

1 BEFORE THE NEW YORK STATE SENATE
2 STANDING COMMITTEE ON CONSUMER PROTECTION

3 PUBLIC HEARING
4 ON LAWSUIT LENDING

5
6 Legislative Office Building
7 Van Buren Hearing Room A - 2nd Floor
8 Albany, New York 12210

9 May 16, 2018
10 12:00 p.m. to 4:00 p.m.

11 PRESIDING:

12 Senator Chris Jacobs, Chair

13 Senator Robert Ortt, Co-Sponsor

14
15 PRESENT:

16 Senator Marisol Alcantara (RM)

17 Senator Michael H. Ranzenhofer

18 Assemblyman William B. Magnarelli
19 (seated in the audience)

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SPEAKERS:	PAGE	QUESTIONS
Tom Stebbins Executive Director Adam Morey Manager of Public Affairs Lawsuit Reform Alliance of New York	9	21
Kelly Gilroy Executive Director American Legal Finance	32	41
Maya Steinitz Professor of Law, University of Iowa College of Law Also, Visiting Professor of Law, Harvard Law School	67	72
Anthony J. Sebok Professor of Law, Benjamin N. Cardozo School of Law Also, Visiting Professor, Cornell Law School	82	92
Honorable Anthony L. Coehlo Retired Member of U.S. House of Representatives Member, Board of Directors Epilepsy Foundation	111	116
Lev Ginsburg Director of Government Affairs The Business Council of New York State, Inc.	131	137
James R. Copland Senior Fellow Director, Legal Policy The Manhattan Institute	144	

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1 SENATOR JACOBS: Good afternoon, everyone.

2 Thank you for being here.

3 I'm Senator Chris Jacobs. I represent the
4 60th Senate District located in Erie County,
5 New York.

6 I serve as the Chair of the Senate Standing
7 Committee on Consumer Protection, and today's public
8 hearing.

9 This public hearing will focus on lawsuit
10 lending, and how we can better regulate third-party
11 litigation -- third-party litigation financing in
12 New York.

13 A few quick housekeeping items before we
14 begin.

15 Each testimony presented today, both oral and
16 written, will be part of the official public record.

17 We will hear from seven witnesses. Speakers
18 will be asked to keep their remarks to 10 minutes so
19 that Committee members will have sufficient time to
20 ask their questions.

21 The testimony you submitted is in every
22 member's hands, so they have the opportunity to --
23 if they haven't read it yet, to read it in its
24 entirety.

25 But we did want to make sure that we have

1 sufficient time for questions.

2 The third-party litigation-financing industry
3 emerged in the 1990s.

4 In recent months, several media sources,
5 including "The New York Post" and "The New York
6 Times," have reported several stories of individuals
7 that have been forced to forfeit much of their
8 proceeds from their litigation settlements to
9 businesses that funded the lawsuits due to very high
10 interest rates.

11 However, we can all agree that litigation is
12 not cheap.

13 Members of the lawsuit-lending industry claim
14 they have served a much-needed role in providing
15 loans to litigants who would otherwise struggle to
16 make ends meet during their lengthy lawsuits.

17 Two pieces of legislation have been
18 introduced to help claimants from excessive interest
19 rates and fees.

20 These bills are S3911 and A8653, sponsored,
21 respectively, by Senator Ortt and Assembly
22 Member Magnarelli, and A899, sponsored by Assembly
23 Member Dilan.

24 The Consumer Protection Committee has called
25 this public hearing to hear from members of the

1 industry, consumer advocates, and experts on this
2 topic so that they -- that we can reach a solution
3 that will better protect claimants in our state.

4 I want to thank my Senate colleagues in their
5 attendance.

6 Many of them are still at session, so
7 I imagine many will be filing in over the next few
8 minutes.

9 But, my Ranking Member, Senator Alcantara is
10 here. Thank you for being here.

11 And, Senator Ortt, who is the author of one
12 of the pieces of legislation that I just referenced.

13 I wanted to just mention, the members that
14 are -- the individuals that are here that will be
15 testifying, I'm just going to list them right now:

16 Tom Stebbins, executive director, and
17 Adam Morey, managing (sic) public affairs director,
18 for the Lawsuit Reform Alliance of New York;

19 Kelly Gilroy, executive director of the
20 American Legal Finance Association;

21 Maya Steinitz, professor of law at the
22 University of Iowa College of Law, and visiting
23 professor of law at Harvard Law School;

24 Anthony Sebok, professor of law at the
25 Benjamin Cardozo School of Law at Yeshiva

1 University, and visiting professor at Cornell Law
2 School;

3 The Honorable Anthony -- and I'm going to
4 maybe mispronounce this -- Coehlo, a retired member
5 of U.S. House of Representatives from California,
6 and current member of the board of directors from
7 the -- for the Epilepsy Foundation;

8 Lev -- Lev Ginsburg, director of government
9 affairs for the Business Council of New York;

10 James Copland, senior fellow director of
11 legal policy, The Manhattan Institute.

12 Thank you all for being here today.

13 At this point in time I would like to --
14 Member Altantra -- Alcantara is -- is -- she just
15 wants to get right to work, so no opening remarks,
16 she said.

17 But, Senator Ortt did you want to say a few
18 words before we begin.

19 And, thank you very much once again.

20 SENATOR ORTT: Well, I want to get to work
21 too, but I wanted to make some opening comments.

22 I just wanted to thank Senator Jacobs and the
23 Consumer Protection Committee, Senator Alcantara,
24 for putting this hearing together.

25 I think it's important.

1 We pass a lot of pieces of legislation
2 through the New York State Senate and, of course,
3 the Assembly as well, and, very often, there is no
4 real public discussion. There's discussions that
5 happen in hallways, in closed-door meetings, and
6 that's certainly a part of what we do.

7 But I think having a hearing like this where
8 we have this discussion, because a lot of people
9 probably don't know what this industry is. A lot of
10 senators probably are unfamiliar with it.

11 And it's very important, I think, if we're
12 going to have a real substantive discussion, and try
13 to get to good policy, then we need to educate not
14 only members of the public, but even the officials
15 who will be voting on this legislation.

16 And so I think it's very important.

17 And I just want to say that, you know, the
18 goal here really is to -- I think there's a lot of
19 folks out there who are in this industry, who do a
20 good job, and serve a very important need. Probably
21 not a high need, but there's a very important need
22 when it arises.

23 But, of course, like any industry, especially
24 when it's not regulated or has no sort of oversight,
25 you have a number of bad actors as well.

1 So the goal really is to try to make sure
2 that we have some oversight, that we are not
3 encouraging any practices that are untoward, or that
4 encourage what I would call "unnecessary" lawsuits
5 or litigation that don't increase the cost, and
6 certainly don't take advantage of people who are
7 incredibly vulnerable and have a high risk.

8 On the same token, if there's lenders out
9 there who are serving a real important need and
10 they're doing everything above-board, then I think
11 having them part of this discussion can only result,
12 hopefully, in positive legislation and positive
13 oversight.

14 So, that's what I'm hoping for, as this is
15 the first step.

16 So I want to again thank Senator Jacobs,
17 I want to thank Senator Alcantara, and I want to
18 thank all the folks who are coming here to testify
19 today.

20 SENATOR JACOBS: Thank you, Senator.

21 And now I'd like to call up Tom Stebbins and
22 Adam Morey, please.

23 And you know your hierarchy of your
24 organization better, so whoever wants to go first,
25 you're more than welcome.

1 TOM STEBBINS: Well, I appreciate that,
2 Senators.

3 Thank you very much for having us today.

4 Chairman Jacobs, Senator Ortt, members of the
5 Committee, thank you for the opportunity to provide
6 testimony regarding third-party litigation
7 financing.

8 Law suit cash-advance companies currently
9 operate in New York unchecked and without meaningful
10 consumer protections.

11 This is an obvious disservice to some of the
12 state's most vulnerable citizens, those who have
13 already fallen victim to the actions of a negligent
14 party.

15 The industry targets New Yorkers when they
16 are at their most desperate, when they are injured,
17 and may be unable to work or afford their rent.

18 A quick Internet search for "lawsuit loans"
19 turns up hundreds of thousands of results from
20 companies that offer cash advances for pending
21 lawsuits and claims.

22 Many funders promise "cash now," offering
23 approval in just one day.

24 The interest is often compounded monthly,
25 with annual interest rates that exceed 100 percent.

1 An individual who has entered into one of
2 these lending contracts may ultimately settle or win
3 a lawsuit, only to take home a tiny fraction of
4 their award, or, in some cases, none at all.

5 "The New York Post" recently uncovered a
6 story of Theresa Gus, a woman who borrowed \$23,000
7 from two cash-advance law firms: LawBuck\$, spelled
8 with a dollar sign, and MFL Case Funding.

9 She passed away before she ever saw a cent of
10 the \$2.1 million settlement she received from a
11 slip-and-fall case against the City because the
12 companies had put liens on the total amount, nearly
13 100 times the original principal of the loan.

14 Lawsuit-lending companies claim, that because
15 the advances are contingent on the borrower winning
16 the case, the product they offer is risky and should
17 be classified as an investment, not a loan.

18 This mischaracterization allows them to
19 charge interest rates that are well beyond
20 New York's civil and criminal usury rates.

21 The level of risk that actually exists here
22 is questionable, and nowhere near anything that
23 could justify interest rates over 100 percent.

24 There is no evidence to suggest that the rate
25 of default on lawsuit loans is higher than it is for

1 other financial products.

2 As LawCash executives told "Crain's New York
3 Business," the company, quote, uses strict
4 underwriting screening rules to ensure only about
5 4 percent of the cases it advances money to are lost
6 in court, end quote.

7 In one illustrative example, a Brooklyn
8 resident, Joseph Gill, borrowed \$4,000 from
9 LawBuck\$ -- again, spelled with a dollar sign -- in
10 order to cover medical expenses while his lawsuit
11 was pending in court.

12 At the time Gill's lawsuit settled five years
13 later, LawBuck\$ demanded repayment to the tune of
14 \$116,000, 29 times the original amount that he was
15 advanced.

16 The judge who presided over the case in
17 Brooklyn Supreme Court was incredulous, and ordered
18 LawBUck\$ to explain its loan agreement.

19 In court papers, the judge presiding over the
20 case called the interest rate, quote, usurious, and
21 if not usurious, then unconscionable, end quote.

22 In another case, Carolyn Williams, a former
23 nurse in the midst of a disability lawsuit with her
24 former employer, borrowed \$5,000, in her case, to
25 pay medical bills.

1 The lender, U.S. Claims, not spelled with a
2 dollar sign, did not inform Williams or her lawyer
3 of their rate of interest to be charged on the loan.

4 It was not until nearly a year later when she
5 discovered the annual interest rate was 76 percent.

6 Williams told "The New York Times" that she
7 was, quote, definitely misled, and, quote, never
8 expected that high of a rate, end quote.

9 After three years, Williams' case remained
10 unresolved and her loan debt had ballooned to nearly
11 \$19,000.

12 Due to many legal and ethical considerations
13 surrounding lawsuit consumer -- consumer lawsuit
14 financing, state officials around the country have
15 begun to look into and investigate the legitimacy of
16 the industry.

17 Colorado's Attorney General recently
18 announced that she will be sending out restitution
19 checks from a \$2.3 million settlement her office
20 reached with LawCash and Oasis Legal Finance.

21 Here in New York, the Office of the Attorney
22 General joined with the Consumer Finance Protection
23 Bureau to file a complaint last year against
24 RD Legal Funding, a New Jersey-based cash-advance
25 lawsuit firm -- lawsuit cash-advance firm, for

1 allegedly taking advantage of 9/11 first responders
2 and NFL players with concussion-related
3 complications by offering high-interest advances on
4 expected payouts from legal settlements and
5 compensation funds.

6 The court filings for this enforcement action
7 highlight the case of an unnamed 9/11 first
8 responder who fell victim to this scheme when she
9 was advanced \$18,000 while awaiting a payout from
10 the Ground Zero Compensation Fund.

11 After six months, she owed \$33,000, an
12 83 percent increase in less than a year.

13 Sadly, as media outlets continue to reveal,
14 the abuse is more widespread than just the stories
15 mentioned here.

16 A "New York Times" investigation has
17 uncovered lenders advertising directly to women with
18 claims in the "me too." movement.

19 Another report uncovered a scheme in which
20 lawyers and lenders convince women to get often
21 unnecessary and potentially dangerous surgeries in
22 order to increase the value of their litigation.

23 This controversial practice is allowed to
24 continue because lawsuit lending and surgical
25 funding are not adequately regulated under New York

1 law.

2 This is why the Lawsuit Reform Alliance of
3 New York supports Senator Ortt's bill, 3911-A, a
4 bill introduced by Senator Ortt and Assemblyman
5 William Magnarelli, that would protect consumers
6 from usurious rates by requiring the lawsuit lenders
7 and financiers to comply with existing lending laws
8 that cap consumer interest rates.

9 To further reduce harms to individuals and
10 protect the integrity of the civil justice system,
11 the bill also ensures that lawyers do not have
12 overlapping financial interests in lending outfits
13 or arrangements to collect lucrative referral fees.

14 Such partnerships can encourage frivolous
15 filings and prolong litigation that should have
16 settled sooner.

17 According to "The New York Times," federal
18 prosecutors are currently investigating whether some
19 of the existing relationships that lawyers have with
20 the lenders constitute illegal kickback schemes.

21 For the above reasons, we urge members of the
22 Committee to swiftly discharge S3911-A for
23 consideration by the full Senate.

24 We also urge the Assembly and the Governor's
25 Office to pass this legislation and sign it into

1 law.

2 Thank you for your consideration.

3 SENATOR JACOBS: Adam, before I allow you to
4 speak, I just want to recognize, Senator Ranzenhofer
5 is here.

6 And it was brought to my attention that
7 Assemblyman Magnarelli is here in the crowd. And
8 you are more than welcome to come up here.

9 ASSEMBLYMAN MAGNARELLI: (Inaudible.)

10 SENATOR JACOBS: Thank you very much.

11 Okay. Adam, thank you.

12 ADAM MOREY: Oh, that was our -- that's our
13 full testimony.

14 SENATOR JACOBS: Do you have any questions at
15 this point for Tom?

16 Senator Ortt?

17 SENATOR ORTT: Yeah, just, do you know what
18 other states currently regulate lawsuit lending?

19 TOM STEBBINS: Yeah, several states have
20 regulated lawsuit lending. And a few of them have
21 actually subjected their -- the litigation
22 financing, or lawsuit lending, to existing usury
23 law.

24 And in one notable example, in Tennessee,
25 where they were subject to those usury rates, which

1 are lower than New York --

2 New York is at 16 percent. I believe
3 Tennessee is 10 percent.

4 ADAM MOREY: 10 percent, yeah.

5 TOM STEBBINS: -- all of the lawsuit lenders
6 still registered in that state to do business.

7 So you may hear some testimony today that
8 lawsuit lenders will not do business where the
9 regulate -- where the interest rate is capped.

10 That is false. According to public records,
11 they have registered to do business in the states
12 where this has been regulated.

13 ADAM MOREY: And Arkansas is another one.

14 They have -- those are capped at 17 percent.
15 We've seen -- there's been no reports that anybody
16 pulled out there.

17 SENATOR ORTT: So -- because, obviously,
18 there's like two issues here:

19 There's oversight, which is a general, you
20 know, it can be a lot of different things;

21 And then there's caps, which can be part of
22 oversight.

23 But both of these states you mentioned are --
24 or, I guess, would it be fair to say that a number
25 of the states that do regulate, there are -- there

1 is some kind of a cap or set max rate they can
2 charge, or is that -- would that be not true?

3 TOM STEBBINS: Some have their own caps.
4 Some have caps to existing usury laws.

5 And that's what we're advocating for: a cap
6 to existing usury law in New York State.

7 Existing usury law is 16 percent for civil.
8 And anything above 25 percent is criminal loan
9 sharking for which you would go to jail.

10 SENATOR ORTT: Thank you.

11 Senator Alcantara?

12 SENATOR ALCANTARA: Thank you, Tom, for your
13 testimony.

14 What are the common victims of lawsuit
15 lending?

16 TOM STEBBINS: Well, we see a number of
17 victims.

18 I think the 9/11 first responders and the NFL
19 settlement is most troubling because, what the
20 lenders often say is, that these loans are risky,
21 and that there's a certain amount of risk involved,
22 that they need to charge these 100 percent,
23 85 percent, whatever it may be.

24 But in the case of the 9/11 first responders
25 and the NFL concussion settlement, those were

1 settlements, they're making claims. There's no
2 litigation risk there at all; and yet, in one of
3 the cases, we saw an 83 percent increase in just
4 6 months.

5 So an 83 percent increase on a claim for
6 which there is, essentially, no litigation risk,
7 because it's made against a fund in this particular
8 case, the 9/11 First Responders Fund.

9 But we've seen a lot of other cases, just
10 consumer cases, where somebody takes out \$5,000,
11 and then, you know, over the course of three or
12 four years, compounding interest on \$5,000, they owe
13 over \$100,000. And they took that initial loan for
14 their medical costs. But now, when they get paid
15 for their injury, there's no money left.

16 And so we have these lenders using our
17 justice system for -- as a profit center, and that's
18 not what it should be for.

19 It should be for compensating victims.

20 SENATOR ALCANTARA: And what is the average
21 interest rate in the state of New York?

22 TOM STEBBINS: Well, on a consumer loan, a
23 regular consumer loan, as I said, the usury cap is
24 16 percent.

25 For these loans, I mean, we've seen it all

1 over the map.

2 I think that we've seen --

3 ADAM MOREY: There's been reports of 200-plus
4 percent.

5 I think that's in the complaint about
6 RD Legal Funding. One of them was, 250 percent was
7 the rate that somebody was charged.

8 TOM STEBBINS: And I can't imagine the
9 litigation risk, or the risk that any funder would
10 be taking, to fund something that required a
11 250 percent return in exchange for that risk.

12 ADAM MOREY: And even if the average is
13 around 50 percent, that's still, you know, double
14 the criminal usury rate.

15 SENATOR ALCANTARA: And what is the length of
16 time, normally?

17 Like, let's say I take out a \$5,000 loan.

18 TOM STEBBINS: Well, generally, litigation
19 can go from three to five years. So -- and it's
20 compounding interest.

21 And one of the things you may hear today is
22 that there was a deal with the attorney general back
23 in, I believe 2005, that says that these lenders
24 must disclose their loans, and they have a cover
25 page that discloses the loans.

1 But, it's clearly not working.

2 All the media reports we've seen are from
3 after 2005, and yet there's still so many people
4 that are getting roped into these loans, that have
5 no idea that they're going to be paying 150 percent,
6 because sometimes these cover pages don't adequately
7 show what actually the interest rate will be.

8 They'll talk about how it's compounded
9 monthly, or something like that.

10 SENATOR ALCANTARA: And my last question: Do
11 we have a region of the state where they make the
12 most amount of loans -- of these type of loans?

13 TOM STEBBINS: No, and we've seen it all over
14 the state.

15 Interestingly, "The New York Post" had a
16 story about a person in Staten Island who has the
17 Lawsuit Cash Truck. I mean, he drives around,
18 throwing money out of a converted ice cream truck,
19 essentially saying, that if you've got a lawsuit,
20 he's got \$10,000 for you.

21 What he, of course, doesn't say is the
22 interest rate that's on that \$10,000.

23 SENATOR ALCANTARA: Thank you.

24 TOM STEBBINS: Thank you.

25

1 SENATOR JACOBS: Senator Ranzenhofer, any
2 questions?

3 SENATOR RANZENHOFER: Yes.

4 Yeah, thank you, Chairman.

5 Thank you for being here today.

6 Can you just tell me the basic difference
7 between Senator Ortt's bill and Assemblyman Dilan's
8 bill?

9 TOM STEBBINS: Caps.

10 Caps on the interest rate.

11 So one of the things you'll hear today is the
12 need for transparency and the need for reporting,
13 and all that.

14 And, absolutely, we need all those things.

15 But without an adequate interest rate cap
16 there will be no adequate consumer protection.

17 SENATOR RANZENHOFER: So you agree with
18 everything in the Dilan bill, with the exception of
19 the fact that it doesn't have a cap?

20 TOM STEBBINS: Well, it also -- I mean, it
21 connects it to existing usury law, and so there's a
22 lot of protections within existing usury law beyond
23 just the caps.

24 But, really, the most important thing here is
25 the caps.

1 SENATOR RANZENHOFER: So you had mentioned
2 the usury law, and you had mentioned 16 percent.

3 What is the -- I thought the credit card rate
4 on a credit card right now is 1.5 percent.

5 So if I was --

6 TOM STEBBINS: So credit cards have a
7 different lending rate. Those aren't considered
8 loans. Those are regulated in a different way.

9 SENATOR RANZENHOFER: -- yeah, but that would
10 be 18 percent annually?

11 TOM STEBBINS: I don't know what credit card
12 interest rate is.

13 I believe it's 23? Is it 18?

14 I don't know. I honestly don't know.

15 SENATOR ALCANTARA: It depends on the
16 company.

17 SENATOR RANZENHOFER: Okay.

18 SENATOR ALCANTARA: Some are as high as 32.

19 SENATOR RANZENHOFER: I try and pay off my
20 balance I owe them. (Indiscernible.)

21 SENATOR ALCANTARA: Some are as high as 32.

22 SENATOR ORTT: Good answer, Mike.

23 SENATOR RANZENHOFER: Okay. But there are
24 some -- so there is some other lending in the state,
25 which, obviously, it's a different type of loan.

1 But there are some areas of the state, and
2 other types of consumer transactions, whether it be
3 credit card, or as Senator Alcantara just said, as
4 high as 22 or 23 percent, up to, maybe, 32 percent.

5 And I know this is not your, you know, area,
6 but is there something wrong with those type of
7 rates?

8 TOM STEBBINS: Well, I mean, in the case of
9 this particular kind of financing, litigation
10 financing, there's a non-profit out of Buffalo, the
11 Bair Foundation, which offers rates at 8 percent.

12 So to say that they can't do this kind of
13 lending without rates that exceed the rate of
14 criminal usury I think is absurd.

15 And, frankly, again, we've seen in states
16 where the interest rate has been capped, that these
17 lending outfits have registered with the secretary
18 of state to do business in those states, and we
19 presume that they are doing business in those
20 states.

21 SENATOR RANZENHOFER: Okay. Has there
22 been -- and I'm sure we'll hear from them.

23 You had said they're still doing business.

24 Obviously, there's competition among
25 companies.

1 Has there been any reduction in the number of
2 these businesses in these other states where there
3 is a cap on the amount of interest?

4 So, in other words, before the cap, you know,
5 was there 10 companies doing business, and after the
6 cap, that same number continued to do business? Or,
7 was there any diminution (sic) in the number of
8 companies that were involved?

9 TOM STEBBINS: I don't know. We have not
10 done a time-lapse analysis of the -- of those --

11 SENATOR RANZENHOFER: That would be helpful,
12 because I know, obviously, there's the "going out of
13 business." And then there's the second aspect, of
14 whether or not there's been a decrease in the number
15 of companies and the effect of competition.

16 TOM STEBBINS: Well, if you can't -- if you
17 can't make a go out of -- of it without 150 percent
18 interest rate, I would argue you shouldn't be in
19 business.

20 SENATOR RANZENHOFER: All right. So you have
21 mentioned 150 percent interest rate, and you
22 mentioned an 83 percent interest rate. And I don't
23 think anybody would argue that those are exorbitant.

24 Is there a number that's higher than the
25 16 percent that would be reasonable in light of

1 other areas of consumer transactions that have
2 higher rates?

3 TOM STEBBINS: Again, I would think anything
4 over 25 percent, which is the rate of criminal loan
5 sharking, is -- would be impossible for us to
6 support, because, again, that is the rate of
7 criminal loan sharking for which you would go to
8 jail.

9 SENATOR RANZENHOFER: Okay. And I know I --
10 you know, I don't mean to put Senator Alcantara on
11 the spot, but she had mentioned that there are some
12 as high as 32 percent.

13 Obviously, that would be a crime if it was
14 lending.

15 TOM STEBBINS: I don't know what kind -- was
16 that credit card lending? Or --

17 SENATOR ALCANTARA: Some credit card lendings
18 are pretty high --

19 TOM STEBBINS: Okay.

20 SENATOR ALCANTARA: -- at 32 percent.

21 SENATOR RANZENHOFER: So if you have credit
22 card lending at 32 percent, and, again, I understand
23 the difference in the type of transaction, you know,
24 where -- you know, what is your opinion -- I know
25 you had mentioned 25. But what's your opinion --

1 TOM STEBBINS: Not a big fan of 32 percent
2 either.

3 SENATOR RANZENHOFER: -- I don't want to pay
4 it either.

5 But, in terms of the legislation that we're
6 talking about, I mean, where is your organization
7 in -- if there's already that type of lending in the
8 state at that rate, and, again, I'm not asking --
9 I'm not going to put you on the spot, I'm not asking
10 you to endorse anything, but, you know, what would
11 be your thought --

12 And, again, you know, you don't have to
13 answer this right now.

14 -- on adopting a rate that is already being
15 used in the state for other types of consumer
16 transactions?

17 TOM STEBBINS: I mean, I think the problem
18 with litigation in particular, is that it is going
19 to go on a certain period of time; whereas -- and
20 that is not the choice of the consumer as to how
21 long that goes on.

22 A 32 percent interest rate, credit card rate,
23 you know, somebody can, presumably, work to pay that
24 off; whereas, on a lawsuit loan, you can't work to
25 pay that off. It's not up to you as the consumer.

1 SENATOR RANZENHOFER: Okay.

2 You had mentioned, right now, it either
3 should be, you can't have an interest in a law firm,
4 and, also, a consumer-lending company.

5 I remember there was a pretty prominent law
6 firm in my neck of the woods, which is western
7 New York, where one of the partners of the law firm
8 was -- he was disbarred or sanctioned because they
9 had an interest in a lending company.

10 So, are there already provisions which make
11 it, if not illegal, you could lose your license or
12 your license could be suspended when you're doing
13 that?

14 TOM STEBBINS: Well, frankly, I wish we had
15 seen more from the bar association or the Trial
16 Lawyers Association on this.

17 But the sad fact is, many of their members
18 have commercial interests with these lenders.

19 And so, you know, while there may have been
20 sanctions, I'm not exactly familiar with those
21 particular instances, but, you know, we have not
22 seen the legal community do a very good job of
23 policing themselves on this.

24 And there was a "New York Times" story that
25 I referenced, just two weeks ago -- or, I believe it

1 was --

2 ADAM MOREY: About a month ago.

3 TOM STEBBINS: -- about a month ago, that
4 showed this -- these -- this interest of the law
5 firm in the lender, you know, sending this --
6 sending the particular case to the lender.

7 And, frankly, that we don't think that
8 relationship should exist.

9 ADAM MOREY: Yeah, and there's an
10 investigation in the Southern District, the U.S.
11 Attorney's Office, into some of these -- some of the
12 lenders and what they're -- you know, what
13 they're -- as reported by "The Times," with this.

14 SENATOR RANZENHOFER: I don't want to
15 (inaudible), but I have one more question, and I'll
16 turn it over to -- turn it back to Senator Jacobs.

17 Right now, if you're involved in consumer
18 lending, and you're not successful in the lawsuit,
19 would it be correct to say that you don't have to
20 pay that amount back?

21 Is that --

22 TOM STEBBINS: That is correct to say.

23 But as I mentioned, in the case of the 9/11
24 fund, and those sorts of things, you're making a
25 claim. You are not involved in a lawsuit.

1 SENATOR RANZENHOFER: I'm talking about in
2 the lawsuits.

3 TOM STEBBINS: Right.

4 No, but in a lawsuit, that is -- I think that
5 is the primary defense of the lender, is that they
6 are not -- they don't have to get paid back if the
7 case doesn't win.

8 SENATOR RANZENHOFER: Okay. So -- and
9 I don't know if this is feasible.

10 So if a -- if someone is unsuccessful, and
11 they did have to pay back a portion of it, would
12 that be a fair exchange for a higher interest rate?

13 Because, obviously, there's some risk on a
14 company, you know, maybe lending, you know, \$5,000,
15 \$30,000, whatever, if the claim is not successful,
16 you know, they're out.

17 So --

18 TOM STEBBINS: And then I would argue, you
19 would just put that under existing commercial
20 lending, or existing consumer lending.

21 SENATOR RANZENHOFER: Okay.

22 Well, thank you very much. I appreciate your
23 taking the time to answer the questions.

24 Thank you.

25 TOM STEBBINS: Thank you.

1 SENATOR ALCANTARA: What is the percentage of
2 people that default on their loans?

3 TOM STEBBINS: You would have to ask the
4 lenders of that.

5 But as I said, in "Crain's New York
6 Business," one of the largest lenders said that, and
7 I'll quote them here: That they use strict
8 underwriting screening rules to ensure that only
9 about 4 percent of the cases they advance money are
10 lost in court.

11 End quote.

12 SENATOR ALCANTARA: Okay. Thanks.

13 SENATOR JACOBS: If I -- Senator Ranzenhofer
14 mentioned a case from our area, where an attorney
15 was -- I think had his license suspended for a
16 period of time because of having an ownership in an
17 entity.

18 But -- so there must be a law on the books
19 for that.

20 But my question is: If I had a lending
21 operation, I was an attorney, and I -- and --
22 I guess this is part of the question, too, is it
23 typical that, if I am seeking a loan, that I come to
24 the lender first, and then get an attorney? Or is
25 it usually the attorney that -- they've already gone

1 to attorney, and then they are seeking a loan?

2 TOM STEBBINS: I think it depends. I don't
3 think there's any hard-and-fast rule.

4 I mean, certainly, you know, one of the
5 things we've seen is the proliferation of online
6 advertising in regards to these.

7 So, you know, obviously, personal-injury
8 lawyers are already very, very vigorous in
9 advertising.

10 And we're seeing the lawsuit lenders doing
11 the same.

12 And I guess it just depends on which banner
13 the consumer clicks on first.

14 SENATOR JACOBS: I guess my question was, if
15 I was an attorney, but not practicing, let's say,
16 but I had a lawsuit-lending operation, somebody
17 comes to me for a loan, say, looks like a good case.

18 TOM STEBBINS: Right.

19 SENATOR JACOBS: I refer to Mike Ranzenhofer,
20 and I get a referral as an attorney.

21 TOM STEBBINS: Right. And that's one of the
22 things -- that's one of those conflicts of interests
23 that we would like to control as part -- and is
24 controlled in Senator's Ortt's bill.

25 SENATOR JACOBS: Oh, it is? Okay.

1 TOM STEBBINS: Yes.

2 SENATOR JACOBS: Okay.

3 Any other questions?

4 Thank you very much.

5 TOM STEBBINS: Thank you again for having us.

6 SENATOR JACOBS: And the next speaker is

7 Kelly Gilroy.

8 Thank you for being here.

9 KELLY GILROY: Do I need to push anything?

10 SENATOR JACOBS: I think you're good.

11 KELLY GILROY: Thank you, Chairman Jacobs and

12 members of the Committee.

13 I appreciate the opportunity to be here

14 today.

15 My name is Kelly Gilroy. I am the executive
16 director of the American Legal Finance Association.

17 ALFA is a trade association made up of
18 companies that provide this level of funding around
19 the country.

20 We were formed in 2004, and we're dedicated
21 to ensuring fair, ethical, and transparent standards
22 in this industry.

23 I just want to give you a little background
24 and tell you where we stand on the issues, and then
25 address a few points that were made in the previous

1 testimony.

2 Let me just quickly mention, first, who legal
3 funding helps.

4 These are people who have already been
5 injured through no fault of their own, have already
6 filed a case or claim, have already hired an
7 attorney.

8 This all happens before they are funded by
9 one of my members, so these are existing cases.

10 This is not affecting the amount of
11 litigation, and it's not affecting the amount of
12 frivolous lawsuits. These are completely different
13 things.

14 What's the money used for?

15 The money is used for life expenses. We're
16 talking about rent payments, groceries, car
17 payments, house payments, preventing foreclosure;
18 different things like that.

19 This money is not needed or used for legal
20 expenses.

21 People aren't calling up one of my members
22 because they need help finding an attorney or
23 because they want help filing a case.

24 They're calling because they can't pay their
25 rent and they can't feed their kids, and they're

1 feeling the pressure.

2 In -- just to be clear, we have supported
3 legislation, and we are -- we support and want
4 legislation in New York, but it needs to be
5 legislation that is appropriate for this product and
6 it takes into effect its unique nature.

7 And all the legislation that we have
8 supported across the country, and what is in the
9 Dilan bill as well, prohibits any funds from being
10 used to pay for legal expenses.

11 So that's just not part of the equation here.

12 In the states that we've supported, and
13 worked with regulators to come up with commonsense
14 regulations, none of those states have subjected
15 this product to the usury law.

16 Arkansas is the only state that was mentioned
17 that did. And no one in my association does
18 business in Arkansas because the rate there is not
19 something that they could possibly live with.

20 The other states that have regulation --
21 Oklahoma, Vermont, Tennessee, Indiana, Maine,
22 Nebraska, and Ohio -- have a special carve-out for
23 this industry, does not subject to usury.

24 Tennessee was mentioned a moment ago.

25 The rate in Tennessee is not 10 percent. The

1 rate is actually closer to 46 percent, so -- a year,
2 is what's in the law.

3 And we worked with those states to come up
4 with consumer protections: Prohibitions with the
5 companies -- or, prohibitions for law firms,
6 commonsense contracts, to make the industry be able
7 to operate and still protect the consumers in those
8 states.

9 We are committed to protecting these
10 consumers and the process.

11 So when the bad actors that were mentioned in
12 the testimony before me, some of the really
13 egregious cases, we agree.

14 And we've been involved in several of those,
15 in trying to find remedies, and speak out against
16 the practices that we have -- that we think are
17 egregious.

18 And, in fact, in the case that was mentioned,
19 the RD Legal case that's happening right now, that
20 was a joint case with the New York Attorney General
21 and the CFPB, we were asked to submit an amicus
22 brief for that, and we did.

23 So the kind of regulations we support:

24 We support strict licensure;

25 We support an appropriate bond so you know

1 you're getting a legitimate company;

2 Assessment of character and fitness;

3 Transparency in contracts.

4 A lot of times, when you've seen problems in
5 this industry since it came into existence, it's
6 been because people didn't understand the terms of
7 their contract.

8 These kind of things, by standardizing the
9 contracts, you take care of that immediately. You
10 allow the consumer to be able to compare contracts
11 from three or more companies, and find what -- the
12 one that works best for them.

13 We support, you know, right of rescission.

14 So, people take out this money, and then they
15 change their mind, they can return it without having
16 any penalty, without having to pay anything.

17 The Dilan bill does all of these things, and
18 it also prohibits referral fees, all of those things
19 that were mentioned before.

20 And I think -- based on the opening
21 statements by Senator Ortt, I think there's so many
22 things we agree on.

23 We agree about the bad actors.

24 We don't -- you know, at ALFA, we don't want
25 those to be part of this industry either.

1 And it's not hurting -- it's hurting
2 consumers, it's hurting the industry, it's hurting
3 everything.

4 I just think we disagree on the right way to
5 do it.

6 And, unfortunately, in the form that the bill
7 is right now, subjecting these companies, and my
8 members, to usury would just eliminate this from the
9 state of New York. There aren't companies that can
10 operate under that.

11 Basically, the bill treats this as a loan,
12 and, in fact, it's very different.

13 Loans require a lot of things that are not --
14 that are not in existence here.

15 There are no credit checks.

16 There are no income or employment
17 verification checks.

18 There's no collateral.

19 People aren't paying interest payments.

20 There's no fixed maturity date.

21 So, basically, when a person -- when a
22 company funds someone, they don't know when, or if,
23 they'll ever be paid back.

24 And in the event that they don't receive any
25 money back, they don't -- there's nothing they can

1 do, there's no recourse.

2 They don't garnish wages. They don't
3 repossess cars. They don't affect your credit.
4 There's no debt creation here.

5 So it's a very different product, even though
6 I understand why people kind of want to jump to call
7 it "a loan."

8 It is a very unique, different product.

9 I think you know that, in this economy, if
10 you walked in a bank and said, I need even a loan
11 for \$1,000, and you didn't have a job, you had
12 horrible credit, and you didn't have anything you
13 were going to put up for it, you didn't tell --
14 couldn't tell them when you were going to pay them
15 back, and they couldn't do anything to you in the
16 end, I think they would laugh you out of the -- out
17 the door.

18 So a couple other things that were mentioned
19 in the previous testimony that I think merits some
20 discussion are the risks mentioned.

21 So, it was mentioned that a company said they
22 have strict underwriting, and they do. And that's a
23 good business practice, because -- and, that,
24 I think, points to the fact that these aren't
25 frivolous cases.

1 People are looking at them, and trying to
2 find cases that have merit, and make sense.

3 But with all of that said, it's still a very
4 risky transaction.

5 Companies don't know when they're going to
6 get paid back, and they don't know if they will.

7 So even with all you can know, and how good a
8 case can look, there are so many unknowns when
9 you're dealing with litigation.

10 You could fund right today, and then in
11 discovery it turns out that the injury that the
12 client had was actually preexisting from something
13 that happened 10 years before, and you might not get
14 paid back.

15 There's a lot of unknowns, and the risk is
16 very real.

17 Our members have reported that, sometimes, as
18 high as, like, 10 percent of the time they can get
19 nothing back at all.

20 But what happens often here, which is another
21 thing you don't find in credit cards or loans or car
22 payments, or anything like that, is that, when a
23 person goes to settle, although that attorney is
24 settling the case, they often reach out to the
25 company and say, You know what? This is settling

1 for a lot less than we thought. There's not going
2 to be enough to pay you back what was in the
3 contract. Can we cut that down?

4 And that happens all the time.

5 So that's something else that makes it
6 unique.

7 And something else I think is just kind of an
8 interesting part of this discussion, especially when
9 it seems like we agree on a lot of things about how
10 to do it, but some of the methods are a little
11 different, it was mentioned earlier that a lot of
12 these cases go out for three to five years, and that
13 that's not fault of the plaintiff.

14 And that is -- I couldn't agree more.

15 But what's happening here, is these
16 plaintiffs are being sweated out by the people on
17 the other side of the lawsuit.

18 They know you don't have money.

19 They know when you're going to run out.

20 They know you need to -- you might lose your
21 house.

22 And they think you're gonna settle your case
23 if you don't have something that's going to help
24 you.

25 And what legal funding does, and what my

1 members do every single day, is step in and take the
2 pressure off, and help level the playing field, and
3 help them take care of those expenses, so they can
4 make a -- the right decision with their attorney for
5 when the case should be settled.

6 We are committed to regulation, as I said.

7 We are open to talking about any part of this
8 process.

9 But, right now, the way it stands, the -- you
10 know, Senator Ortt's bill would put us out.

11 And so we're leaning more towards the Dilan
12 bill.

13 But we are happy to keep the discussion
14 going, and talk to -- you know, work with any
15 stakeholders to come up with a fair solution.

16 SENATOR ORTT: Thank you.

17 Senator, any questions?

18 SENATOR ALCANTARA: Yes.

19 Are you -- the members that you represent,
20 are they non-profits?

21 KELLY GILROY: No.

22 SENATOR ORTT: Okay.

23 So I was interested, because, you know,
24 Miss Gilroy, you come here and, you know, you say
25 it's not a loan. It's just something out of -- you

1 know, like, from hearing your speech, it almost
2 confused me with Catholic Charities, because now you
3 guys make it sound like this is something so nice
4 and cute you guys are doing for people.

5 You know, when, in reality, these -- if
6 they're not loans, what are they?

7 KELLY GILROY: You know, it's just a
8 different kind of financial product.

9 I mean, it is -- you're right, it is a
10 financial transaction, and the companies are there
11 to make money, they're for-profit things.

12 But the requirements of when you get a loan,
13 those people know they're going to get paid back.

14 And a credit card, they're going to get their
15 money back.

16 Like, that doesn't happen here.

17 If you walk away from the case, if you move,
18 if you drop it, if you lose, they don't get any
19 money back, not even the principal.

20 So in the case where you lose your case, you
21 still got to keep the couple thousand dollars, or
22 whatever it was.

23 SENATOR ALCANTARA: What percentage of the
24 clients default on this loan?

25 KELLY GILROY: I can give you generalities

1 based on my members.

2 We have 43 members, and we have people, our
3 members report, that, like, in 10 percent of the
4 cases they don't get paid back at all. And, you
5 know, in, probably, about 15 to 20 percent, they
6 take reductions or they don't get paid back the full
7 amount that's in the contract.

8 SENATOR ALCANTARA: But is -- what the normal
9 interest rate for the companies, for the
10 organizations, you represent?

11 KELLY GILROY: We don't -- we don't focus on
12 interest rates because of antitrust laws for our
13 association.

14 It's different for every company and every
15 case.

16 But I will tell you, we were involved in the
17 legislation that passed in Tennessee and in Indiana,
18 that both have interest rate caps in them, and
19 they're nowhere close to the rates that they
20 disclosed.

21 Tennessee's is 46, and Indiana's is 42.

22 SENATOR ALCANTARA: I'm sorry, Miss Gilroy,
23 but I -- you know, we need specific.

24 You know, you come here to testify.

25 This is my second question, and you're giving

1 me general answers.

2 KELLY GILROY: Well, I don't have --

3 SENATOR ALCANTARA: You know, if you are in
4 the state of New York, I need to know specifically.

5 The young man that was before you, we ask
6 him, was the average number of companies that
7 default?

8 And he was able to tell me about 4 percent.

9 I'm not in Tennessee. I'm not in Texas.

10 I'm in New York.

11 So, I am sorry, I would like to know what
12 percentage of your companies, what's the percentage
13 of interest rate that they charge?

14 KELLY GILROY: Okay. I can -- we can --
15 I can get information from the companies
16 I represent, and we can get back to you with more
17 specifics.

18 But, all due respect to the gentleman before
19 me, he was speaking generally about things that
20 he -- I mean, those aren't -- that's not -- that
21 wasn't evidence. That wasn't real -- those aren't
22 real numbers. Those are things that are
23 generalities, that there's -- there's not evidence
24 to what he's saying.

25 SENATOR ALCANTARA: So he made it up?

1 KELLY GILROY: I mean, he could have read it
2 somewhere. But that's not -- that's not -- like,
3 this is not evidence-based.

4 Most of the things that that side is saying
5 are anecdotal.

6 Like, "I read a horrible story."

7 And I read those horrible stories too, but
8 that's not -- doesn't mean that that's exactly how
9 it plays out. That's not the way it is every day in
10 the business.

11 SENATOR ALCANTARA: Oh. And did he tell you
12 that he picked up this information from out of the
13 sky, or are you assuming?

14 Sorry.

15 You know, I just want to say, Senator Jacobs,
16 I think we should be respectful of other people's
17 information because, I was a union organizer for the
18 nurses union. And I myself saw trucks outside of my
19 hospital, giving people business cards, asking them
20 to take out a loan for their injuries and so.

21 So, I would assume that, if he came here
22 representing an organization, that he did, probably,
23 a little bit more research than you do, because you
24 don't even have any numbers for us, any percentage.

25 You are talking to me about Tennessee, and

1 all these other places, that they are nice places,
2 but I don't live there.

3 So when you can come to me and tell me
4 numbers, then we can argue about the information he
5 gave us.

6 Thanks.

7 KELLY GILROY: May I just say something?

8 SENATOR ORTT: Sure.

9 KELLY GILROY: Just to be -- just -- I --
10 I think I was -- didn't -- wasn't clear in the way
11 I said it before.

12 The only reason I mentioned the other states
13 are because those are some of the only states that
14 have laws.

15 I recognize it's very different from
16 New York.

17 I'd be happy to find those numbers from you.
18 Someone standing outside and handing business
19 cards, those are exactly the bad actors that we
20 agree, Senator Ortt, Assemblymember Dilan, all the
21 people agree, those are horrible business practices
22 that my members don't do.

23 There are bad actors.

24 And we want to see regulation that will push
25 those bad people out, so that the people who need it

1 have access to legitimate operating companies who
2 are not there to take advantage of them, but are
3 being clear and, you know, forthright in how they're
4 handling this.

5 So I apologize, I wasn't clear about
6 (inaudible).

7 SENATOR ALCANTARA: This will be my last
8 question.

9 Your company, do you guys give out the loan
10 information in any other language besides English?

11 KELLY GILROY: So for the trade association,
12 our members, what they do, they -- that's the thing
13 that we've supported in other regulation as well,
14 that people get a contract in the language that they
15 speak.

16 SENATOR ALCANTARA: Do they do that now?

17 KELLY GILROY: Yes.

18 SENATOR ALCANTARA: Okay. So if I am in
19 The Bronx and I speak Spanish, I would get a
20 contract in English -- in Spanish?

21 KELLY GILROY: If you are dealing with one of
22 the ALFA members.

23 I can't speak to what some of these other
24 companies, that are the ones who are -- are doing.

25 SENATOR ALCANTARA: Would you argue that

1 that's why we need some sort of regulation?

2 KELLY GILROY: Absolutely.

3 SENATOR ALCANTARA: Because we need to have a
4 uniform --

5 KELLY GILROY: Absolutely.

6 SENATOR ALCANTARA: -- on how these companies
7 operate.

8 And, last -- I'm sorry, Senator Jacobs.
9 I don't want to hijack the -- but I'm an only child,
10 so I talk a lot.

11 [Laughter.]

12 SENATOR ALCANTARA: My other question is:

13 You say that there might be a 10 percent
14 default rate.

15 But, if some companies are charging about
16 100 percent interest rate, would they not make up
17 the money in that?

18 And, also, I find it hard to believe that
19 organizations that are non-non-profit, that you are
20 taking a risk in lending people money, because this
21 is what they are: loans.

22 They're not a gift. You know, they're not a
23 present.

24 They're loans, because you are expected to
25 pay them back.

1 That there has got to be a profit. This is a
2 business. You know, there -- people are making
3 money on this.

4 So if there were so many people defaulting on
5 this, then you would not be representing
6 43 organizations, or companies. Correct?

7 KELLY GILROY: Well, it is a business.

8 And my point with the loss rate is that, it's
9 one of the reasons that you -- it's hard to treat it
10 like a loan. The rates are higher than a
11 traditional loan for those exact reasons.

12 There's higher -- there's a higher risk, and
13 all of those other things about the unknown.

14 There's no guarantee that you'll get paid
15 back like there is with some other things.

16 SENATOR JACOBS: Senator Ortt?

17 SENATOR ORTT: Ah, yes.

18 Good morning -- or, afternoon.

19 So I want to start with a comment, a general
20 statement, and then I'll go into some questions.

21 First of all, I agree with some of the things
22 you said.

23 I think everyone here, I think the focus is
24 to bring some oversight, some guidelines, some
25 standard practices, to this industry, which,

1 clearly, there aren't. I mean, it's hard to argue
2 there would be.

3 Right now you're sort of left to the ethics
4 or guidelines of whatever individual lender you may
5 have.

6 To Senator Alcantara's point, I think --
7 look, I think it's -- to me -- I'm not a lawyer, I'm
8 not a banker. It's clearly a loan, because, to me,
9 a loan is something that has to be paid back.

10 That's sort of the criteria that I would say.

11 If you don't have to pay it back, then you
12 can come up with a lot of other names for it.

13 But if it's a -- if there's an expectation of
14 payment, to some degree, then I would say it's a
15 loan.

16 Now, to your point, obviously, the criteria
17 for it are very different than if you went into a
18 bank. Right?

19 And maybe it is a unique product.

20 That might be a fair point, that there is a
21 uniqueness to this lending, or to this type of loan,
22 that would maybe necessitate some other rate or
23 structure or guidelines.

24 But I wanted to ask you: So what is the
25 criteria?

1 So they're not -- we know they're not
2 financial, like if you went in for a loan. There's
3 no credit checks, you said, all those kinds of
4 things.

5 But there surely must be some criteria,
6 because I'm certain that some people might be turned
7 away, and some people might be loaned a certain
8 amount.

9 So what are the criteria that go into whether
10 you loan to somebody or not?

11 KELLY GILROY: Well, as I mentioned earlier,
12 they have to have already had a claim or case --

13 SENATOR ORTT: Right.

14 KELLY GILROY: -- they already have to have
15 an attorney; it's already in the process. And then
16 they reach out to the companies.

17 The companies want to know what the liability
18 was. You know, what are -- the insurance, you know,
19 what are the limits on it. And that kind of thing.

20 And that's what they're looking at.

21 They're not looking for privileged
22 information when they -- when they do that kind of a
23 thing. But they're looking for, you know, is there
24 good potential that is going to -- that is going to
25 settle?

1 That being said, there's still a lot of
2 unknowns that make it where you don't know if it's
3 going to settle, or if it's going to settle for a
4 lot less.

5 SENATOR ORTT: Okay. But, I mean, from a --
6 I guess, maybe from a legal standpoint, they're
7 looking at, obviously, the likelihood that it will
8 settle and there will be some ability for that
9 person to then pay them. Right?

10 So there is still some criteria, I would
11 argue, that goes into the decision to loan.

12 KELLY GILROY: Absolutely.

13 SENATOR ORTT: Obviously (indiscernible) --
14 right.

15 And so it might not be financial. It might
16 be more of a legal criteria that goes into it.

17 And, obviously, there's still an expectation,
18 if that settled, there will be a payback.

19 Are there standard practices that your
20 association puts out to its members?

21 KELLY GILROY: Yes, our members adhere to
22 best practices when they join the organization.

23 And the attorney -- the New York Attorney
24 General agreement that was agreed to many years ago,
25 is one of the things that was mentioned, and that

1 was with the founding members of my organization.

2 So the people who join ALFA follow those best
3 practices. And we have strengthened -- based on the
4 New York Attorney General agreement, but those have
5 strengthened over time as we've passed other laws in
6 other states.

7 But it's ALFA members who are -- who are
8 adhering to those practices.

9 Other companies, and there are a lot of
10 companies that I don't even -- I'm not even aware of
11 because they're small companies, and there's other
12 companies, that don't adhere to those.

13 SENATOR ORTT: Sure.

14 KELLY GILROY: So that's why you need some
15 regulation to.

16 SENATOR ORTT: No question.

17 And I think that goes to the concern that
18 I have, and I think a point that was made earlier
19 was, there -- certainly, there's always, in Albany,
20 and in any form, I guess, any capital, any
21 governmental body, there's always the debate,
22 I believe, is to, how do we get there?

23 We all like to think that we're trying to get
24 to the same spot, but maybe we have different ways
25 of getting there.

1 But I think, to your point, without some
2 structure on the rate, I think you're really --
3 you're not putting enough teeth to getting the bad
4 actors out.

5 So that's where I come from, and, certainly,
6 my -- my -- my position has been, I think that a lot
7 of the other stuff you mentioned in the other piece
8 of legislation sponsored by Senator Dilan, a lot of
9 good things in there, and I think a lot of things
10 that can be part of a possible piece legislation
11 that comes through.

12 But I think without some -- you know, and we
13 can argue about the rate or argue about how it's
14 structured. But I think some type of rate
15 structure, where someone that goes in has some idea
16 of what they might have to pay back.

17 I know of companies that say, Here's the
18 money. And after it's settled, when you come back,
19 then we'll talk about what you have to pay us.

20 Now --

21 KELLY GILROY: Right.

22 SENATOR ORTT: Now, I'm not saying that's any
23 of your members.

24 I don't know if we know, but I know that's
25 not your -- certainly, that's not your best

1 practices, and I get all that.

2 But I know that's happening.

3 When we made phone calls to some of these
4 companies, you know, you've heard of the high rates.
5 I'm sure there's lower rates.

6 But the fact of the matter is, to me, if I'm
7 going in, whether -- whatever the criteria might be,
8 if somebody loans me an amount of money, I should
9 have some sense of what that payment, amount,
10 schedule, all of that, would be. And I think,
11 anything less than that, we're still going to be
12 having some of these same discussions after the
13 fact.

14 You know what I mean?

15 So the goal is to try to get this right, as
16 best we can, out of the gate.

17 Do you -- now -- and I'm going to run through
18 just two more questions, and you may have answered
19 them or you may discussed it with Senator Alcantara.

20 We talked about:

21 Factors that go into deciding a case.

22 Percentage of cases that you finance. I know
23 it's hard to -- or maybe you do know that.

24 Do -- do you -- the amount of cases that --
25 like, as far as cases that might come in the door,

1 versus cases that actually may receive financing,
2 even if you could provide me a rough estimate.

3 KELLY GILROY: There is a person who is going
4 to testify --

5 SENATOR ORTT: Later?

6 KELLY GILROY: -- after me who I think has
7 that.

8 SENATOR ORTT: Who has that?

9 KELLY GILROY: I just wanted to mention that.

10 SENATOR ORTT: Okay. Good. That's perfect.

11 I will save that, then.

12 And then, do you see -- and I'm guessing the
13 answer is yes, but I'm going to ask it anyways: Do
14 you see any possible conflict, or do you understand,
15 I guess, the concern between law firms and lenders,
16 possible steering of clients to one particular
17 lender over another, and, specifically for me, which
18 I've kind of recently learned, with regard to
19 surgical funding, and surgical-funding products, and
20 selective surgeries?

21 I mean, can you understand the concern there,
22 or do you see a conflict there?

23 KELLY GILROY: I understand the concern.

24 And, you know, I think that what legislation
25 that we have supported, and that we support now, an

1 attorney -- this was kind of asked earlier -- but
2 the attorney can't have an interest in a company
3 that's funding their clients.

4 SENATOR ORTT: Okay?

5 KELLY GILROY: So that's not to say that they
6 couldn't have a company. But they couldn't have an
7 interest in one that's funding their own clients.

8 SENATOR ORTT: Okay.

9 KELLY GILROY: And kind of -- whether --
10 whatever the money is being used for, and whether,
11 depending on the -- whatever kind of case it is,
12 I mean, we want the same things.

13 We want consumers who are coming in to know
14 what they're getting into.

15 We want it to be really clear.

16 We want the terms to be crystal-clear so
17 there's no question.

18 And we want to know that there were no
19 referral fees between the attorney and the funding
20 company or any other medical providers, or anything
21 else.

22 And when you were asking me about the rate,
23 and saying about people's need to understand,
24 I think we need to point out to you, I think the
25 Dilan bill requires a schedule.

1 And that's one of the things that we have
2 seen, that we've done in other places, and my
3 members do this.

4 I mean, it would say, that you would include
5 a schedule. On the first page of the contract, it
6 would say, in very clear terms: How much money
7 you're getting. Any fees associated with it. And
8 it would say, in points of time, how much you would
9 pay back.

10 So it would say: Today I took out, you know,
11 this amount of money. And if you pay it back
12 between today and six months, you owe X. If you pay
13 it back between six months and a year, you owe Y.

14 And so the bottom number on that schedule
15 would be the most you would ever be expected to pay
16 back, and it oftentimes could be, and would be,
17 less.

18 So it's not like a chart that shows you,
19 like, this is how much you pay every month, because,
20 like a traditional loan, you make monthly payments.

21 In this you don't.

22 So it would just say: All right. I'm
23 settling my case. It's been a year and a half.

24 You would pull down to where that is on the
25 chart, and that number is what you will you pay

1 back. And the very bottom number would be for the
2 entire life of the contract, the most it could
3 possibly be that you would ever owe.

4 So there would never be a point where you
5 would go to settle your case, and you would go, I
6 had no idea that I owed this.

7 And that's something that happened in some of
8 the cases that have been in the media, and mentioned
9 before, and some of the things before the New York
10 Attorney General agreement.

11 So, I mean, we agree, people need to, when
12 they take this out, know in the most basic, clear,
13 commonsense terms, "I'm taking out this amount
14 money, and this is the most I could pay back," so
15 they can make that decision, because maybe this
16 isn't the right thing for them, because it's not for
17 everyone, and it's, certainly, not for every case.

18 But, in the cases where people really need
19 it, it's a very valuable tool that I think that has
20 been a good lifeline for them.

21 SENATOR ORTT: Thank you.

22 SENATOR JACOBS: Mike, do you have --

23 SENATOR RANZENHOFER: Yes.

24 First question I wanted to ask: You had
25 mentioned that, I think, there were 37 members of

1 your association?

2 KELLY GILROY: 43.

3 SENATOR RANZENHOFER: 43. Okay.

4 I should have written that down and I would
5 have remembered.

6 So of your 43 members, how many businesses
7 are there in the state that engage in the practice,
8 so I can figure out how many are members of your
9 association, and what's the total number?

10 KELLY GILROY: I can't speak to the number of
11 companies that are not part of my association,
12 because there are companies that are small, that are
13 one person, that are not people that we would be
14 aware of.

15 But, I mean, we make up a -- we make up a
16 pretty sizeable portion of it, I would say, because
17 we have some very large members that are based here.

18 SENATOR RANZENHOFER: I mean, would you --
19 would you be able to give us an estimate?

20 Are there 5 other companies? 50 other
21 companies?

22 I mean, do you have any inkling of how many
23 other companies that are out there?

24 KELLY GILROY: I mean, I would say there's
25 probably -- there is probably more than 20 --

1 there's more than 20 other companies.

2 SENATOR RANZENHOFER: Okay.

3 So it appears, from Senator Ortt's
4 questioning, that there is some agreement in terms
5 of the need for regulation.

6 And to Senator Alcantara's point, you know,
7 making sure that a contract is in the language that
8 the person speaks.

9 And to Senator Ortt's point, to have a
10 schedule so the person knows exactly what they have
11 to pay.

12 It appears to me, and I'm going to come back
13 to this, because this is what I was asking the
14 previous individual that testified, is, you know, if
15 this company -- you know, this type of company or
16 service is going to exist in the state of New York,
17 really, what's the trade-off between, you know,
18 having a fixed rate or not a fixed rate, versus a
19 consumer being able to avail himself or herself of
20 the products?

21 So, you had mentioned that one of the things
22 they don't look at, is they don't look at a
23 consumer's assets, they don't look at a consumer's
24 ability to pay, because, obviously, they're hoping
25 for a settlement and be able to get paid that way.

1 So -- I mean, I see the difference in the
2 type of product because, you know, if you default on
3 a car loan or you default on a bank loan, you know,
4 they can come after you and seize your assets, and
5 you would have to file bankruptcy in order to avoid
6 that.

7 Here, if you don't pay, you know, the company
8 is just out of luck. They have no recourse against
9 you.

10 So it seems to be, to me, that you had
11 mentioned, in other states -- and, again, I know
12 this is, Tennessee and Indiana are not New York --
13 you know, in other states they have interest rates
14 that are in the 40s. I think 42 percent and
15 46 percent were mentioned.

16 You know, to me, it seems the question is:

17 If we want to have this service in the state
18 of New York, and to allow consumers to avail
19 themselves of the service, and not have the risk of
20 having to pay, so maybe you could have a lower rate,
21 but then, you know, you'd have to make the consumer
22 qualify for it. So there would have to be a
23 financial background check. Or, maybe, if the
24 consumer lost his case, maybe that consumer would
25 still have to pay back.

1 You know, I think that has to be reflected in
2 the rate discussion.

3 So, I do -- you know, I am very, you know,
4 happy by the fact that everybody agrees that there
5 are some basic ground rules that have to be in place
6 with respect to consumer protection.

7 And it seems to me, I mean, the issue that
8 really is at the forefront is: What are we doing
9 about an interest rate versus, you know, companies
10 being able to do business in the state?

11 And, if we're going to -- you know, if we're
12 going to make this service less available to
13 consumers, to protect them, then what do you do with
14 respect to the interest rates?

15 So -- I didn't really have any questions.

16 I mean, that's just the way -- that's the
17 sense I get from this hearing.

18 I'm sure we're going to hear from more
19 speakers, although I have another committee meeting
20 I got to go to.

21 But, thank you, as I thanked Mr. Stebbin, for
22 your testimony today.

23 KELLY GILROY: Thank you.

24 SENATOR ALCANTARA: Hi, Miss Gilroy.

25 My -- I have two more questions.

1 When Senator Ortt asked you about the best
2 practice, that you guys have a sheet that your
3 members distribute out to consumers, can the
4 Committee get a copy of the best practice?

5 KELLY GILROY: Oh, we can get you a copy of
6 our best practices, yes.

7 SENATOR ALCANTARA: Okay. Great.

8 And my -- oh, the last question: What
9 percentage of the New York market does your
10 43 company -- what percentage of the market in
11 New York do you guys dominate?

12 KELLY GILROY: I can really only speak to the
13 number of -- the people that I represent, because
14 there's companies I don't know about.

15 SENATOR ALCANTARA: That's all right.

16 KELLY GILROY: I would assume it's probably
17 the larger part of it, though, because, if there
18 were very big companies operating here, we would
19 know about those.

20 And I think they're mostly, the ones who
21 aren't members, are smaller players.

22 So -- I mean, I would -- over half,
23 I would -- that's my assumption.

24 SENATOR ALCANTARA: So your 43 companies,
25 they all operate in the state of New York?

1 KELLY GILROY: They don't all operate in the
2 state of New York.

3 They are -- some of them are big companies
4 that operate all across the country. Some are
5 smaller companies that might only work in one state,
6 here and there.

7 SENATOR ALCANTARA: So out of those 43, how
8 many operate in New York?

9 KELLY GILROY: We have about a dozen that are
10 based in New York, that are, like, New York
11 companies.

12 SENATOR ALCANTARA: No, that do business in
13 New York.

14 KELLY GILROY: Oh. Probably 38.

15 SENATOR ALCANTARA: Okay. Thank you.

16 Thank you.

17 SENATOR JACOBS: Two quick things.

18 The -- these best practices, I was just
19 wondering, is there a standard contract that members
20 in ALFA adhere to?

21 KELLY GILROY: Yes. We actually have a -- we
22 have a model contract that we have been working on
23 that has -- is being implemented right now.

24 We worked on it in conjunction with some of
25 the work we were doing with the CFPB and others, to

1 make sure that the contracts are up to the highest
2 standards and clearer disclosures that we can get.

3 SENATOR JACOBS: Okay. And I just wanted to
4 give you an opportunity to explain, just briefly,
5 you answered him why you couldn't tell what the
6 interest rate, when you say "antitrust."

7 I just wanted you to elaborate why that --

8 KELLY GILROY: So, as a trade association, we
9 don't discuss pricing. Like, at our meetings, we
10 don't say, How much are you guys charging? You
11 can't charge more than this.

12 We talk about other business practices --

13 SENATOR JACOBS: Got you.

14 KELLY GILROY: -- and those kinds of things.

15 SENATOR JACOBS: I just thought that would be
16 important to be clear.

17 SENATOR ORTT: Can I just ask just one last?

18 Are there any incentives, you know, for -- to
19 refer a client to a lender, that are out there?

20 I mean, is there any incent -- what is the
21 incentive, I guess, for a referral --

22 KELLY GILROY: I mean, I think that attorneys
23 would refer people to specific companies because
24 they worked with them in the past and they know
25 them. They like the way they do business. They get

1 it done fast, or they -- things like that, just a
2 general preference.

3 SENATOR ORTT: Okay.

4 KELLY GILROY: But I think, a lot of times,
5 and very oftentimes, the consumer comes to the
6 company, finds the company, and then tells their
7 attorney, I want to work with this firm.

8 SENATOR ORTT: Okay.

9 SENATOR JACOBS: All right. Thank you very
10 much.

11 KELLY GILROY: Thank you.

12 SENATOR JACOBS: And now I'm going to -- and
13 thank you, Senator Ranzenhofer. I know you need to
14 go.

15 SENATOR RANZENHOFER: Thank you for letting
16 me ask questions about -- on the Committee.

17 SENATOR JACOBS: Absolutely, absolutely.

18 And now, Professor Steinitz.

19 Whenever you're ready.

20 PROF. MAYA STEINITZ: Thank you very much.

21 SENATOR JACOBS: Thank you.

22 PROF. MAYA STEINITZ: Good afternoon,
23 Chairman Jacobs and members of the Committee.

24 I thank you for giving me the opportunity to
25 provide feedback on the pending legislation.

1 My name is Maya Steinitz, and I'm a professor
2 of law at the University of Iowa College of Law, and
3 a visiting professor at Harvard Law School.

4 Third-party litigation financing is one of my
5 main fields of expertise as an academic.

6 I have published papers relating to
7 third-party funding, and have recently taught a
8 course on the subject at Harvard.

9 Third-party litigation finance is a service
10 with great potential if harnessed in the correct
11 way.

12 Litigation financing can help indigent
13 plaintiffs access justice in their (indiscernible)
14 mediations for harms; however, like all financing,
15 it's open to abuse.

16 Everyday consumers are particularly
17 vulnerable, and an appropriate consumer protection
18 regime needs to be put in place.

19 The pending bills, therefore, are to be
20 commended.

21 My comments will focus on three main
22 suggestions in reaction to the current bills.

23 First, I wish to note that the Assembly bill
24 does not, strictly speaking, regulate litigation
25 finance; rather, it would regulate financing of a

1 consumer's costs while the litigation is pending.

2 Specifically, the bill forbids
3 litigation-finance companies from paying court costs
4 or attorney's fees, and requires the borrowers to
5 have a contingency-fee arrangement with an attorney
6 in place.

7 The Senate bill lacks this prohibition and
8 would allow the financing of the actual litigation.

9 Such financing, if allowed, can create
10 competition for financing vis-a-vis contingency
11 fees, and may, therefore, reduce the cost of
12 litigation finance for consumers.

13 It's, therefore, in my view, preferable to
14 permit it. And if it is permitted, it should be
15 covered by the protections contemplated by the
16 bills.

17 My second suggestion is to define the scope
18 of protection by focusing on the characteristics of
19 the plaintiff rather than on the amount of
20 financing.

21 The Senate version of the bill exempts
22 contracts offering non-recourse financing of more
23 than half a million dollars from its scope, while
24 the Assembly version provides no such exemption.

25 In my opinion, the Senate version of the bill

1 represents the correct direction, in the sense that
2 the Senate bill's attempts to focus its protection
3 on those individuals who are less-sophisticated
4 litigants by exempting high-dollar
5 litigation-financing contracts from its
6 (indiscernible).

7 Nonetheless, it would seem that a dollar
8 amount is an imperfect way to capture the difference
9 between the different kind of litigation-finance
10 consumers.

11 I, therefore, suggest protecting
12 unsophisticated plaintiffs.

13 In making this suggestion, I'm drawing from
14 the field of securities litigation, where the law
15 distinguishes between sophisticated investors and
16 unsophisticated investors.

17 My third suggestion is to ensure appropriate
18 plaintiff recovery by setting a statutory minimum
19 recovery requirement.

20 It's critically important that third-party
21 litigation finance does not lead to a drastic
22 reduction in plaintiff's recovery.

23 The concern is that the combination of the
24 compensation of third-party funders and the
25 attorney's contingency fees would, separately or

1 combined, leave the wronged or injured plaintiff
2 without meaningful recovery in remediation.

3 To achieve this goal, the bills focus on the
4 methodology through which the funder's return is
5 calculated.

6 The Senate bill sets a limit on the
7 percentage of the return, and the Assembly bill
8 requires a flat rate.

9 I propose that, rather than focusing on the
10 financier's return formula, the statute directly
11 guarantees a minimum return to the plaintiff.

12 In order to guarantee this minimum return,
13 the focus will need to broaden to include both the
14 contingency fees of attorneys and the litigation
15 finance -- funder's return, and ensure that the
16 return of both lawyer financiers and third-party
17 financiers, combined, do not exceed the plaintiff's
18 minimum recovery requirement.

19 Currently, generally speaking, in
20 personal-injury cases, the return on lawyer's
21 litigation finance, with contingency fee, are capped
22 in New York at a third of the total recovery,
23 barring extraordinary circumstances.

24 If funders are allowed, as the bills
25 currently envision, funding living expenses and

1 similar expenses, which lawyers are prohibited from
2 advancing to their clients, the combined minimum
3 return to all financiers, the lawyers and the
4 funders, should be somewhat higher than a third.

5 But to keep the spirit of the current
6 limitation, on return on litigation finance should
7 probably not exceed half of the recovery.

8 Therefore, if my suggested approach is
9 adopted, the statute could ensure, for example, a
10 minimum recovery for the plaintiff of no less than
11 50 percent, barring extraordinary circumstances.

12 Thank you very much for offering me this
13 opportunity, and I welcome your questions.

14 SENATOR JACOBS: Any questions?

15 SENATOR ALCANTARA: Yes, a point of
16 clarification: Which of the Senate bills were you
17 speaking of: Dilan or Senator Ortt?

18 PROF. MAYA STEINITZ: Which of the Senate
19 bills?

20 SENATOR ALCANTARA: Yes, ma'am.

21 PROF. MAYA STEINITZ: The ones that I have
22 been provided.

23 I hope I'm reading the right number, 3911-A.

24 SENATOR ALCANTARA: Okay. Thank you.

25 SENATOR JACOBS: Well, of course,

1 I apologize. I had to step out.

2 The kid's got to eat. Right?

3 So -- but I missed part of your testimony.

4 It sounded like, as I came in --

5 And I thank you for being here, by the way.

6 Especially with your credentials, I'm sure you can
7 add a lot to this discussion.

8 -- so were you suggesting that there be,
9 essentially, whatever is ultimately determined, that
10 the key is to make sure that whatever is paid out
11 does not exceed the award?

12 Did I hear that correctly?

13 PROF. MAYA STEINITZ: Actually -- well,
14 that's -- I'm offering something more generous to
15 the plaintiffs.

16 SENATOR ORTT: Of course.

17 PROF. MAYA STEINITZ: But, that's the way I'm
18 thinking about it.

19 So I'm thinking, what we're trying to do
20 here, I think, is to ensure that, at the end of the
21 day, the plaintiff, who has gotten injured, actually
22 keeps a substantial amount of their recovery.

23 SENATOR ORTT: Yes, yes.

24 PROF. MAYA STEINITZ: And so the most direct
25 way do it, is to just stay a minimum recovery

1 requirement in the statute, and say, at a minimum,
2 the plaintiff needs to recover 50 percent.

3 SENATOR ORTT: Okay.

4 PROF. MAYA STEINITZ: And then the formula,
5 of whether funders use a flat rate or a percentage
6 becomes less important, once we are actually,
7 directly, ensuring what it is, I think, the concern
8 is about.

9 SENATOR ORTT: Okay. Thank you.

10 SENATOR ALCANTARA: I have a couple of
11 questions when you finish.

12 SENATOR JACOBS: Okay. I just wanted to,
13 while you were out, Senator Ortt, there were several
14 compliments to your legislation.

15 So, you know.

16 SENATOR ORTT: That's great.

17 SENATOR JACOBS: Yeah.

18 But I was curious, you were saying that
19 the -- Senator Ortt's legislation allows for funding
20 of legal costs, and you felt that was a good thing
21 because it could spur competition in terms of the
22 legal costs that lawyers are pursuing clients,
23 charging?

24 Is that what --

25 PROF. MAYA STEINITZ: Yeah, I think it's a

1 good idea to allow litigation financiers to actually
2 fund the litigation costs, to pay for lawyer's fees,
3 as well as the court costs, testimony costs,
4 et cetera, because, that way, they're directly
5 competing with contingency-fee lawyers for what it
6 is that lawyers currently fund.

7 So, right now, or, before litigation finance
8 sort came into the -- into existence, really,
9 lawyers had a monopoly over financing litigation.

10 And I can't think of a good reason why we
11 should let lawyers sort of monopolize that form of
12 financing.

13 SENATOR JACOBS: I mean, do you have any
14 sense that lawyers in -- when -- if I had an injury
15 and I go to a law firm, that they -- it seemed to
16 me, from my experience, the third is so standard.

17 Or, do they every say, Well, if you come with
18 me, I'll only take 25 percent if you win?

19 PROF. MAYA STEINITZ: I don't have empirical
20 knowledge of that, but my understanding from one,
21 sort of, academic study that was conducted in the
22 '90s, and I think it was in Wisconsin, so with all
23 of those qualifications, that, actually, there's a
24 range. It's not actually a fixed 33 percent. But
25 it does range from, you know, 20 percent to

1 50 percent.

2 And my understanding is -- again, I don't
3 practice in this area as an attorney -- but with
4 many personal-injury cases, there's -- there's no
5 real question that the plaintiff is going to get
6 paid.

7 I mean, if they were maimed or hurt, sort of,
8 like, we know they're getting paid.

9 We maybe don't know exactly how much, and at
10 what time frame. But, lawyers sort of tend to know
11 what that is, and so the risk may actually be less
12 than what is sometimes portrayed.

13 SENATOR JACOBS: And in your suggestion that
14 you would have a minimum of 50 percent -- that the
15 plaintiff would get 50 percent of the suit,
16 basically, if 50 percent, and a third, that's
17 leaving about 16 percent for the lender.

18 Your sense that's -- still would enable that
19 market to exist, that the lender --

20 PROF. MAYA STEINITZ: Here's what I think of
21 it: All of the questions that have been presented
22 to my predecessors here, I think have an underlying
23 theme, which is: We don't have data. We simply
24 don't.

25 But funders have data.

1 And my understanding from academics who have
2 tried to access that data is that it's private data,
3 of course, and funders say, no, we don't want to
4 provide it.

5 So I think that the onus should be on the
6 party that has data to produce it. And if they're
7 not producing it, then I think, I would want to see
8 sort of leaning in favor of protection of consumers.

9 SENATOR JACOBS: Sure.

10 And one other, it's really unrelated to the
11 legislation we're talking about.

12 I was just curious, on your testimony, that
13 the growth in portfolio financing.

14 PROF. MAYA STEINITZ: Yes.

15 SENATOR JACOBS: And so this is a law firm
16 basically saying, we have this group of loans -- or,
17 group of cases, and we believe we're going to get
18 X amount. We'd like to loan on that.

19 PROF. MAYA STEINITZ: Yes.

20 SENATOR JACOBS: That's fair -- is it a new
21 phenomena that that is happening?

22 And I guess I'm wondering, is there any
23 concern that that could start to alter the
24 attorney's judgment on the merits of the case, and
25 pursuing the case, on whether settling or not,

1 because they may be getting caught in a situation
2 with a loan?

3 PROF. MAYA STEINITZ: Yes.

4 Yeah, I do think that it raises its own set
5 of concerns.

6 And one new set of concerns it raises, is
7 lawyers doing trade-offs between cases within the
8 portfolio.

9 And another concern is that the clients may
10 not know that their cases are being funded.

11 And so the lawyers may be receiving this
12 funding under some arrangement in which, how much
13 they themselves pay, depends on the duration of the
14 litigation. And so that might affect how long they
15 want to -- sort of, what kind of strategy they want
16 to pursue, whether they recommend taking a
17 settlement early, et cetera.

18 So it just raises its own set of
19 considerations that are sort of worth considering.

20 SENATOR JACOBS: Senator, did you have any --

21 SENATOR ALCANTARA: Yes.

22 Professor, thank you for being here. I know
23 you've come from far and away.

24 How would you characterize these payments?

25 Would you characterize them as loans? Or

1 what -- would you -- how would you characterize
2 these payments that are made?

3 PROF. MAYA STEINITZ: I think that there is a
4 good argument to be made that they're not a loan.

5 I wonder, though, whether the question about
6 what we call them makes a difference, because the
7 concerns are very similar to the concerns that we're
8 seeing in relation to loans and lendings.

9 So, that's my view.

10 SENATOR ALCANTARA: Okay.

11 Number two: Out of the states that have
12 regulations on these lending institutions, have you
13 seen a drop in business?

14 PROF. MAYA STEINITZ: I don't know either way
15 because I have no data.

16 SENATOR ALCANTARA: There's no data? Okay.

17 And do you -- what is the average interest
18 rate in other states for these type of loans?

19 PROF. MAYA STEINITZ: I -- also, I don't have
20 that data, and that's why I made my general comment.

21 The parties who have the data should either
22 make it available, or, I think we should just be
23 more protective, since the parties with the data are
24 not releasing it.

25 SENATOR ALCANTARA: Okay. And I know, you

1 know, you have said it over and over again that
2 there's no data.

3 But, again, have you seen a pattern in the
4 type of folks that seek out these type of loans?

5 PROF. MAYA STEINITZ: Who are the plaintiffs
6 seeking the loans?

7 SENATOR ALCANTARA: Yes.

8 PROF. MAYA STEINITZ: Patterns?

9 I'm not aware of patterns.

10 SENATOR ALCANTARA: Okay.

11 And would we argue that the reason that
12 they're not showing us any data is because there's
13 might be information?

14 I know as an attorney you cannot -- you know,
15 but I would argue that the reason why they don't
16 provide us with the data is because there's stuff in
17 there that maybe they don't want us to see, because,
18 if there's nothing to hide, show me the money.
19 I mean, like, show me the information.

20 So, I just want to say that.

21 SENATOR JACOBS: Questions?

22 I had one more.

23 Just your -- you had suggested using the
24 unsophisticated plaintiff/sophisticated plaintiff.

25 And how -- what would be -- I guess you said

1 you were referring -- you were gleaning that from
2 securities regulation.

3 What is an "unsophisticated plaintiff"?

4 PROF. MAYA STEINITZ: I wish I had more time
5 to put this written testimony together because,
6 then, I would have looked at the jurisprudence and
7 what kind of factors there are.

8 So I don't have that at my fingertips.

9 SENATOR JACOBS: But it's something they've
10 used for a while, and --

11 PROF. MAYA STEINITZ: Oh, yeah, there's a lot
12 of jurisprudence on that, a lot of scholarship on
13 that.

14 And, basically, the idea is to have a
15 multifactor test that allows regulators and judges,
16 at the end of the day, to exercise judgment and
17 reason to say: This individual needs protection.
18 This individual, not so much.

19 So level of wealth, and access to assistance
20 from lawyers or financial advisors, is an example of
21 the kinds of things that are being looked at.

22 SENATOR JACOBS: Anymore questions?

23 Professor, thank you very much; thank you so
24 much for coming.

25 PROF. MAYA STEINITZ: Thank you for having

1 me.

2 SENATOR ALCANTARA: Thank you.

3 SENATOR JACOBS: Next, another professor,
4 Anthony Sebok.

5 PROF. ANTHONY SEBOK: Good afternoon.

6 My name is Anthony Sebok.

7 I teach law at Cardoza Law School in
8 New York City. I also am a visiting law professor
9 at Cornell.

10 And a colleague and friend of Maya Steinitz,
11 so I respect greatly.

12 And, like her, I am one of the few people who
13 have been studying this for a long time.

14 Now, I want to make four points today.

15 The first point is that, until now, no one
16 really knew the true cost of consumer litigation
17 funding.

18 This is a question which has been asked over
19 and over again so far.

20 And journalists, for example, are
21 journalists. They just grab what they see. They
22 have anecdotes.

23 And, actually, the actual contracts are,
24 weirdly, not telling the whole story either.

25 So with a colleague, I studied, 15 years,

1 100,000 cases that were funded.

2 We got access to the largest litigation
3 funding company in the United States, doing business
4 across the country, including New York.

5 The cases they had were typical of the whole
6 country.

7 New York's cases, which I can tell you we
8 saw, but I didn't break out for this hearing, just
9 because my article, which I published, and coming
10 out in "The Cornell Law Review" in the fall, talks
11 about this phenomenon nationally.

12 But I think the results we have can be
13 projected on to New York pretty well.

14 We looked at 100,000 cases over 15 years.

15 Of those 100,000 cases:

16 We saw how much was being charged up front;

17 We saw how much was actually being recovered
18 by the funding company at the end;

19 We saw what kind of cases were being funded;

20 We saw a lot.

21 Now, there are a lot of wrong numbers
22 floating around, and this is, like, you hear this
23 from academics all the time: Well, only we know the
24 numbers.

25 But, I mean, I feel like we do have at least

1 better knowledge now than we did before this study.

2 This is the first large-scale study that's
3 ever been done. I think it's a good study.

4 I can't reveal who gave us access.

5 It's a big company.

6 I'm happy to describe our methodology, and
7 I think it's reliable.

8 Now, the reality, I mean, you hear numbers,
9 like, 100 percent per annum interest. Right?

10 I mean, when you look at what the actual
11 bottom-line cost to this funder was of their
12 funding, first of all, the average length of funding
13 was 14 months for the median case.

14 Not every case, the median case, 14 months
15 from date of funding to resolution.

16 By the way, the average period of time before
17 the applicant went to get funding, and there was an
18 incident that they claimed they are going to get
19 compensation for, was 10 months.

20 So the median consumer waited 10 months
21 before they approached the funder.

22 We don't know what they did in those
23 10 months. But, I teach tort law, I teach legal
24 ethics. There's a good chance that they spoke to a
25 lawyer before they spoke to a funder.

1 Now, what did we discover?

2 We discovered that, again, the median, the
3 median recovery, for the funder was 44 percent per
4 year.

5 50 percent total, because it was a 14-month
6 period. 44 percent per annum.

7 Not 120 percent. Not 180 percent.

8 Are there 108 percent deals out there?

9 Maybe.

10 I can tell you one thing, there are contracts
11 out there that might say we're going to get
12 120 percent after 14 months.

13 But what we discovered, is that almost half
14 of the cases, the funder came back and gave a
15 haircut.

16 The funder came back and said, We don't take
17 as much as we legally could. We recognize -- and
18 this goes back to Professor Steinitz's point -- that
19 maybe that would leave you too little.

20 That's an interesting result.

21 In almost half the cases which resulted in a
22 positive amount that the funder could collect, the
23 funder didn't take all they could.

24 So in the end, if you ask somebody, What are
25 you going to expect is going to be your cost?

1 If you look at our study and trust it,
2 I can't promise you it's going to be 44 percent.
3 There's a huge variability, lots of factors.

4 But the expected cost, beforehand, is
5 44 percent per annum.

6 Now, the other thing we discovered, which is
7 interesting, is that in 12 percent of the cases of
8 those, approximately, 50,000 cases that were funded,
9 12 percent of them were net losses for the funder:
10 10 percent total loses. 2 percent they didn't get
11 back what they put in.

12 Also, of the 100,000 cases where they got
13 applications, they rejected more than 50 percent.

14 They took 48 percent. They rejected
15 52 percent.

16 So those are the three things I want to tell
17 you, but I have a fourth point.

18 And my fourth point, and I say this
19 respectfully, is that the figure "16 percent cap"
20 equals zero.

21 I'm going to tell you, from my experience
22 studying this business, that if you impose a
23 16 percent cap, you are going to have zero
24 litigation funding in the jurisdiction.

25 Now, I'm going to talk about Points 1

1 through 3 a little bit more, and then I'm going to
2 talk about Point Number 4 later. Okay?

3 So what does this tell us, what I've learned?

4 Well, first of all, as a lawyer, as a law
5 professor who's done studies of stuff, I can tell
6 you that this is a consumer product that deserves
7 consumer protection.

8 But, it's not a consumer credit product.

9 It doesn't walk or talk or quack like a
10 credit product.

11 The price paid by the funder is highly
12 variable and many factors.

13 It's not a fixed interest rate that is being
14 offered to the consumer, especially if you think
15 about the ex post haircuts afterwards.

16 There is no risk of increasingly
17 indebtedness. It's not like a payday loan. You
18 don't have a cycle of indebtedness, which is one of
19 the hallmarks of why we have usury law.

20 And just to get pedantic, if I may, because
21 I'm a professor, there are six court opinions that
22 say that this is not a loan, this is not debt,
23 because there's a legal definition of "a loan" in
24 New York State.

25 There are four New York State opinions and

1 there two federal court opinions, they go through
2 the law.

3 Other states may have different definitions
4 of "loans," but there's a definition in New York.

5 Now, maybe we don't need to care about
6 technical terms.

7 We should talk about practical questions.

8 What is it we want to do for our consumers?

9 And this is to answer a question that was
10 asked, and I apologize if I mispronounce the name,
11 it's Senator Alcantara?

12 SENATOR ALCANTARA: Alcantara (pronouncing).

13 ANTHONY J. SEBOK: Alcantara (pronouncing).

14 Sorry.

15 There's a technical word for what this is.
16 It's not a word that people use. It's a word that's
17 used in the commercial litigation funding area,
18 where people hire lawyers to write very big
19 contracts.

20 But what they do in the commercial litigation
21 area, where they do exactly the same thing for
22 millions of dollars, the consumer's doing for
23 thousands of dollars, and that is, they're selling a
24 contingent right to proceeds from a lawsuit.

25 And that is defined as a "general

1 intangible." They are selling a general intangible.

2 The UCC has a definition for it.

3 Now, I realize that the average person
4 doesn't realize that that's what they're doing, but
5 we have a category for it, and it's not a loan.

6 It doesn't mean, however, that a consumer who
7 is selling a general intangible shouldn't be
8 protected.

9 I think a consumer should be protected, not
10 because it's a loan, but because they're vulnerable.

11 But when we have vulnerable consumers,
12 according -- in the marketplace, we have different
13 ways of protecting them.

14 In my submitted testimony I talk about this.

15 We don't often use price controls to protect
16 consumers when they're selling something.

17 I don't think we should use price controls
18 here.

19 I think we have other ways of protecting
20 them. I can talk about those later.

21 Now, I want to talk about my fourth point,
22 which is, perhaps, the most aggressive.

23 Despite what you heard earlier, Arkansas does
24 not have consumer litigation funding anymore.

25 They're not -- I mean, there may be

1 registrants, but there are no contracts being
2 offered.

3 Tennessee does, but Tennessee doesn't have
4 the rate that you were quoted.

5 Tennessee has a much higher rate, as
6 Miss Gilroy said: 36 plus 10.

7 Okay?

8 Now, I don't like the idea of picking a
9 number.

10 I'm here to tell you we shouldn't pick a
11 number. There should be other ways of protecting
12 consumers.

13 But I can tell you, if you go to 16, you're
14 gonna get a zero.

15 A further point about the bill, with all due
16 respect, for the life of me, I cannot understand why
17 the bill prohibits the assignment of the litigation
18 funding asset.

19 I mean, I just don't see it; I don't see it
20 for two reasons:

21 I don't see how that protects the consumer;

22 And I also know that it is in the teeth of
23 the UCC in New York, because New York actually
24 favors assignment, and it specifically says, you
25 know, under -- under our UCC, that, you know, you

1 have to specifically prohibit assignment of the
2 contract.

3 All right?

4 So I don't understand why we are diverting or
5 carving out from the Uniform Commercial Code this
6 anti-assignment provision, other than, to put a
7 hurdle; to put a hurdle up in front of these
8 companies.

9 I don't think, that putting a hurdle up in
10 front of these companies, it doesn't help the
11 consumer.

12 I don't think that putting a cap, that's
13 basically going to make it impossible for them to
14 reach the returns which they seem to be achieving in
15 the marketplace, is going to help the consumer.

16 I think there are other ways of helping the
17 consumer.

18 I think transparency in the contract,
19 simplicity in the contract, and more importantly,
20 publicity about what's actually being charged for
21 these assets, will help a marketplace grow.

22 And that's what I would like to see.

23 Thank you.

24 SENATOR JACOBS: Do you have any questions?

25 SENATOR ALCANTARA: Yes, I do.

1 Thank you, Professor, for being here and
2 testifying.

3 You know, I understand that there have been
4 six court opinion saying otherwise.

5 But, you know, English is not my first
6 language.

7 And when somebody gives me something and
8 I have to pay them back, I call it "a loan," you
9 know, regardless of what the court says.

10 I mean, this is not Catholic Charity giving
11 me \$100 to help me with my rent for this month, or,
12 the City -- or, HRA and the City of New York giving
13 me a one-shot deal and I don't have to pay them
14 back.

15 Obviously, I have to pay this back.

16 And, you know, what the court says, you know,
17 at one time the court said that slavery was legal.

18 But we all know now that it was wrong.

19 So, that's all I have to say in regards to
20 that.

21 Do you have any information on what type of
22 folks come out and seek these loans?

23 PROF. ANTHONY SEBOK: So, interestingly, the
24 company doesn't take that information.

25 I can tell you what kind of cases they're

1 using them for, if that would help you?

2 SENATOR ALCANTARA: Thank you.

3 ANTHONY J. SEBOK: Okay.

4 So, the vast majority are for motor vehicle
5 accidents.

6 You wouldn't be surprised that, then, there's
7 a big drop off from that for slip-and-falls and
8 premises liability.

9 And then, you know, a very vanishingly small
10 amount is for the kind of cases that a lot of people
11 are worried about, products liability, we're talking
12 about a few percentage points.

13 Medical malpractice, a few percentage points.

14 Really, we're talking about the kind of
15 work -- I teach torts in New York City.

16 My students, a lot of them, I used to teach
17 at Brooklyn Law School, my students went out and did
18 what you do when you open up a shingle on
19 Court Street: Car accidents, slip-and-fall on
20 someone else's property, and then premises liability
21 on your own.

22 That's the -- that's really the bulk of this.

23 And then there's a few scaffold cases,
24 scaffold -- you know, under the scaffold law.

25 But, that's it. That's -- it's the sort of

1 the stuff people have happen to them every day.

2 If it was a medical-malpractice case, I've
3 looked into this, why isn't there more litigation
4 funding of medical malpractice?

5 And I can tell you, the litigation funders
6 tell me that they shy away from them, because they
7 find that they are extremely difficult for them to
8 evaluate efficiently.

9 And you have to understand that this is, to
10 go back to your point, a business.

11 SENATOR ALCANTARA: Uh-huh.

12 ANTHONY J. SEBOK: This is a volume business,
13 and the companies are trying to make a profit any
14 way they can.

15 One way they cut corners, so to speak, is
16 they don't want to spend a couple of days going
17 through a case. They want to spend a couple hours
18 going through a case.

19 Med-mal, it's too expensive for them to
20 actually underwrite them.

21 I wish they did, personally.

22 SENATOR JACOBS: Senator Ortt?

23 SENATOR ORTT: Yes.

24 Professor Sebok, thank you for being here.

25 I certainly appreciate the figures, because

1 I think the data is very important as we're having
2 this discussion.

3 I mean, our conclusions on what to do with
4 that data may vary, but I think having some starting
5 point or some baseline that's based on some
6 empirical research is important.

7 So I thank you for sharing some of those
8 things with us.

9 Would you agree with your -- with the
10 predecessor, your colleague, you know, she kind of
11 came at it from an end approach, of making sure that
12 they keep a certain percentage or volume of the --
13 do you agree with that notion?

14 PROF. ANTHONY SEBOK: So we didn't talk
15 before we appeared here today.

16 SENATOR ORTT: That's good.

17 PROF. ANTHONY SEBOK: And I was intrigued by
18 that proposal, which I heard for the first time
19 today.

20 So I immediately thought to myself, well,
21 how's that going to work, given what I know about
22 the data?

23 Now, what I know about the data is that the
24 average advance is approximately 2250 -- \$2,250.

25 Now, we don't know, because I couldn't get

1 this data, what the average, sort of, resolution was
2 at trial, which we know never really happens, or,
3 settlement, if it does happen.

4 But we actually do have a sense that it's a
5 lot more than \$2,250.

6 So if you say, well, we don't know what it
7 is.

8 Let's say, the valuation of these cases that
9 they put down, the company does that, is, median,
10 \$37,000, that's a very, very soft figure.

11 I don't know if you know much about the way
12 personal-injury law works.

13 SENATOR ORTT: I don't.

14 PROF. ANTHONY SEBOK: But it's very hard to
15 evaluate a case walking in the door. Right?

16 But let's say that number, "37,000," is
17 right.

18 Take a third off of 37,000, okay, what is
19 that?

20 You're left with approximately twenty-four,
21 twenty-five thousand?

22 If my numbers are right, the 2250 turns into,
23 approximately, 3670. You still have a big amount of
24 money easily meeting Professor Steinitz's
25 requirement of at least 50 percent of whatever

1 resolution there was to the case.

2 So my initial response is, this fits with
3 what I've been told in the field.

4 In the field I've been told by reputable
5 funders that they never want to advance more than
6 10 percent of what they think is the value of the
7 case, because they know what's going to happen.

8 They know what's going to happen is, first of
9 all, after resolution, the funded party is going to
10 be very, very upset about giving up too much of what
11 they recovered. There's going to be a fight.

12 Maybe you'll get a haircut.

13 Maybe that's why we're getting the haircuts.

14 And, also, the funded party who controls
15 settlement --

16 Their lawyer doesn't control settlement. The
17 funder doesn't control settlement.

18 It's plaintiff who controls settlement.

19 -- may refuse what everyone thinks is a
20 reasonable settlement, because they're worried about
21 giving too much over to the funder.

22 Now, that's why funders, if they're
23 thoughtful, and I believe that the ones who are
24 making money are thoughtful, have rules of thumb,
25 like, no more than 10 percent of the expected value.

1 So I think we can find a way of reconciling
2 Professor Steinitz's recommendation with the current
3 industry, with proper, smart regulation, without a
4 cap.

5 SENATOR ORTT: You said you were funded by --
6 or, I'm sorry.

7 You said the -- you can't provide the company
8 that cooperated, or the company that --

9 PROF. ANTHONY SEBOK: Yeah.

10 If they gave me permission, I would.

11 SENATOR ORTT: -- that's fine.

12 But can you tell us who funded the study?

13 PROF. ANTHONY SEBOK: Oh, yes. It was the
14 Israeli Science Foundation (the ISF), who my
15 co-author teaches, in Israel; also at the University
16 of Texas.

17 But, they were our primary funder.

18 SENATOR ORTT: Is release?

19 ANTHONY J. SEBOK: Israeli.

20 Like the National Science Foundation, it's
21 the Israeli Science Foundation.

22 SENATOR ORTT: Israeli Science Foundation.

23 ANTHONY J. SEBOK: Yeah.

24 So their version of the National Science
25 Foundation gave us funding, gave him funding.

1 And then the rest of the funding came from my
2 law school, Cardozo.

3 SENATOR ORTT: You talked -- you mentioned
4 44 percent.

5 ANTHONY J. SEBOK: Yeah.

6 SENATOR ORTT: That was the per annum.

7 PROF. ANTHONY SEBOK: That's the per annum
8 that we got on the median.

9 SENATOR ORTT: And that was from -- that
10 was -- of course, that's being extrapolated from
11 this one lender, obviously, a very large lender?

12 ANTHONY J. SEBOK: Yeah.

13 SENATOR ORTT: Okay.

14 But I think it's fair -- and you mentioned
15 this, fair enough to point out, obviously, one of
16 the concerns today is that there are a number of
17 actors --

18 We don't even know how many. You still don't
19 have that amount of data.

20 -- who are operating outside of what may be
21 an established practice by a large and reputable
22 lender?

23 PROF. ANTHONY SEBOK: Yeah.

24 SENATOR ORTT: And so I think that that's
25 certainly a concern that I have, is how to bring

1 those folks to heel.

2 I also, you know, the -- and you're right,
3 the anecdotes that -- that the -- there's a lot of
4 figures out there that can be pulled out of context.

5 I see it all the time here in Albany.

6 But, I do think that, I've also seen where
7 you have a study. Right?

8 And then someone will present another study
9 that says the exact opposite --

10 ANTHONY J. SEBOK: Yep.

11 SENATOR ORTT: -- of what, you know,
12 sometimes, sometimes, you know, the study tells you
13 what you want it to tell you.

14 Sometimes. Okay?

15 But I do think your figures, the debt are
16 important; the length of time I think is important,
17 the 14 months; knowing that is critical.

18 You know, 44 percent, I guess the question
19 becomes, still:

20 If 44 percent is what they're normally
21 getting, maybe -- maybe it's a matter of a number --

22 I know you're not a price-control guy when it
23 comes to this.

24 -- maybe it's what Professor Steinitz
25 mentioned, because I think that is, certainly, a

1 focus up here, is making sure, whatever you want to
2 call it, there's still -- in my view, there's still
3 an aspect of predatory or predation in this area.

4 Right away, everybody wants to talk about
5 predatory lending, or whether you want to call it
6 "predatory intangible," whatever, "general
7 intangibles."

8 I don't know what you want call it, but like
9 in any industry, especially, you know, folks who are
10 in need of money to pay their mortgage, you know,
11 there can be an aspect of predation.

12 And so I think what we're trying to do is
13 eliminate that, get those folks out of the industry.

14 No one wants to ban the industry.

15 That's not what I intend to do.

16 Every bill, I would tell you, is based on --
17 you know, we base on the usury rates here in
18 New York.

19 You know, we're trying to have a discussion.

20 We may end up in a different spot.

21 I've already said that I think that this is a
22 very unique area, but I do think it's important to
23 not have some type of, sort of, end result; meaning,
24 you're either going to keep a certain percentage of
25 your settlement, or, it's based on a rate, or, some

1 knowledge of that person going in, I think is very
2 important to eliminate that -- the predatory, I'll
3 call it, "lending." I know it's, legally, maybe
4 it's not a lending.

5 And I understand what you're saying, and
6 I can appreciate that there's a legal classification
7 for it, certainly.

8 But I just -- I do think, still, you know,
9 the figures are very helpful to me.

10 You know, the 16 percent, the fact that it's
11 zero, that it would be gone.

12 I think there are people who may need this
13 funding, you know.

14 And so this is helpful to have this data,
15 because you're the first speaker that provided any
16 data to us, as far as real figures based on some
17 empirical research.

18 So I very much appreciate that.

19 And I -- hopefully, we can take that into
20 consideration, as we move forward, from a
21 legislative standpoint.

22 SENATOR JACOBS: Professor, just again, the
23 study you did was one lender -- one lender?

24 PROF. ANTHONY SEBOK: One firm.

25 SENATOR JACOBS: One firm.

1 ANTHONY J. SEBOK: Yes.

2 SENATOR JACOBS: And you said one of the
3 largest in the --

4 SENATOR ORTT: It is the largest.

5 SENATOR JACOBS: Okay.

6 ANTHONY J. SEBOK: The second largest might
7 not like it when I say that.

8 SENATOR ORTT: Yeah. And probably very
9 reputable, I would think.

10 ANTHONY J. SEBOK: (Nods head.)

11 SENATOR JACOBS: Yeah.

12 And I just -- one other question, and this is
13 the legislation you mentioned, that the assignment
14 of litigation-funding asset, why is that important
15 to have, in your mind?

16 ANTHONY J. SEBOK: So I think this is an
17 interesting issue, right, in the following sense:
18 there's two questions.

19 One is, why do I think the funders want it?

20 And the other is, why would someone want to
21 take it away?

22 Okay?

23 Now, burden-of-proof arguments, I learned a
24 long time ago, are the lowest form of argument.

25 I mean, I don't know whether I should put the

1 burden on the other side and say, why do you want to
2 take it away, especially given what I know about
3 commercial law in this state?

4 But I can say this: The reason why the
5 funders want it, is because they themselves are
6 borrowers. And if they're going to enter into the
7 credit markets, they need to point to a security
8 interest that they can identify for a lender.

9 Now, I want to be clear about one thing:

10 When I saw that word "assignment," I was
11 wondering whether or not there was an ambiguity here
12 about whether or not the assignment was of the claim
13 itself, or just the proceeds after the claim has
14 been resolved.

15 There's a big difference.

16 I mean, in New York, for example, you cannot
17 assign a personal-injury claim.

18 You can assign the proceeds from a
19 personal-injury claim.

20 This is a very important distinction that a
21 lot turns on.

22 If we got rid of the second, we would do
23 terrible damage to the ability of insurers to
24 operate in this state.

25 Okay?

1 So the assignment of the proceeds, right, of
2 a claim, is something which people can pledge all
3 the time, and the reason they do so is because it is
4 a secured interest, which creditors like to be able
5 to look to, if worst comes to worst, there's
6 insolvency.

7 SENATOR JACOBS: Uh-huh.

8 ANTHONY J. SEBOK: So if you take that away
9 from these companies, you're basically saying,
10 you're not like any other company, first of all; and
11 second of all, good luck trying to get commercial
12 credit.

13 SENATOR JACOBS: Got you.

14 Do you see that -- that -- if there is the
15 assignment which they have now, I mean, do they --
16 are these sold off --

17 PROF. ANTHONY SEBOK: I don't think they're
18 being securitized right now.

19 I think they're being pledged for credit --

20 SENATOR JACOBS: Got it.

21 ANTHONY J. SEBOK: -- I mean, for
22 commercial-lending purposes.

23 I don't know for sure.

24 I mean, there may be securitization going on
25 out there.

1 I try my best to keep up on the industry, but
2 people don't tell me everything.

3 SENATOR JACOBS: Thank you.

4 Any other questions?

5 SENATOR ALCANTARA: I have a question.

6 I'm sorry, can you repeat again who funded
7 the study?

8 PROF. ANTHONY SEBOK: Yes. It was funded by
9 the -- well, there were two authors.

10 I'm an author.

11 I received all my funding from my university,
12 which is Yeshiva University, the Benjamin N. Cardozo
13 School of Law in New York City.

14 I have a co-author who teaches at the
15 University of Texas, and also at Tel Aviv
16 University. And he applied for a grant from the
17 Israeli government, which he received. And as far
18 as I know, all the funds were used for his research
19 assistants to crunch these numbers, because, I have
20 to admit, I'm not really a quantifiable -- I'm not
21 "quant" person. I'm not good with numbers. I'm
22 good with law.

23 He's is a real economist, and he crunched the
24 numbers. And he had some research assistants.

25 And then I also spent some time working with

1 him, so that paid for my hotel room.

2 SENATOR ALCANTARA: What was the criteria of
3 the Israeli government for funding this study?

4 Out of curiosity.

5 PROF. ANTHONY SEBOK: It's just general
6 academic merit.

7 It was a good study, that they compete -- you
8 know, there's a competition for grant money.

9 SENATOR ALCANTARA: Okay.

10 PROF. ANTHONY SEBOK: As far as I know,
11 I didn't -- I signed the -- I signed a letter,
12 saying that I agreed with everything he was saying
13 in his application.

14 SENATOR ALCANTARA: I was just curious, why
15 would a foreign government be interested in funding
16 studies about paid-loan institutions --

17 PROF. ANTHONY SEBOK: There are so many
18 academics in the United States who have joint
19 appointments with Israeli universities, that they're
20 always doing studies outside their own country.

21 SENATOR ALCANTARA: No, I totally understand
22 that. But I would figure that they do, like, other
23 kind of, like, scientific research, but not on
24 paid-lending institution.

25 I was just curious.

1 And my last questions:

2 In the study that was conducted, did you guys
3 speak to some of the people that have gotten these
4 type of loans?

5 PROF. ANTHONY SEBOK: No. And that was a
6 study I wanted to do, but I haven't gotten funding
7 for that yet.

8 SENATOR ALCANTARA: Okay. Great.

9 ANTHONY J. SEBOK: I do have a study on tap,
10 and I actually have a bit -- I have a model for
11 that.

12 SENATOR ALCANTARA: So this -- so everything
13 that was based on the study was on the research that
14 you are obtained from that institution?

15 PROF. ANTHONY SEBOK: And most importantly,
16 it was totally anonymized. We know nothing about
17 the names of any of the files we had.

18 SENATOR ALCANTARA: You told me.

19 But there has been no study on the
20 individuals that go out and seek --

21 ANTHONY J. SEBOK: I wanted --

22 SENATOR ALCANTARA: -- these type of loans?

23 PROF. ANTHONY SEBOK: -- I still want to do
24 that. I still want to do a granular, qualitative,
25 not quantitative, study of the reasons why people

1 apply, and their experiences, because one of the
2 hypothesis that had been floated, which I think is a
3 worthwhile hypotheses to take seriously, is that, in
4 addition to being necessitous, which is why we care,
5 these people need money.

6 And they either can go and max out their
7 credit cards, or they can do some other form of
8 raising funds, or they can do this.

9 But in addition, there's an additional thing
10 that's very different than other forms of consumer
11 credit going on here.

12 And for this you really have to be in the
13 trenches of personal-injury law, like I am.

14 Because one thing that I think is really
15 important to understand, is these consumers can
16 always get money for their claim.

17 There's always someone out there willing to
18 buy their claim, other than, say, the litigation
19 funding company who wants to buy a tiny piece of it.

20 The insurance company of the defendant
21 they're suing will always put a check on the table
22 to settle a claim.

23 And that's buying a claim. Right?

24 So you have to understand, litigation funding
25 adds a new competitor in the settlement equation.

1 That's what I believe.

2 And I would love to be able to demonstrate
3 that, in fact, there is, subjectively, in the minds
4 of the consumer, that I'm going to hold out and see
5 if I -- if my lawyer -- my lawyer tells me we have a
6 good case, but they're offering this check now.
7 Maybe I'll hold out. Maybe that check will get
8 bigger.

9 You talk to PI lawyers, they'll tell you all
10 the time, that's the dynamic.

11 I understand, that from the defense
12 (indiscernible) point of view, that's not a good
13 thing, because that means the insurance company pays
14 more.

15 But I'm not interested here, primarily, in
16 worrying about insurance companies.

17 SENATOR ALCANTARA: Okay. Thank you.

18 SENATOR JACOBS: Thank you very much,
19 Professor.

20 PROF. ANTHONY SEBOK: Thank you; thank you
21 very much.

22 SENATOR JACOBS: Okay. Next, Anthony Coehlo.

23 HON. ANTHONY COEHLO: Thank you.

24 SENATOR JACOBS: Congressman, thank you for
25 being here.

1 HON. ANTHONY COEHLO: Thank you,
2 Mr. Chairman.

3 Thank you for pronouncing my name correctly.

4 I get so many different ways to pronounce it.

5 It's a pleasure to be here, and thank you
6 very much for having this hearing.

7 My name is Tony Coehlo, and I'm pleased to
8 present my testimony to your Committee.

9 I would like to thank the Committee for the
10 decision to hold this hearing, and for the
11 opportunity to testify in support of consumer
12 litigation funding.

13 I served in the United States Congress,
14 representing California's 15th District, for
15 10 years, including 3 years as majority whip of the
16 House.

17 During that time, I consistently advocated
18 for the rights of disabled Americans.

19 Most notably, I was the author of the
20 Americans With Disabilities Act of 1990, better
21 known as the "ADA."

22 Over the past 28 years, it has been
23 extraordinarily gratifying to see this law help
24 disabled Americans enter the workforce, access
25 public spaces, and fight back against

1 discrimination.

2 According to the U.S. census, one in five
3 Americans suffer from a disability.

4 That includes me.

5 I had epilepsy for most of my life, a disease
6 that causes unpredictable seizures and other health
7 problems.

8 I've had seizures for the last 60 years, and
9 still have some.

10 I'm sure many of you have friends and
11 relatives who experienced or are currently living
12 with some type of a disability.

13 Imagine, if you will, that you are confined
14 to a wheelchair, sitting in front of a door that you
15 cannot open.

16 Others can pass through that door freely, but
17 you cannot.

18 Also imagine that there is a federal law in
19 place that says you should have the same ability to
20 open that door as anyone else.

21 What can you do?

22 Your only recourse is through the court, but
23 bringing a lawsuit can be a long and difficult
24 process that can involve significant financial
25 pressure for the individuals who take it upon

1 themselves to enforce the law through the courts.

2 And that's why I'm here today.

3 As all of you today I'm sure understand, the
4 passage of legislation is only the beginning of a
5 long process, leading to public acceptance and
6 widespread compliance.

7 That has certainly been the case with the
8 ADA, which was just the first step in establishing
9 rights for disabled Americans.

10 Since then, disabled Americans have had to
11 turn to the courts to enforce and find justice under
12 the ADA.

13 Laws are not enforcement.

14 Enforcement is critical to make laws real.

15 That's where legal funding comes in.

16 Presettlement advances can provide immediate
17 financial relief to plaintiffs who are struggling
18 with day-to-day expenses, enabling them to stay the
19 course in cases that are critical to enforcing
20 compliance with the law.

21 While most individuals with disabilities are
22 capable of much more than people understand in the
23 workplace, some are unable to work as a result of
24 injuries they have sustained because of someone
25 else's negligence or malice.

1 Legal funding is critical to those victims as
2 they seek an appropriate outcome for their ordeal.

3 Disabled or not, plaintiffs in complex
4 litigation can be vulnerable.

5 And some in the marketplace employ deceptive
6 and brassive (ph.) (sic) practices.

7 That is why New York needs strong protections
8 for legal-funding consumers.

9 Legal funders should be licensed by the
10 State, and transparency for the consumer regarding
11 the terms of the advance should be mandated by law.
12 It must be clear exactly how much the recipient will
13 owe.

14 However, well-intentioned approaches that
15 rely on interest-rate caps, instead of robust
16 regulation, in my view, are misguided.

17 Interest-rate caps threaten to make
18 presettlement advances unsustainable for funders;
19 and, therefore, reduce or eliminate the access for
20 plaintiffs.

21 To someone like me who cares deeply about the
22 disabled, and the enforcement of ADA, this is highly
23 concerning.

24 ADA violations are serious and widespread,
25 and the pushback that these suits continue to

1 receive is dangerous.

2 Access to legal funding will help disabled
3 Americans defend themselves and uphold the law of
4 this great land; yet interest-rate caps are the
5 preferred solution of insurance companies and other
6 corporate interests driving the tort-reform
7 movement.

8 They would like to eliminate legal funding,
9 for the simple reason, that it reduces their ability
10 to extract low-ball settlements from plaintiffs who,
11 because of the harm that they have experienced, lack
12 the financial resources to get by in their daily
13 lives during the long pendency of a case.

14 Legal funding is not a panacea for the
15 challengers who -- that disabled Americans face, but
16 it's one tool that is available, and, it works.

17 It ensures individuals have a chance to seek
18 justice when they have been harmed, regardless of
19 financial circumstances.

20 With strong regulations mandating
21 transparency, clear contracts for consumers, and
22 robust oversight of funders, legal funding will be a
23 safe alternative for victims who need financial
24 support while they see their cases through the
25 process.

1 Legal funding is important to the cause of we
2 disabled Americans who still need the courts to
3 enforce the equity under the law.

4 In closing: I want to reiterate my hope that
5 this Senate will embrace effective regulation of the
6 industry and preserve legal funding for your
7 constituents.

8 And I thank you for your time.

9 SENATOR JACOBS: Thank you very much,
10 Congressman.

11 Any questions?

12 Senator Ortt?

13 SENATOR ORTT: Congressman, thank you for
14 being here.

15 HON. ANTHONY L. COEHLO: Thank you.

16 SENATOR ORTT: As you may be aware, I'm the
17 Chair of the Mental Health and Developmental
18 Disability (sic) Committee in the Senate, so I have
19 a shared interest in protecting that community, as
20 I'm sure, and I know, you do, because of your
21 previous service and your authorship of a landmark
22 legislation.

23 So I want to thank you for your work with
24 that community.

25 Because I care about it, and since

1 percentages is a big topic here today, do you have
2 any idea what the percentage of the disability
3 community that takes -- that, you know, tries to
4 take advantage, I guess, of legal lending?

5 HON. ANTHONY L. COEHLO: I really don't know,
6 Senator, but I can tell you that one case is too
7 much.

8 And it's my ministry, it's my passion.

9 I believe very strongly, in that, that if
10 anybody is getting -- I won't use that word -- if
11 anybody is getting treated wrongly, that should be
12 corrected.

13 And so I do know the specifics of
14 individuals, but I have no idea of numbers.

15 SENATOR ORTT: Okay. And I ask because, one
16 of the concerns I think that we've heard today is
17 about folks who are vulnerable, meaning anybody
18 who's, obviously coming, looking for funding, is,
19 obviously, in a -- probably, a significantly
20 vulnerable position.

21 If you were to add to that, they have a, you
22 know, developmental disability, that could be
23 even -- I mean, now we're really talking about a
24 vulnerable population in and of itself.

25 Because, to your point, the ADA certainly has

1 to be enforced all the time -- you know, they have
2 to go to court and try to enforcement that law.

3 HON. ANTHONY COEHLO: They have to enforce
4 it.

5 Let me make one point as well, is that the
6 ADA, I always say, is an insurance policy for those
7 of you on the podium that I don't think have
8 disabilities.

9 If you end up with a disability, because of
10 an accident, or because of whatever, the ADA covers
11 you.

12 And so it's a question, people always talk
13 about somebody with a severe disability, implying
14 that they're the only individual.

15 People are -- you know -- every day, more --
16 and as we get older as a society, the more and more
17 people will qualify as someone who is disabled.

18 And so it is -- and it's an ongoing problem.

19 And I really believe strongly -- I was
20 intrigued with the testimony of the individual just
21 before me, and I don't know any of these folks, so
22 the -- the -- I was intrigued with what he was
23 saying about what needs to be done.

24 And I really strongly believe that regulation
25 is the answer.

1 And I think that -- I know that -- and I'm
2 not negative about insurance companies, but they
3 have a business as well. And they have lots of
4 lawyers that fight those of us who have claims.

5 And the lawyers that represent us don't have
6 the resources that the insurance companies have.

7 And so I think it's important to keep all
8 this in balance, and that's what I preach about,
9 talk about.

10 I'm 75, and still my ministry, it's what
11 I strongly believe in.

12 And as I say to you, I don't know how many,
13 but I do know it happens, and one time is too many.

14 SENATOR ORTT: And I was asking because, as
15 Chair of this Committee, and as sponsor of this
16 bill, I've never heard the nexus.

17 No one from that community has come to me and
18 said, This is a big issue for me, or for my family,
19 or my loved one, or...

20 So that was -- this is a first-time nexus for
21 me.

22 Not to say that (indiscernible) --

23 HON. ANTHONY COEHLO: But let me tell you,
24 I was, in part of my life pursuing disabilities,
25 I was chairman of the Epilepsy Foundation of

1 America.

2 SENATOR ORTT: Okay.

3 You are still, or you were?

4 HON. ANTHONY COEHLO: No, I was.

5 I'm on the board.

6 SENATOR ORTT: Okay.

7 HON. ANTHONY L. COEHLO: I'm not chair

8 anymore.

9 And lots of examples there of these type of
10 cases.

11 I was chair of the American Association of
12 People with Disabilities.

13 I can give you examples there.

14 SENATOR ORTT: Okay.

15 HON. ANTHONY L. COEHLO: I'm chair of
16 Partnership to Improve Patient Care.

17 A lot of -- this is what I strongly, I'm
18 committed to.

19 And I can give you examples of people who
20 have -- as a result of their disability, have gotten
21 some help. And others who, basically, got
22 mistreated as a result of what occurred.

23 And so it's -- I can help you in that regard.

24 I'm not sure I can give you exact numbers,
25 but I can give you examples if you need them.

1 SENATOR ORTT: Well, and I think that's
2 important, because I think -- I want to -- I want to
3 create -- or, I want to address something you said,
4 but also many other speakers have said, and
5 I certainly make no attempt to speak for my
6 colleagues.

7 No one is talking about trying to --
8 certainly on the intent, to eliminate this from
9 people who need it.

10 We're talking about regulating it.

11 HON. ANTHONY COEHLO: And you're also talking
12 about eliminating the bad actors --

13 SENATOR ORTT: Oh, absolutely.

14 HON. ANTHONY L. COEHLO: -- which I'm
15 hopeful.

16 SENATOR ORTT: Yeah, yeah, if they're gone,
17 that's a good thing.

18 HON. ANTHONY L. COEHLO: Yeah.

19 SENATOR ORTT: And so the question is: How
20 do we do it, and how do we do that in an effective
21 way?

22 And how do we make sure that people who are
23 successful and get a claim, keep the bulk of that
24 claim?

25 So that's really what this attempts to do.

1 And I think, I would imagine, that's what all
2 the other states have tried to do.

3 This has nothing to do with tort reform, of
4 which I am a supporter. But that isn't -- that is
5 not why we're talking about this today.

6 And I am certainly no defender or no
7 water-carrier of the insurance industry.

8 HON. ANTHONY L. COEHLO: Good.

9 SENATOR ORTT: You know, we all have to have
10 insurance, and they have a business model.

11 And -- but, you know, no one up here, this
12 bill is not an attempt to kill.

13 The real -- the goal is:

14 Because you said "one is too many much."

15 And before we heard, you know, on average,
16 44 percent, you know.

17 But we also know there's rates that are
18 higher than that.

19 And I would say, that just because the
20 average might be "this" number, the fact that we
21 have rates significantly higher, we shouldn't just
22 say, eh, that's not the majority.

23 That's -- you know, so there still is the
24 real prospect of predation lending, predatory
25 lending, or predatory characteristics in this

1 industry. And there is no oversight today, as you
2 have acknowledged.

3 And so I think trying to get to, you know,
4 how will we get there?

5 Whether it's a hard rate, or what that number
6 is, or whether we come up with, you know, additional
7 transparencies and regulations that companies have
8 to follow, or maybe it's something like the other --
9 the one professor said about, you know, ensuring
10 that plaintiffs, you know, that there's a certain
11 amount of their award they have to -- that has to be
12 kept for them.

13 However you do that, I think having something
14 hard at the end.

15 You know, I'm kind of a bottom-line person,
16 and I realize you can't always do that.

17 But I'm sort of a bottom-line guy, and that's
18 what we're trying to get to, or what I'm trying to
19 get to, with the legislation.

20 And, obviously, your testimony, as it relates
21 to this, epilepsy, you know, folks who have
22 developmental disabilities, or intellectual
23 disability, who may become that way or are born that
24 way, I think is important, because those are very
25 vulnerable New Yorkers, every single day.

1 And we surely don't want to do anything
2 that's going to increase their vulnerability.

3 HON. ANTHONY L. COEHLO: I know a lot of
4 New Yorkers that fit that category --

5 SENATOR ORTT: I'm certain.

6 HON. ANTHONY L. COEHLO: -- and I work with
7 them.

8 But let me -- I'm going to do something
9 I shouldn't do. As a former legislature, I'm going
10 to make a suggestion.

11 It seems to me that, in this industry, the
12 problem is, there's no regulations. There's really
13 no data. There's -- and for you to try to come up
14 with something without those basics is difficult.

15 It would seem to me that what you should be
16 doing is looking at, how do you regulate it, and
17 enforce it?

18 And you develop data as a result of that.

19 And then it might be, that as a result of the
20 data that you get, that then you have to do
21 something else to prevent the bad apples from doing
22 what they're doing.

23 But, there's no regulation.

24 SENATOR ORTT: Right.

25 HON. ANTHONY COEHLO: And -- and -- and

1 I know a lot of these funders, because of what they
2 do, and so forth.

3 But it seems to me, regulation first, get
4 facts, and then make adjustments where needed.

5 SENATOR ORTT: If I could add --

6 HON. ANTHONY L. COEHLO: And that's --
7 that's --

8 SENATOR ORTT: -- no, that's a -- it's a --
9 from a former Congressman, it's a worthy suggestion.

10 I would just add, and you probably could
11 appreciate this, if there wasn't a bill in, none of
12 us are sitting here today.

13 Let's not kid ourselves.

14 HON. ANTHONY L. COEHLO: Oh, I agree.

15 SENATOR ORTT: If there wasn't something to
16 bring people to the table and put some fire on
17 people, and bring them to heel, you know, because
18 somebody is making money off of this.

19 And if they can get whatever rates they can
20 get, great for them.

21 That's going to be their attitude. Right?

22 HON. ANTHONY L. COEHLO: It's the American
23 (indiscernible).

24 SENATOR ORTT: Right.

25 So if you don't -- somehow, you have to start

1 somewhere to get people into the room, because we've
2 had this discussion, at least in New York, for the
3 past two or three years, since I've been here in the
4 New York Senate.

5 And this is the first time we've even moved.

6 And a lot of that is because there's media
7 coverage in major media outlets. There's
8 legislation. There's people who are interested in
9 this.

10 And so, you know, such is the nature of
11 lawmaking, but I think we can certainly try to get
12 to a point where we have -- (indiscernible) a
13 zero-sum game.

14 There's no regulation in New York.

15 So some regulation, and some consumer
16 protection, to me, is where we're trying to get to
17 here.

18 So I appreciate your testimony, though,
19 Congressman.

20 HON. ANTHONY COEHLLO: Yeah, I would just
21 close by saying that we've got to remember that the
22 people that are involved here.

23 Generally, it's poor folks.

24 Generally, it's people who have disabilities.

25 It is people who have no other recourse.

1 And what is taking place today is a recourse
2 for them.

3 Now, if we were to regulate it, and we get
4 data, we could then control some things that are
5 wrong.

6 But we need to regulate it. It needs to --
7 we ought to get to that point, if that's the
8 compromise that can be made, to start that process.

9 And it shouldn't only be here in New York.

10 It should be all over.

11 There are abuses all over the country.

12 And the fact that you are holding hearings,
13 Senator, I appreciate it, because it -- it is maybe
14 a way to get this process started, to do what needs
15 to be done for this community.

16 SENATOR ALCANTARA: Thank you, Congressman,
17 for being here.

18 And I want to thank my colleagues,
19 Senator Ortt, for bringing this, and Senator Jacobs
20 for hosting this Committee.

21 And just to echo what Senator Ortt said, you
22 know, we are having this meeting, we are having this
23 hearing, because, obviously, there have been a lot
24 of publicity about it.

25 And like you stated before, none of us want

1 to put anyone out of business, because, when
2 business thrive in New York, we hope that that means
3 that there are people that have those jobs, there
4 are people that are making money, and invested in
5 the local economy.

6 But we also want to make sure that vulnerable
7 New Yorkers -- the poor, victims of domestic
8 violence, immigrants -- that they are protected from
9 any kind of harm, because we do know that people
10 that seek out these type of loans --

11 I mean, you know, the court of appeal can
12 call it whatever they want.

13 I'm going to call it "a loan," you know.

14 -- there are people that need this.

15 There are people that are poor.

16 Somebody that lives in Fifth Avenue and
17 59th Street is not going to go and get one of
18 these loans.

19 Somebody that lives in Scarsdale, in
20 Westchester County, probably has friends, or
21 probably access to a bank.

22 So we just want to make sure, the reason why
23 we're having this, is because we believe in
24 transparency, and we believe that, when you are not
25 doing anything wrong, you should have no problems

1 with some type of regulations.

2 And we want to make sure that people don't
3 lose their homes. That people are not taking
4 advantage of.

5 And that's why we are here, is not to try to
6 put anyone out of business.

7 We believe in business, that everybody, you
8 know, is part of the American Dream, and that you
9 become a successful business.

10 But we also know what can happen, and who
11 pays the price when there are no regulations and
12 there are no transparency?

13 You know, and we hope that, from this day,
14 on, and the next time we meet with some of these
15 companies, that they can provide some type of data
16 for us.

17 Like, for example, what is the income level
18 of people that seek out these loans?

19 What part of the state do they come from?

20 And that they can provide us with real
21 document, so we can see, and we can read, and we
22 have time -- and we can have time to digest this.

23 But I just wanted to say that, and I'm going
24 to be excusing myself out.

25 And, again, thank you for having this.

1 I think this is something very important.

2 But, you know, New York has been the pioneer
3 on a lot of things.

4 And I think this is a way for New York to
5 say:

6 Hey, we don't care what anybody else has in
7 another state. We want to make sure that the people
8 that live in our district in the state of New York
9 are protected.

10 Thank you.

11 SENATOR JACOBS: Thank you.

12 You good?

13 SENATOR ORTT: Yeah, I'm good.

14 SENATOR JACOBS: Congressman, thank you very
15 much for your time.

16 HON. ANTHONY COEHLO: Thank you, Chairman;
17 appreciate it.

18 SENATOR JACOBS: And next, Lev Ginsburg.

19 LEV GINSBURG: Thanks, Senator.

20 SENATOR JACOBS: Good afternoon.

21 LEV GINSBURG: How are you?

22 SENATOR JACOBS: Thank you for being here.

23 LEV GINSBURG: My pleasure.

24 So now that you've heard from the experts,
25 you can hear from me.

1 And I studied torts, actually, at the
2 Benjamin Cardozo School of Law.

3 But, Professor Sebok is not to be blamed.
4 I don't think he was a professor there at that
5 point.

6 I want to thank you on behalf of The Business
7 Council, and our more than 2300 members in the state
8 of New York who employ over a million New Yorkers,
9 businesses, large and small, across the state.

10 And I wish to submit these comments into the
11 record as part of the Committee's hearing on
12 third-party lawsuit lending in the state of
13 New York.

14 I will keep my comments relatively brief.

15 As the state's largest statewide
16 employer-advocacy organization, we often address
17 issues impacting the state's economic
18 competitiveness, including business costs driven by
19 state policy actions and New York's profoundly
20 litigious environment.

21 By many measures, New York's business climate
22 lags far behind that of many other states.

23 New York has higher taxes, higher labor
24 costs, higher energy costs, and more regulations
25 than most states.

1 New York also has a vast array of laws making
2 it advantageous to be a plaintiff and a plaintiff's
3 attorney at the expense of defendants.

4 Since businesses are so often the defendants
5 in lawsuits, this paradigm leads to higher risks and
6 higher costs of doing business in New York.

7 One cause of the ever-growing litigation
8 docket in New York's courts is the proliferation of
9 third-party lawsuit lenders in the state.

10 While many of us are familiar with banks and
11 firms that provide bridge money to bankroll
12 long-running, complex commercial litigation, many of
13 us are less familiar with the cottage industry that
14 has developed, offering non-recourse lawsuit loans,
15 loans at exorbitant interest rates, for common tort
16 claims.

17 These loans, which are becoming more
18 documented, thanks to investigations around the
19 country, charge as much as 200 percent, and often
20 leave a consumer-plaintiff with little or no money
21 at the completion or settlement of their lawsuit.

22 Lawsuit-lending outfits have been able to
23 circumvent regulation and usury laws because the
24 loans are contingent on the plaintiff winning or
25 successfully settling a case.

1 It's also difficult to fully quantify the
2 impact -- and we've heard this -- and pervasiveness
3 of the problem, because such presettlement loans
4 need not be filed with any court, and as a result,
5 no public record of these loans exist.

6 That said, these loans have a profound
7 negative impact on our legal system and on the very
8 plaintiffs that they purport to help.

9 Much of the industry, founded by
10 personal-injury lawyers, but now heavily financed by
11 hedge funds and other investors, relies on
12 plaintiffs' lawyers to send business.

13 Often, the same lawyers receive a finder's
14 fee or a referral fee for these loans.

15 Prosecutors in New York, and beyond, have
16 been investigating the business relationships
17 between the lenders and the trial lawyers as to
18 whether these financial arrangements between the
19 parties constitute illegal kickbacks.

20 Whether these financial arrangements are
21 technically legal or not, they demean the legal
22 profession and have a serious appearance of
23 impropriety, while inserting a third-party's
24 interest into the important attorney-client
25 relationship.

1 Instead of truly helping plaintiffs in need,
2 often, these third-party lenders prey on the most
3 vulnerable people with aggressive advertising on
4 television and the Internet, much like other
5 get-rich schemes, psychic readers, and class-action
6 lawsuits.

7 The advertising offers quick cash with no
8 mention of triple-digit interest rates.

9 Many plaintiffs are left with almost nothing
10 after their awards or settlements after paying back
11 these usurious loans.

12 Such a reality, once realized by a plaintiff,
13 also has repercussions on the outcome of the
14 lawsuits themselves.

15 As plaintiffs become aware of the massive
16 amounts of money owed to these lenders, the
17 plaintiffs, in an effort to salvage any chance of
18 substantial monetary awards reaching their pockets,
19 are forced to reject reasonable settlement offers
20 and, instead, swing for the fences and go to trial
21 to reach an amount high enough to repay their loans
22 and have little left over for themselves.

23 This shift away from reasonable settlements
24 greatly and needlessly increases litigation costs
25 for businesses across New York.

1 As a direct result of this lending,
2 settlement discussions are often upended.

3 This push towards litigation further crowds
4 already-stressed court dockets, and slows down the
5 process for all cases, taking up valuable court time
6 and judicial resources.

7 Sadly, this reality does not help defendants,
8 and it does not help plaintiffs.

9 Once plaintiff attorneys are paid, and after
10 lawsuit loans get repaid, with their high interest
11 rates, there is often little left in the settlement
12 or judgment for a plaintiff to make them whole.

13 Lawyers and lenders are the only winners in
14 this new reality.

15 While my primary concern in this arena is the
16 interest of my members, I'm also deeply concerned as
17 an attorney and as a citizen of New York.

18 As a representative for employers in the
19 state, I'm concerned that third-party lawsuit
20 lending leads to evermore baseless litigation
21 against employers, and stymies reasonable
22 settlements, one of the cornerstones of our almost
23 system.

24 As an attorney, I'm deeply troubled by what
25 these loans, and the inappropriate relationships

1 between plaintiff lawyers and the lenders, do to the
2 reputation of a good, necessary, and honorable
3 profession.

4 These actions diminish our collective
5 professionalism and trustworthiness.

6 Finally, as a New Yorker, it's abundantly
7 clear that these lenders prey on the weakest among
8 us.

9 There's no consideration for fairness or
10 decency, and just an unbridled grab at easy money,
11 leaving the vulnerable with no money and no
12 recourse.

13 It isn't often that I testify in favor of
14 more litigation and regulation.

15 While it's rare, when there's a clear
16 injustice that needs correction through law, the
17 business community and The Business Council do not
18 shy away from calling for the appropriate action.

19 In this case, at the very least, these
20 lawsuits must be made -- these lawsuit lendings must
21 be made subject to usury laws to limit the
22 outrageous rates that they -- that some of them
23 charge.

24 Beyond that, further transparency, licensing,
25 and reporting are definitely in order.

1 I appreciate the opportunity to share my
2 thoughts on this important issue.

3 And on behalf of The Business Council and our
4 members, I thank the Committee for investigating the
5 important subject on behalf of New York's consumers.

6 SENATOR JACOBS: Thank you very much.

7 Any questions?

8 SENATOR ORTT: Yeah, Mr. Ginsberg,
9 I appreciate you coming in.

10 Not everyone else did it, because they seemed
11 to have all left before you spoke.

12 LEV GINSBURG: That's the way it goes.

13 SENATOR ORTT: That's okay.

14 But, I appreciate your testimony.

15 And, you know, what do you -- so I --
16 I share -- or, at least I -- you know, I always had
17 the feeling that, to me, one of the costs -- you
18 hear about people talking about New York State a
19 high cost of doing business.

20 One of those costs, you know, it's not just
21 taxes. It isn't just -- it's the cost of, whether
22 it's policies, or what have you, because of a high
23 liti -- you know, New York State seems to be highly
24 litigious state.

25 LEV GINSBURG: Sure.

1 SENATOR ORTT: What do you say -- you know,
2 one of the previous testifiers said, Well, this
3 money just goes to their living costs. It doesn't
4 go to -- you know, in other words, it doesn't really
5 play a part in the length of the suit or in the
6 lawsuit being taken, or anything like that.

7 So I guess, what would you say to that in
8 response?

9 LEV GINSBURG: Well, I think a couple of
10 things.

11 I mean, first of all, money is fungible.

12 So, you know, first dollar in, first dollar
13 out -- first and last dollar out.

14 Money is money.

15 So whether it's going directly towards
16 litigation or other living expenses, I think the end
17 result is about the same.

18 SENATOR ORTT: Okay?

19 LEV GINSBURG: I also think that, you know,
20 part of the -- I think one of the biggest problems
21 for me, is that, if I have a client -- if I'm an
22 attorney and I have a client, and that client is
23 facing, you know, an enormous fee to a lender,
24 there's no way they're going to settle for a
25 reasonable amount.

1 So we're going to extend the length of just
2 about every case, because, you know, a settlement
3 might come at 18 months, or some of the times that
4 we heard earlier.

5 But if the case ends up going to trial,
6 because that plaintiff is sort of desperate for a
7 bigger payday in order to pay off the loan, and then
8 have something left over, I think that no matter
9 what the loan is going for, the net result is, you
10 know, a longer process and, frankly, more money that
11 goes into the hand of the lender.

12 SENATOR ORTT: Sure.

13 Gee, I had so many more questions, but it's
14 late in the day.

15 Let me add this:

16 You know, I am also not someone that normally
17 is in favor of more regulation, because I certainly
18 think New York State is also a very highly-regulated
19 state.

20 But to your earlier point, I do think it's
21 important, you know, where there's -- we regulate so
22 many other areas, and yet, this one, you know,
23 there's really nothing. Right? I mean, it just
24 almost seems -- it seems strangely odd, you know,
25 that there's no regulation.

1 I guess my last question would be, or my last
2 comment, maybe you can speak to this:

3 Would it be your estimation, or your -- The
4 Business Council's estimation, if I understand
5 correctly, that this type of third-party financing,
6 especially with these rates, really are -- you know,
7 extend lawsuits, extend the time, because you're
8 waiting for that bigger payday you're trying to get?

9 You know, so there's more hands in the till,
10 whether it's the attorneys, whether it's the
11 lenders, whoever it might be, and that really just
12 drives up the costs and time for everybody?

13 LEV GINSBURG: Sure.

14 I mean, you know, if you go to legal
15 ethics --

16 And I'm not an expert on legal ethics. I'm
17 bound by them, but not an expert.

18 -- I know that one of the main tests, if you
19 will, when dealing with whether an attorney can get
20 into a financial relationship, a business
21 relationship, with a client, which I would argue
22 that this is some form of business relationship,
23 is -- is the interest of the client different than
24 the interest of the attorney?

25 Right?

1 So, in this particular case, if I'm an
2 attorney, and I'm bringing my client to a lawsuit
3 lender, who happens to pay me a finder's fee, my
4 interest is, of course, I've gotten paid already, if
5 you will.

6 So my client's interests is, they need more
7 money at the end of whatever this particular case
8 is.

9 And my interest as their attorney may no
10 longer be identical. I may no longer be married to,
11 you know, going the distance in a trial when I have
12 a decent settlement on the table.

13 Right?

14 So -- and I'm not saying -- that there's
15 always differences of opinion. Right?

16 A lawyer can only give the advice. The
17 client can or cannot take it.

18 But, I actually may have a different
19 interest. I may want the case over at settlement,
20 and that client may very well need me to go to
21 trial.

22 And I really worry that we're really putting
23 plaintiffs at a disadvantage.

24 Now, I also worry about the defendant,
25 obviously, because I represent several of them, in

1 many cases.

2 So I'm worried that, once again, we're
3 pushing, and as the gentleman who testified a moment
4 ago indicated, you know, we're sort of, insurance
5 companies, payers, defendants, whomever, have an
6 interest, obviously, in mitigating their own losses,
7 as they should.

8 But that's where settlement comes in.

9 And that's why everybody, you know, weighs
10 and measures the costs, and the opportunity costs,
11 and the BATNA, if you will (the best alternative to
12 negotiated agreement), and all of those things.

13 This adds another element to the table. It
14 puts another thumb on the scale, if you will.

15 And I think it's, in many respects,
16 inappropriate.

17 I'm not saying that the entire industry is
18 inappropriate.

19 SENATOR ORTT: Sure.

20 LEV GINSBURG: You know, if people need that
21 bridge, I do understand it.

22 But, to operate outside of the usury rates
23 is -- is -- I don't want to get too dramatic, but
24 it's almost obscene, some of the numbers that, you
25 know, we've all read in various reports in the news,

1 and so forth.

2 And I think that, you know, we heard
3 testimony -- excuse me -- that if we bring it to
4 14 percent, it might as well be zero.

5 No one actually said bring it necessarily to
6 14 percent, you know.

7 Your colleagues, you all discuss these
8 things, and there's always a magic number, right,
9 and it's always a bit arbitrary, but there's a
10 number that makes sense.

11 And, certainly, if Tony Soprano would go to
12 prison for that number, it's too high.

13 SENATOR ORTT: Right, right.

14 LEV GINSBURG: You know, it's as simple as
15 that.

16 SENATOR ORTT: Do a lot of your members get a
17 44 percent per an annum return?

18 LEV GINSBURG: They're not paying me a
19 dividend.

20 I'm going say no.

21 SENATOR ORTT: Okay. I just -- I thought so.
22 Thank you very much, Mr. Ginsburg.

23 SENATOR JACOBS: You had just mentioned that,
24 hedge funds, is that -- are getting involved in
25 this.

1 LEV GINSBURG: I don't have intimate
2 knowledge, but I've certainly read about it.

3 I mean, "The New York Times" did an expose a
4 while back, and there were a few other articles that
5 I've read in some national newspapers, that have
6 said that there's a lot of money being made; and,
7 therefore, a lot of money being poured in for
8 investment purposes.

9 SENATOR JACOBS: Thank you very much.

10 LEV GINSBURG: My pleasure.

11 Thank you, all; appreciate it.

12 SENATOR JACOBS: James Copland from
13 The Manhattan Institute.

14 SENATOR ORTT: Last, but certainly not least.

15 SENATOR JACOBS: Not at all.

16 We're here.

17 JAMES COPLAND: Someone has to be last;
18 right?

19 SENATOR JACOBS: Well, this is being taped,
20 so we --

21 JAMES R. COPLAND: That's the good thing.

22 I testified once in the House, and I was on
23 the panel behind Newt Gingrich. And once he got up
24 and left, the entire -- it was empty. I was
25 speaking to the chairs.

1 SENATOR JACOBS: That's what happens with
2 Rob Ortt. He said he had to leave by three, so...

3 JAMES R. COPLAND: So I do want to thank you,
4 Chairman Jacobs, Ranking Member Alcantara,
5 Senator Ortt, other members of the Committee, for
6 your time, and the thought that's gone into Senate
7 Bill 3911, the opportunity to speak.

8 It's particularly nice for me to be able to
9 speak to something.

10 I'm accused often -- I've, for 15 years,
11 directed The Manhattan Institute's legal-policy
12 program, and, you know, I've been accused by the
13 National Trial Lawyers organization as being a
14 well-known defender of corporate negligence and
15 malfeasance.

16 I always say that's not totally fair. I'm
17 not really very well known.

18 But -- but I do often sort of take the side
19 of a corporate defendant.

20 And so it's nice to sort of be attacking an
21 unscrupulous set of corporations, and I don't mean
22 to suggest they all are, and defending consumer
23 rights here.

24 Senator Ortt, you said -- but -- but as
25 I start here, and I just want to emphasize, I've

1 given my written testimony here to the staff on the
2 Committee, so I'm going to assume that that's
3 incorporated here by reference --

4 SENATOR JACOBS: Yes.

5 JAMES R. COPLAND: -- and don't want to go
6 through 2500 words with multiple footnotes here in
7 front of you, and would, rather, just sort of
8 summarize those points, and respond to some of the
9 things the other panelists have talked about here
10 today.

11 And I do want to emphasize at the outset,
12 just like Professor Sebok's not speaking for Cardozo
13 Law School, I am not speaking for The Manhattan
14 Institute in the sense that, The Manhattan Institute
15 doesn't take institutional positions on any
16 legislation.

17 So I'm just here in my individual capacity.

18 That being said, I -- I -- I want say,
19 I mean, Senator Ortt, you said no one here is saying
20 to get rid of all this.

21 You know, I'm going to say, well, I am.

22 I'm not so sure I wouldn't say that in an
23 optimal situation.

24 I'm not so sure I wouldn't bring back robust
25 champerty and maintenance rules which are the old

1 common-law legal rules I talk about in some of my
2 written testimony, that forbade sort of the
3 sponsorship of litigation.

4 But I do admit, that that's water under the
5 bridge.

6 We can all watch TV and see "1-800,
7 J.G. Wentworth, Need Cash Now."

8 This industry does exist.

9 There is a lot of money, there is financing
10 for it, as you talked about, Chairman Jacobs.

11 And, understandably, I don't mean to suggest
12 the hedge funds are doing anything wrong, because
13 this is, relatively, uncorrelated with the markets,
14 so it's an alternative asset class that they want to
15 invest in.

16 But it's a big business at this point.

17 It does exist there, and I do think that
18 there's a strong case here for regulations.

19 So in my remarks I call this "a modest
20 proposal."

21 It's not outlawing the industry, and it's --
22 it's only really this consumer part of the industry.

23 So there is another large industry in terms
24 of commercial litigation financing. Outfits like
25 Berther Capital, that pays Professor Sebok a

1 retainer to advise them, are out there and doing
2 big-dollar claims.

3 That's really kind of different than what
4 we're talking about here, where we're talking about
5 two- or three-thousand-dollar average advances to
6 small-fry consumers paying exorbitantly high
7 interest rates, or implicit interest rates, on those
8 sorts of arrangements.

9 And so the Senate bill exempts at 500,000.

10 That's actually consistent with the Safe
11 Harbor, under the New York Champerty law, which
12 still exists in Section 489.

13 So it has some logic to it.

14 And I actually sort of like that better
15 than -- it was an interesting idea that
16 Professor Steinitz posited, with a
17 qualified-investor standard, or something like that.

18 I'm also not sure how that works here,
19 though.

20 I mean, the qualified-investor standard that
21 the SEC generates, which is investing in initial
22 public offerings and risky sorts of investors --
23 investments, 140 -- 4A's, and what have you.

24 I mean, that's individuals with one million in net
25 liquid investable assets.

1 I don't think any of them are taking out
2 lawsuit loans with implicit rates of interest of
3 44 percent per annum.

4 I just -- so I just don't -- I don't know how
5 that really fits here.

6 I understand that the "500,000" is kind of
7 arbitrary, and that may have said, Wow, that's kind
8 of arbitrary.

9 Well, it is, but it's also consistent with
10 another section of the New York law.

11 And the same thing with the lawsuit caps that
12 you've got in the bill, they're just a direct
13 reference of New York usury law, at least as I read
14 the draft that I've been circulated here.

15 You're not just coming up with some number
16 out of the sky, or saying, well, this is consistent
17 with other areas of law.

18 So I do think Professor Sebok's work with
19 (indiscernible) Abraham, I know both of them.
20 They're both outstanding professors.

21 I do think it's really interesting, and
22 I don't have any reason to question the data. It's
23 a dataset that I'm not privy to, so I couldn't if
24 I wanted to.

25 But I sort of infer different things from it

1 than Professor Sebok.

2 I mean, he's saying that there's an average
3 recovery -- median recovery, 50th percentile
4 recovery, of 44 percent per year.

5 That's a really, really, really high rate of
6 recovery on these sorts of financial situations.

7 And he's saying that it's a bit more than
8 \$2,000, on average, that's advanced.

9 So these are people take -- these are pretty
10 desperate people.

11 I mean, let's -- let's -- let's be real here,
12 these are pretty desperate people taking out these
13 loans.

14 And he says it's a volume business.

15 As someone who studies litigation in the
16 aggregate, and has been doing it for some time, that
17 raises my eyebrows when I hear "this is a volume
18 business."

19 So, while I think these are useful
20 situations, I mean, I don't know what it's really
21 saying, to say, well, the median's 44 percent, not
22 120 percent.

23 They're both extremely high interest rates
24 here. And, he finds a 12 percent drop rate.

25 That's showing that, you know, there is risk,

1 but 88 percent of the time they're getting a payout.

2 So there's risk, but it's a fairly noble
3 risk, and it's a noble risk when you start building
4 a portfolio of cases, which is the whole point here.

5 And so, sure, you're going to have risks,
6 just like if you have a high-interest bond, you're
7 going to have a risk. But it's not the same as
8 equity.

9 So we can say it's not a loan, and,
10 technically, it's not under New York law, but
11 neither is it equity.

12 The contingent fee is like equity.

13 The lawyer is getting a third of the payout
14 at the end, upside (indicating). Downside, zero.

15 Here, the downside's zero, just like with any
16 risky sort of debt instrument.

17 But the upside is a set payout. It's not a
18 percentage take. It's a -- it's an interest rate.

19 And the implicit interest rate that you're
20 going to expect to get is 44 percent.

21 So the question is: Is that right or the
22 wrong number?

23 And as I sit and think about this, and
24 started thinking about this in preparing this
25 testimony, which, again, I go into a lot of

1 historical detail and things in here, the way to
2 think about this for me is from two perspectives,
3 and both of them mentioned by the other folks
4 testifying here today.

5 One is: What do we think about with
6 consumers?

7 And that's one of the charge of this
8 Committee: How are we thinking about protecting
9 these consumers?

10 And the second is: What does this matter for
11 society at large?

12 How is it going to change the way the
13 litigation system operates? Or how is it changing
14 the way the litigation system operates?

15 And they're two sort of separate questions,
16 but I think they're both important.

17 Now, when it comes to consumers, I'll admit,
18 just like Mr. Ginsburg, my normal bias is to have a
19 lot of transparency, a lot of disclosure, and let
20 people sort of decide after that.

21 And -- and -- I'm not a big fan, in general,
22 of broader usury laws, which New York and other
23 states have.

24 I certainly wouldn't be a fan of Arkansas'
25 usury law. You know, it was alluded to, well,

1 Arkansas's got the wrong rate.

2 Well, yeah.

3 Their usury law in Arkansas is 500 basis
4 points/5 percentage points above the federal reserve
5 discount rate.

6 So that's 200 basis points above the primary
7 right now.

8 That's an absurd usury.

9 So, yeah, I mean, you could set the wrong
10 usury. Even if you wanted to say, we want to have a
11 usury standard, you could set the wrong rate.

12 I do think what we're talking about here,
13 though, is something a bit different than your
14 ordinary usury case.

15 A paradigm case that comes in for
16 high-interest lending, and it's one that's been in
17 the crosshairs of the federal regulators at the CFPB
18 recently, is -- and in Washington, otherwise, is
19 payday lending. Right?

20 Now, payday lending rates can be quite high.
21 They're very short-term interest rates set, and
22 they're usually people who are kind of desperate to
23 make a payment, they need to make the payment.

24 And rather than not get health care or not
25 default on a mortgage, et cetera, they're going to

1 take out a high-interest loan for a short basis.

2 But, by and large, the individual taking out
3 the loan has full understanding of the likelihood
4 that they're going to get paid on their payday.

5 They may get fired in the interim, but they
6 have a pretty good idea, and almost certainly can
7 decide, well, you know, I'm going to get paid in a
8 week. I need the money now.

9 The individual who's contracting with an
10 attorney on a lawsuit is not aware of what the odds
11 are that they'll collect on their suit; also not
12 aware of how much they're likely to get; and not
13 aware of how much the attorney is going to have to
14 do to collect it.

15 The attorney, on the other hand, and
16 businesses full of attorneys evaluating these
17 claims, which is what we're talking about, is able
18 to look at the case and say, Yep, this is a
19 policy-limit case.

20 That's a no-risk case.

21 If the insurance company's going to pay out
22 the policy limit on this case, it's no risk.

23 Now, the attorney's still going cut it -- get
24 a third cut in most of these cases.

25 I mean, not always a third, but there's no

1 price-shopping here, because there's no way to
2 really price-shop.

3 There's not much price-shopping in
4 real-estate agents -- for real-estate agents.

5 No one's price-shopping for plaintiffs'
6 attorneys, because nobody wants to get the cut-rate
7 attorney to handle their case, and nobody is able to
8 really evaluate it.

9 So there tends to be a pretty standard rate
10 here. I mean, this is how this is done.

11 And we've chronicled, and we've got Manhattan
12 Institute papers we've published, going way back
13 from ethicists like Richard Painter, and
14 Lester Brickman who recently retired at Cardozo, who
15 have gone through this, come up with reform
16 proposals on the contingent fee itself, because
17 there's all sorts of opportunities for the lawyer to
18 exploit the client, because the lawyer has a lot
19 more information than the client.

20 And, if the lawyer's going to take a third
21 for a case that involves no work, that's just a
22 windfall to the lawyer.

23 Well, you know, the lawyer at least, though,
24 is subject to legal-ethics rules.

25 The lawyer, at least, could be sued for legal

1 malpractice.

2 The lawyer, at least, could be disbarred for
3 unethical behavior.

4 Right now, there's nothing protecting the
5 consumer from these sorts of litigation-lending
6 shops that may very well know this is a no-risk
7 case, and still take these massive interest rates
8 out.

9 The consumer has no way of knowing that,
10 which is why disclosure alone, to me, probably isn't
11 enough in this context.

12 The other reason why I think disclosure of
13 loan isn't enough in this -- in these contexts, is
14 that our legal system creates incentives for
15 meritless litigation, abusive litigation.

16 And this is somewhat by historical accident;
17 right?

18 I mean, we, unlike most of the developed
19 world, don't have a "loser pays" rule, where, if you
20 lose your case, you have to reimburse the other
21 side's expenses.

22 And that's one reason why we have contingent
23 fees, is because it's really the only -- without --
24 without that, I mean, that's about the only way to
25 get people without means to be able to pay their

1 lawyer.

2 But because -- but because of that, you have
3 subsets of cases, nuisance cases, which have
4 settlement value, because the value to litigate the
5 case for the defendant is real, and they're going to
6 pay you to walk away.

7 And then you have lottery cases; cases where
8 the probability of payout is very, very low, but the
9 expected return across a portfolio of cases, if you
10 are a plaintiffs' firm with a number of lawyers and
11 a number of cases, there's -- is high.

12 So if you take cases with 10 percent chance,
13 and, you know, 9 out of 10 fail, but the tenth one
14 bumps you up to 200, you made a big, big profit,
15 even though you've lost 9 out of your 10 cases,
16 depending on what your cost structure is to work
17 these cases.

18 So, why I bring this up is that, litigation
19 finance can very well facilitate this type of
20 abusive litigation, and, in particular, this sort of
21 the lottery-case examples, because what they're
22 doing is, is creating bounties for a portfolio of
23 cases.

24 Now -- so what this ultimately is going to
25 do, and, again, there is a derth of evidence in

1 terms of how exactly this is happening, other than
2 the fact that it's extremely high interest rates, or
3 implicit interest rates.

4 But -- but -- but -- but what you could do,
5 again, is take a bunch of really weak cases with
6 high payouts, and aggregate them together, and then
7 get payouts at the end.

8 Now -- now I -- Professor Sebok's evidence
9 suggests this is not happening in the worst regard,
10 and the reason for that is, the drop rates are
11 actually low.

12 So, by and large, it's more the consumer
13 protection than a -- a -- a lottery-case model at
14 this point.

15 But there's nothing in an unregulated market
16 to prevent someone from trying to aggregate, roll
17 up, a bunch of bad claims, and -- as long as they
18 can predict that there's a high possible payout on
19 some of these cases.

20 And so this would facilitate, precisely, that
21 sort of situation.

22 And then the individuals in question are,
23 more likely than not, losing their case, and taking
24 out extraordinarily high-interest loans on that
25 case.

1 So -- so it's -- you know, it's -- it could
2 happen, but it doesn't seem like it's happening that
3 much if 88 percent of them are being upheld.

4 So let's go, though, to the notion of the
5 interest rate, and why we might think of this a
6 little different than your normal sort of usury
7 case.

8 I mean, (a) you've got the information
9 imbalance.

10 So, you know, New York has usury laws.

11 But -- but, if there's a case of usury laws
12 in an ordinary case, there's certainly one here
13 where there's an information imbalance.

14 The second is the legal-ethics rules -- the
15 second reason here, is the legal-ethics rules, and
16 Mr. Ginsburg talked about this, you're basically
17 severing ties.

18 If these aren't done properly, you're
19 severing ties and creating conflicts of interests
20 between the lawyer and the attorney.

21 And then the third sort of situation here is,
22 you can create odd incentives.

23 And one is what Mr. Ginsburg talked about,
24 and that's really messing with settlement
25 incentives.

1 And -- and -- and, you know, this is my
2 concern, and, again, I haven't thought about it
3 much, because I didn't know she was going to say it
4 either, Professor Steinitz' suggestion on this, on
5 making it sort of a recovery-based situation.

6 My concern on that is it could really
7 influence the motivation of parties in settlement
8 negotiations, make it much harder to settle claims,
9 and increase legal costs in the aggregate.

10 I'm not sure that it's not better just to
11 have a sort of fee cap that's a usury fee.

12 And, again, without comment on what the right
13 rate should be, or whether New York's got the right
14 rate in other context, but what you know you're
15 going to have with that is, you may or may not
16 squeeze out some of this litigation financing.

17 But my attitude would be is, you're squeezing
18 out the worst of it. Right?

19 You're getting rid of the worst of it with
20 those fees, and preventing lottery-type situations
21 from, potentially, being generated by this.

22 And I don't think the cost is that high.

23 There are other opportunities to get for
24 individuals who are desperate to get money at
25 exorbitant interest rates.

1 And -- but I do think that, you know, we
2 shouldn't necessarily wipe out this entire industry.

3 But if we're going to do it, we really need
4 to be careful about how we're regulating it, because
5 there's a lot of perverse effects.

6 So, lots of stuff there, and I'm happy to
7 answer any questions.

8 SENATOR JACOBS: Thanks.

9 Senator?

10 SENATOR ORTT: Yeah, just very quickly.

11 So, you know, I'm hearing your comments.

12 Would it be fair, despite the argument as
13 always, these are high-risk loans; ergo, that's why
14 we charge high rates?

15 JAMES R. COPLAND: Yeah.

16 SENATOR ORTT: But, yet, the evidence that
17 was given even today, which seemed to be certainly
18 in favor of the industry, or a study that seemed
19 certainly to, was that they're really not nearly as
20 high risk as they would have you believe, because
21 88 percent have some payout.

22 Is that -- is that your takeaway --

23 JAMES COPLAND: Well, 44 percent is the
24 median payout.

25 SENATOR ORTT: So half of them --

1 JAMES R. COPLAND: You could do the basic --

2 SENATOR ORTT: -- are higher than 44 percent?

3 JAMES R. COPLAND: -- right.

4 You could do the basic math. Right?

5 I mean, prime rate is 4.75 percent.

6 Add, you know, three-point -- 325 basis
7 points to get 8 percent. Right?

8 You borrow at 8 percent, you know, and cover
9 your costs with some of that surplus there, you can
10 lose a lot more than 12 percent of your cases if
11 your median case is bringing in 44 percent.

12 That's an extraordinary return.

13 One more point, if I may, just on -- because
14 I didn't address Congressman Coehlo's comments.

15 I do want to point out to the Committee,
16 because this wasn't something I necessarily
17 anticipated to put in my written comments, while
18 I very much am sensitive to the need for legal
19 protection for those with disabilities, you know,
20 it's the case for a reason, that the Americans With
21 Disabilities Act did not include a private right of
22 action for that.

23 Now, we do see certain private rights of
24 action here in New York, most prominently in his
25 native state of California, and those tend to be

1 abusive lawsuit-mill situations. Right?

2 They're not a bunch of disabled people who
3 need \$2,000 a piece.

4 You usually have repeat litigants, who are
5 called "vexatious litigants," eventually by the
6 courts, who are on retainer with attorneys that file
7 a portfolio of claims, arguing that ordinary
8 mom-and-pop businesses don't have the signs at the
9 right level, or the right inches between the lines,
10 for their handicapped parking places, and things
11 like that.

12 And they send out letters and basically say,
13 Give us \$30,000 and we'll go away.

14 And the defendant mom-and-pop business,
15 because of the nature of no-loser fees -- the loser
16 pays for fees in the United States, says, Well, it's
17 going to cost us a hundred grand to litigate this.
18 We'll give them the \$30,000 to go away.

19 We've documented this in a report.

20 It's a November 2014 update of our "Trial
21 Lawyers, Inc." series, "Wheels of Fortune," focused
22 on disability law. It has a number of these
23 examples.

24 But I certainly wouldn't hold that area of
25 law out as an example for one to buttress this sort

1 of consumer lending.

2 I think it cuts it exactly the opposite
3 direction.

4 SENATOR JACOBS: Just, you had mentioned,
5 I can't remember exactly, an insure -- a situation
6 where there's an insurance claim, where you --
7 you -- you -- was it a minimum that you need, that,
8 essentially, it's guaranteed that that liti -- the
9 plaintiff would get something?

10 JAMES COPLAND: Yeah, we -- we -- I mean, the
11 lawyers basically know what a good claim and a bad
12 claim is. I mean, not with 100 percent certainty.

13 But, I mean, this is the various situation in
14 the fact pattern that we've done in our
15 contingent-fee work.

16 And Lester Brickman and Richard Painter both
17 worked this out for us in two separate papers.

18 But Professor Brickman's point is this:

19 If -- if -- there doesn't have to be
20 100 percent certainty, but if you've got a case as a
21 plaintiff's attorney, and you know, with 95 percent
22 certainty, the insurance company, because you know
23 how they behave, you see these repeat cases all the
24 time, this is a volume business again.

25 Professor Sebok says, most of these are

1 auto-accident cases and slip-and-fall cases.

2 These are repeat cases, they're relatively
3 simple, you know what you're going to get.

4 If you're the plaintiff's attorney, and you
5 know, with 95 percent certainty, you're going to get
6 the insurance policy limit on the case, and that's
7 the payout, well, one-third fee to sign on for that,
8 you have to do, virtually, no work.

9 You send a letter, you know, you get your
10 name on the (indicating) board, and you've got a
11 massive return.

12 I mean -- and this is under an ordinary
13 contingent-fee situation.

14 That's part of our problem with ordinary
15 contingent-fee arrangements in the law.

16 This sort of situation is the same thing,
17 except, that instead of getting an equity stake,
18 you're getting a high-interest loan on a low-risk
19 case.

20 And, you know, given the drop rates, a lot of
21 these are low-risk cases they're taking.

22 And so you're, basically, just exploiting the
23 ignorance of the claimant in this case, the
24 plaintiff in this case, and getting an extraordinary
25 return from that plaintiff by virtue of this.

1 So -- so -- so it's -- it's precisely the
2 sort of thing I think we ought to worry about, you
3 know, as regulators, particularly, because, I mean,
4 let's be clear on this:

5 I mean, yes, there are some ways the
6 contingent fees and these structures, you know, are
7 market-based, in a sense. But the underlying
8 vehicle here isn't an exchange of two parties in the
9 market.

10 The only vehicle here is that you have a
11 court system, which is the State, that uses the
12 State's monopoly of the use of force, that comes in
13 there and says, We're going to take from you and
14 give to you.

15 Now, we need that court system.

16 There's a good reason for our tort system.

17 There's a good reason for recovery from
18 accidents, and things like this.

19 But, we want to make sure that it's not
20 abused.

21 SENATOR JACOBS: Thank you very much.

22 Any other questions?

23 SENATOR ORTT: Thank you.

24 SENATOR JACOBS: Well, I want to thank
25 everyone who participated today in today's hearing.

1 I certainly found it very beneficial.

2 I hope my colleagues did as well.

3 I want to thank Senator Ortt for being here,
4 and Assemblyman Magnarelli for being here in the
5 audience, for the entirety of this hearing.

6 Again, thank you very much, and this
7 concludes today's hearing.

8 (Whereupon, at approximately 2:47 p.m.,
9 the public hearing held before the New York State
10 Senate Standing Committee on Consumer Protection
11 concluded, and adjourned.)

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