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Alabama State Senate
Committee on the Judiciary

Dear Members of the Committee:

I am writing you today to encourage you to oppose Senate Bill 67, recently introduced by your Chairman, Senator Ward. While I believe Senator Ward has good motives, and while I share his concerns about our tort system, the bill he has introduced is neither tort reform nor will it be beneficial to Alabama's courts or economy.

In every state where this proposal has been introduced, it is presented as "common-sense" tort reform, a bulwark against job-destroying lawsuits that will only be encouraged by Consumer Legal Funding. Having researched and written on both the importance of tort reform and the potential risks associated with litigation funding, I can appreciate those concerns. And yet, the reality is that this legislation will do nothing to advance the real goals of tort reform, to curb the true abuses in our tort system—judges who refuse to dismiss frivolous claims, abandon long-standing legal principles in order to punish defendants they dislike, and approve ridiculous class action settlements that enrich lawyers and *cy pres* beneficiaries instead of the alleged class. Instead, all this legislation would do is make sure that poor plaintiffs are deprived of basic living expenses during litigation.

This issue—and so many others—requires acknowledgement of a simple truth, that there is a fundamental difference between being pro-business and being pro-market. Free markets enable tremendous human flourishing, and protecting markets is essential to growth. Importantly, however, while protecting markets protects consumers and businesses, protecting businesses typically improves the businesses' bottom line at the expense of markets and, by extension, every consumer. Senate Bill 67 is pro-business, rather than pro-market, because it is designed to protect businesses against lawsuits without inquiring as to whether those businesses are actually at fault. In that way, SB 67 engages in the same type of behavior that made Alabama a "tort hell," as referenced by Senator Ward in his recent editorial ("Time To Lend the Poor a Hand by Shining a Light on Lawsuit Lending," Alabama Political Reporter). The goals of Senator Ward are the opposite of the trial lawyers, but the methods of his legislation are the same—ignore the merits of individual lawsuits.

Senate Bill 67 would qualify as a useful tort reform measure only if funded claims are more likely to be frivolous. The early empirical evidence on this issue is inconclusive, but my research—which I would be glad to share—indicates that Consumer Legal Funding might actually increase the percentage of *legitimate* claims brought, benefitting society and the economy by encouraging people and businesses to be more careful. Importantly, the form of litigation funding targeted by SB 67 is benign, but that is not necessarily true of all forms. If Senator Ward were addressing the more problematic forms of litigation funding—an entrepreneurial, hedge-fund model—he would be furthering the interests of Alabamans because

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that model incentivizes financiers to seek large profits through generating new liability and ever-expanding claims. This hedge-fund model funded the Ecuadorian lawsuit against Chevron in the past decade, and that case illustrates how the hedge-fund model tempts lawyers and financiers to suborn corruption and gross distortions of justice. Sadly, Senator Ward has aimed at the wrong target with SB 67, seeking to cripple the beneficial form of litigation funding and leaving alone the harmful form.

Senate Bill 67 deserves to be rejected because it distracts from real tort reform efforts, commandeering the good name and noble goals of tort reform for a narrow, misguided effort that misses the mark and only punishes innocent Alabamans. It also deserves to be rejected because the substance of the legislation is simply wrong, treating an investment decision as if it were a loan.

Loans are exchanges of money now for a promise of repayment with interest. The promise of repayment raises concerns about the consequences of non-repayment, including loss of property, wage garnishment, a downward spiral of debt, and so on. The danger arises in assuming, as here, that any exchange of money involves a loan. Doing so would require inclusion of venture capitalists and angel investors, for example, who regularly hand over large sums of money in exchange for a share of the future successes of a start-up company. Similar to venture capitalists, Consumer Legal Funding provides capital in return for a share of potential future revenues. Investors—including venture capitalists and Consumer Legal Funding—take a different kind of risk than do lenders and a financed plaintiff—like an individual who receives venture capital funds--faces no risk to their assets or credit rating if the venture is unsuccessful.

Finally, the rules that SB 67 applies make no sense in the context of the industry. Imposing a limit of $10 for every $100 financed would be an effective 10% interest rate on a loan, which would be an arbitrarily low limitation on an actual loan. It is even more outlandish for Consumer Legal Funding, given the higher levels of risk associated with a lack of recourse and an unknown time horizon. Given that Consumer Legal Funding is far more like an investment than a loan, consider the reaction if you imposed a 10% limit on all investments. Most Alabamans would be outraged, and legitimately so. If your response is that you would never do that for all investments, then the question becomes why you are willing to pick certain industries for failure. Contrary to Senator Ward's editorial, picking winners and losers, is not conservative. More to the point, doing it this way won't help Alabama's economy and it certainly won't help poor Alabamans who will be deprived of their ability to petition for redress of wrongs.

Thank you for your time. If you have any questions regarding my arguments, I would be glad to elaborate.

Sincerely,

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