News Story

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Nothing to lose

Plaintiffs who have heavily borrowed against an anticipated settlement no longer have skin in the game

By Carol Lundberg

Business of Law

Economic pressure on personal injury plaintiffs pushes them to consider too early in a case what was once considered a last-resort option: obtaining lawsuit funding.

While the cash can be a lifesaver to some plaintiffs, and can provide the much-needed money they need to hold out for a fair settlement, obtaining too much too soon can actually hamper negotiations.

Lawsuit-funding companies advance plaintiffs money, based on the case's potential. If the plaintiff prevails, the funding company is repaid, along with fees. If the case fails, the funding company is not paid.

Sometimes a responsible cash advance to help pay their bills and expenses during a case can keep a client from accepting a low-ball offer.

But those plaintiffs who leverage too much against their anticipated settlements have no motivation to accept a reasonable offer, because they will recover very little additional proceeds from a settlement, say some frustrated lawyers.

"What happens is, when they've borrowed so much, it takes away any motivation they may have had to accept a modest settlement," said personal-injury lawyer Steven M. Gursten, of the Southfield-based auto law firm Gursten, Koltonow, Gursten, Christensen & Raitt PC.

"If [the plaintiff's] case goes south, they're gambling with the house's money. They have no stake in the case. There is no incentive to be reasonable."

That's why Mark M. Bello, owner of Lawsuit Financial Corp., won't let clients over-borrow.

He doesn't market directly to plaintiffs. Instead, he works with the plaintiff's attorney to make a realistic estimate of the case's value, the client's needs, and the timing of the cash advance. He won't make an advance too early in the case, he said, and he won't advance the client more than the case can justify.

"The principle and the profit can't exceed one-third of the underwritten case value," Bello said.

That ensures as long as he's been given accurate information from the plaintiff attorney, and the client has reasonable expectations, the funding should never hamper a case.

Bello also is critical of funding companies that are less ethical, if for no other reason than they give the entire industry a bad reputation.

"There are attorneys out there who don't use this type of service often, or who don't understand it, and who don't contribute to the process. You can't do a deal without the plaintiff's attorney involved," Bello said, stressing the importance of the plaintiff attorney working with the funding company to act in the best interest of the client.

High rates, risk

Traverse City lawyer George R. Thompson, of Thompson, O'Neil & Vanderveen PC, says that, so far, none of his clients have used lawsuit-funding services, and it's only been recently that his clients have asked him about such funding. When they do, he tries to steer them away from it.

"We've been able to talk our clients out of these deals," Thompson said. "These loans really are onerous. They carry the effective interest rates of 30 percent or more. So if you borrow $7,500 today, a year from today you'll owe $12,000."

Bello said fees are determined case-by-case, and his fees are capped. But they are, by some standards, high, in order to balance out those cases in which he loses his principle.

It's only been in the last two years or so that northern Michigan was targeted by nationwide lawsuit-funding companies that advertise on television, Thompson said. He worries about clients who would borrow against a settlement, especially if they overborrow.

"Modest recovery clients may recover nothing else but the money to cover this obligation. Unequivocally, by the time you add interest debt to these loans, it creates an incentive to roll the dice and go to trial in hopes of seeing a bigger recovery," Thompson said.

Though some lawyers are critical of the high-interest lawsuit funding, Gursten said that they have their place.

He had a client who had been injured, and even though he knew it was a multimillion-dollar case, the client's insurance company offered $100,000 to settle.

The client was desperate, unable to work and had bills to pay, and could have been tempted to accept the offer.

"Because the economy is tanking, and the insurance companies know it, no-fault insurance companies are being more aggressive. They're cutting people off as early as three months after an accident," Gursten said.

And when they offer to settle, they're making low-ball offers, in hopes the client is desperate enough to take it.

They often are, because home values have fallen off, leaving many clients with no home equity to draw on after such a catastrophe. Or the injured person's spouse or family members may be

unemployed, so they can't help, Gursten said. And the injured person's investments have taken a hit and aren't worth as much as they were a few years ago, he noted.

"Sometimes, they have nowhere to turn. They have the choice of taking pennies on the dollar from the insurance company, or taking out one of these loans so they can afford to pursue their case," Gursten said. "That's when these arrangements can be lifesavers."

So he advised his client who was offered the $100,000 to look into taking out a lawsuit-funding advance from a reputable firm, even though he usually discourages it. The client wound up with the multimillion-dollar award Gursten believed he deserved.

When things get sticky

That's the upside to the loans, said personal injury lawyer Mark J. Bernstein, of Farmington Hills-based The Bernstein Law Firm.

"So the loan has kept the client from settling the case too fast. You've taken the thorn out of their side, so to speak," Bernstein said.

"On the other hand, if a loan company is irresponsible, and they lend too much money at a high rate of interest, you can wind up in a crisis where no matter what the verdict is, the plaintiff will never be able to pay it back so they don't care," Bernstein said. "They say, 'Forget it, I already got my $20K so you try the case.'

"They have no interest or incentive to settle the case," he added.

More often than ever, Gursten comes to his office in the morning to find a fax sitting on his machine, sent from a lawsuit-funding company somewhere out of state.

"I know that my client was up late at night and saw a commercial on TV, and called in, and applied for one of these," Gursten said.

And if that client borrows too much, Gursten's job gets pretty difficult.

He's working with a client right now who has taken out multiple cash advances against his anticipated settlement, which Gursten said will be in the hundreds of thousands of dollars.

The client had large liens from the Friend of the Court, which had mounted long before his truck accident. His credit was in shambles before he sustained the head, neck and back injuries in his accident. He'd shown a pattern of recklessness in his finances.

"He's not the easiest client to deal with and was in arrears in every aspect of his life," Gursten said. "But now, it's thousands of times worse because he's asking for the moon and has no incentive to be reasonable."

When the client is finally compensated, the Friend of the Court is going to take a huge chunk, the loan company will take another enormous piece of it, and the client will have very little left.

"It's still mostly rare for people to abuse these [advances] like that. But it is increasing," Gursten said. "And I have a problem because I have to deal with unrealistic client expectations that force me to go to trial. And I used to only have to go to trial because of unrealistic insurance companies."

If you would like to comment on this story, please contact Carol Lundberg at (248) 865-3105 or carol.lundberg@mi.lawyersweekly.com.

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