
Mark M. Bello

Lawsuit Funding – New Legislation in Ohio

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In the battle for money damages in personal injury lawsuits, insurance companies have significant economic advantages over injured plaintiffs and often use plaintiffs' economic hardships to their benefit. Settlement avoidance techniques can result in a desperate plaintiff accepting an offer far below case value. Simply stated, the typical plaintiff lacks the financial resources to wait out the process.

Enter lawsuit funding, a process that provides plaintiffs with timely and strategic cash advances that assist them in waiting out the process and allowing them to receive, hopefully, a larger settlement or verdict. Lawsuit funding has been around for many years and has become a prominent tool for trial lawyers in the new century. Plaintiffs and attorneys all over the country have been utilizing this valuable strategic service, except those in Ohio.

In October, 2001, the Ohio Court of Appeals, for the North District, decided [Rancman v. Interim Settlement Funding Corp.](#), 2001 Ohio-1669, affirming a trial

court declaratory judgment against a lawsuit funding company and for a plaintiff who had sought the company out and entered into multiple contracts with it. The appellate court determined that the contracts were “loans”. The court said there was no real probability that non-payment would occur. “Loans” are governed by a licensing requirement in the Small Loan Act. The funding owner had no license, thus was guilty of ‘contracting for small loans’ without a license. The contracts were void and the company could not enforce or collect.

The company appealed to the Ohio Supreme Court. In January, 2003, the Supreme Court affirmed the Court of Appeals, effectively ending the ability to engage in lawsuit funding transactions in

the state of Ohio. In [Rancman v. Interim Settlement Funding Corp.](#) 99 Ohio St. 3d. 121, 2003-Ohio-2721 the Supreme Court not only agreed that the transactions were ‘loans,’ the Court further determined that the transactions were champertous, indicating that an ‘intermeddler was not permitted to gorge upon the fruits of litigation.’ Where a usury finding would have applied to this one case, a champerty finding applied to all similar cases and lawsuit funding was dead in the state of Ohio.

A substantial nationwide demand for lawsuit funding services has allowed the industry to prosper and establish a national niche in the trial lawyer community. Attorneys all over the country have recognized that lawsuit funding is a significant strategic tool that balances financial inequity, obtains needed assistance for their clients, and improves litigation results.

Lawsuit funding industry professionals, trial lawyers and legislators began to



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seek a legislative solution in Ohio that would permit plaintiffs and their attorneys to utilize this valuable service. As a result of this collaboration, and because lawsuit funding can be a vital tool for plaintiffs and attorneys, Governor Ted Strickland signed legislation (former House Bill 248) effective August 27, 2008, allowing lawsuit funding companies to do business in the state of Ohio. Ohio became the second state in the country (Maine is the other) to pass regulatory legislation for the legal funding industry.

This legislation is reasonable and thoughtful. Ohio injury victims can qualify for vital funding in situations where traditional lenders won't provide assistance. Injury victims are protected by guidelines that litigation funding companies must follow when providing their services.

- The act also provides some key definitions:

“Non-recourse civil litigation advance” means a transaction in which a company makes a cash payment to a consumer who has a pending civil claim or action in exchange for the right to receive an amount out of the proceeds of any realized settlement, judgment, award, or verdict the consumer may receive in the civil lawsuit.

“Company” means a person or entity that enters into a non-recourse civil litigation advance transaction with a consumer.

“Consumer” means a person or entity residing or domiciled in Ohio and represented by an attorney with a pending civil claim or action.

Here are some of the bill's requirements:

- Contracts must be completely filled in and contain, on the front page, appropriately headed and in at least 12-point boldface type, the following disclosures:

- (a) the total dollar amount to be advanced to the consumer;
- (b) an itemization of one-time fees;

(c) the total dollar amount to be repaid by the consumer, in six-month intervals for 36 months, and including all fees;

(d) the annual percentage rate of return, calculated as of the last day of each six-month interval, including frequency of compounding.

- Contracts must contain the initials of the consumer on each page.
- Contracts must contain the following statement, in at least 12-point boldface type, located immediately above the place on the contract where the consumer's signature is required: **“DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT COMPLETELY OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO A COMPLETELY FILLED IN COPY OF THIS CONTRACT. BEFORE YOU SIGN THIS CONTRACT YOU SHOULD OBTAIN THE ADVICE OF AN ATTORNEY. DEPENDING ON THE CIRCUMSTANCES, YOU MAY WANT TO CONSULT A TAX, PUBLIC OR PRIVATE BENEFIT PLANNING, OR FINANCIAL PROFESSIONAL. YOU ACKNOWLEDGE THAT YOUR ATTORNEY IN THE CIVIL ACTION OR CLAIM HAS PROVIDED NO TAX, PUBLIC OR PRIVATE BENEFIT PLANNING, OR FINANCIAL ADVICE REGARDING THIS TRANSACTION.”**
- Contracts must require written acknowledgment by the attorney representing the consumer in the civil action or claim, which must state all of the following:

(a) The attorney representing the consumer in the civil action or claim has reviewed the contract and all costs and fees have been disclosed including the annualized rate of return applied to calculate the amount to be paid by the consumer.

(b) The attorney representing the consumer in the civil action or claim is being paid on a

contingency basis per a written fee agreement.

(c) All proceeds of the civil litigation will be disbursed via the trust account of the attorney representing the consumer in the civil action or claim or a settlement fund established to receive the proceeds of the civil litigation from the defendant on behalf of the consumer.

(d) The attorney representing the consumer in the civil action or claim is following the written instructions of the consumer with regard to the non-recourse civil litigation advance.

- Contracts must be written in the primary language of foreign speaking citizens.
- The legal funding company must have no right to make decisions involving the claim and its settlement. Contracts must contain the following statement in at least 12-point boldface type: **“THE COMPANY AGREES THAT IT SHALL HAVE NO RIGHT TO AND WILL NOT MAKE ANY DECISIONS WITH RESPECT TO THE CONDUCT OF THE UNDERLYING CIVIL ACTION OR CLAIM OR ANY SETTLEMENT OR RESOLUTION THEREOF AND THAT THE RIGHT TO MAKE THOSE DECISIONS REMAINS SOLELY WITH YOU AND YOUR ATTORNEY IN THE CIVIL ACTION OR CLAIM.”**
- Contracts may be cancelled by the consumer within five business days without penalty using this specific language: **“CONSUMER'S RIGHT TO CANCELLATION: YOU MAY CANCEL THIS CONTRACT WITHOUT PENALTY OR FURTHER OBLIGATION WITHIN FIVE BUSINESS DAYS FROM THE DATE YOU RECEIVE FUNDING FROM [insert name of company].”**
- If a dispute arises between consumer and funding company concerning the funding contract, the responsibilities of the attorney representing the consumer in the civil action or claim

are no greater than the attorney's responsibilities under the Ohio Rules of Professional Conduct (R.C. 1349.55(C)).

Lawsuit funding is now available to injured and disabled citizens of Ohio, struggling to make ends meet as a direct or indirect result of their injuries or disabilities. The statute contains sensible regulation and protection for lawsuit funding companies and permits seriously needed financial support for personal injury victims in easy-to-understand terminology.

Trial lawyers who are unfamiliar with lawsuit funding companies or common lawsuit funding procedures will find that most companies provide prompt service. Most companies will provide funding within 24 hours of receipt of inquiry. Most provide web-based and/or toll free service to assist the client in his/her time of need. Most will provide complimentary advice by phone or email. Repayment of lawsuit

advances is, typically, contingent upon recovery (non-recourse). If the subject litigation is successful, the company is repaid principal and risk adjusted profit out of case proceeds. If the case fails, the company forfeits the advanced funds. Ethical companies will happily provide an appropriate compromise if the case resolves at significantly less than predicted case value. This is not an industry standard practice and the reader should consider this policy of case appropriate compromise to be an important factor in choosing a company. The goal of lawsuit financing is to get the litigant through the litigation, without having pressing bills and expenses effect the value of their case. Someone desperate for money is not a positive influence on settlement negotiations and will, almost always, settle his/her case for less than appropriate value. Strategic litigation funding will often prevent this from happening and will often pay for itself with increased case proceeds. **OT**

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