

Shirley Adams

Subject: FW: H.12

From: Patrick Bernal [<mailto:pjb@wittenetal.com>]

Sent: Wednesday, April 15, 2015 3:14 PM

To: Shirley Adams

Subject: RE: H.12

Hi, Shirley. I've pasted in the notes I made for myself ahead of the call. Do these work? -Patrick

- Many of my clients are approached by litigation lenders seeking to enter into financing agreements such as those being addressed by H. 12.
- It is relatively obvious in certain situations why litigation funding is attractive. If there is a need for immediate cash, the funder is usually the only possible source.
- These lenders would tell you that the interest rates they charge are not usurious because the repayment obligation is only triggered if the plaintiff “wins” and I’m putting the word “wins” in quotes. I understand that over 95% of cases settle before trial. This means that these lenders are essentially assured of payment. These lenders require sign-off from plaintiffs’ lawyers. The lawyers have already done these companies’ due diligence for them; everyone knows that there will almost certainly be *some* recovery. In my view, this is usury by another name.
- In the agreement I sent you earlier today, the re-payment obligation is triggered by “any monetary sum” recovered by the plaintiff. This means that in the event of a small settlement, or in the event of litigation that is dragged out for a long period of time (such as in the case of an appeal), there is a real risk that the client will recover nothing or close to nothing, and the litigation lender will recover a tremendous windfall on its initial investment. After the consumer has repaid litigation costs to her or his attorney (filing fees and costs for expert witnesses, etc.), the consumer may have actually lost money.
- On the other hand, I have seen these loans work well for desperate people. If that person’s case is good, and being handled by a competent lawyer, the initial loan amount may be critical to them at the time of execution, but peanuts in the context of a large settlement or judgment.
- **Concerns:**
 - Consumers may not understand the total cost of the loan
 - Legal terminology may be difficult for them to understand
 - There may be no translation if the consumer’s first language is not English
 - There may be no opportunity to cancel within a reasonable time after execution
- **Requirements I would like to see attached to these loans:**
 - Disclosure statement included with the total amount advanced to the consumer; itemization of any fees; interest rate and frequency of compounding
 - Total amount to be repaid, broken out by six-month increments
 - Conspicuous notice of right to cancellation
 - Consumer should initial each page
 - Warning legend next to signature

- The agreement will be ineffective if not translated into the consumer's native language
- Reciprocal recovery of attorneys' fees in the event of a breach (not just in favor of the lender)
- No mandatory arbitration in the lender's home forum