to (b): “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 pertaining, and any money borrowed against anticipated settlement proceeds.”

3. Amending N.Y. Ct. Rule §202.67 subsection (d)

The amendment add to (d): “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.”

4. Amending N.Y. Ct. Rule §202.67(f), adding subsections (9), (10), and (11) and renumbering former (9) to (12).

N.Y. Ct. Rule 202.67(f) delineates the information to be set forth in a petition seeking the expenditure of settlement funds which have been set aside for the infant’s benefit. The Committee proposes that further information be provided to the court setting forth:

(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.

III. 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 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.

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;

(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 if by agreement, the person with whom such agreement was made and the terms thereof[.]; and

(6) 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.

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 pertaining, and any money borrowed against anticipated settlement proceeds. 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, 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.

4. Subdivision (f) 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.
- (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 necessities, treatment and education.

(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.