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SCHOOL OF LAW

Victoria Shannon Sahani
Assistant Professor of Law
Washington & Lee University School of Law
445 Sydney Lewis Hall
Lexington, VA 24450
sahaniv@wlu.edu
540-458-8016 (office)
617-680-4851 (cell)

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Dear Members of the Alabama Legislature,

I write to you wholeheartedly to recommend that you vote against SB 67. I am an Assistant Professor of Law at Washington & Lee University School of Law, where I have been teaching for approximately two and a half years. My views expressed in this letter are informed by my extensive, ongoing research for more than five years about the worldwide phenomenon of third-party funding. I have not received and will not receive any form of compensation, whether monetary or non-monetary, to write this letter.

My publication record illustrates my expertise in the law relating to the third-party litigation funding industry both in the United States and worldwide. I co-authored a book entitled Third-Party Funding in International Arbitration (Wolters Kluwer: 2012) (with Lisa Bench Nieuwveld) that examines the domestic laws on third-party litigation funding in over 30 countries on six continents, including a 51-jurisdiction survey of the state laws in the United States that I personally conducted. In 2013, I published an article on third-party funding in international arbitration in the peer-reviewed Journal of International Arbitration. In 2014, I published an article entitled, *Third-Party Litigation Funding and the Dodd-Frank Act*, 16 Tenn. J. Bus. L. 15 (2014), posing the question of whether third-party litigation funding may be properly regulated under the Dodd Frank Act. My most recent article, *Harmonizing Third-Party Litigation Funding Regulation*, 36 Cardozo L. Rev. 861 (2015), proposes a framework for regulating third-party litigation funding in the transactional, procedural, and ethical areas. Several law professors, including myself, signed the amicus brief. My article forthcoming in the UCLA Law Review, *Judging Third-Party Funding*, presents ways to reinterpret the Federal Rules of Civil Procedure, evidentiary privileges, and international arbitration rules of procedure in light of third-party funding. I have also been a Contributor to the Model Litigation Finance Contract Blog, founded by Professor Maya Steinitz and Ms. Abigail C. Field. Finally, I am a member of the global Task Force on Third-Party Funding, co-organized by the International Council for Commercial Arbitration and Queen Mary, University of London, which is developing guidelines for third-party funding in international arbitration. I am also a member of the Advisory Council of the Alliance for Responsible Consumer Legal Funding (ARC Legal Funding). I have not received and will not receive any form of compensation, whether monetary or non-

monetary, to write any of the foregoing publications or to participate in the work of the Task Force on Third-Party Funding.

On pages 892-896 of my article entitled *Harmonizing Third-Party Litigation Funding Regulation*, I present several arguments regarding whether a third-party party litigation funding agreement is a loan and conclude that it is not a loan. First, a consumer's obligation to repay the litigation funder is not absolute; only a winning consumer must repay the litigation funder. By contrast, a traditional lending agreement includes an absolute obligation to repay and often includes provisions requiring repayment in installments over time. Second, the litigation funding agreement is non-recourse, meaning that the funder may not seek satisfaction from the consumer's other assets in order to gain satisfaction. By contrast, if the consumer were to declare bankruptcy, then traditional lenders like banks and credit card companies may attempt to seek satisfaction from the consumer's other assets. Litigation funders may not do so according to the terms of their own agreements. Third, the litigation funder takes on more risk than a traditional lender and, correspondingly, asks for a higher rate of return. Similarly, unsecured loans, such as credit cards, carry higher interests rates that secured loans, such as mortgages. In fact, the litigation funder's higher rate of return also reflects risk sharing between the funded consumer and the litigation funder. Since the funded consumer pays nothing if he or she loses the case, the consumer's allocation of the risk is wholly reflected in the consumer's potential for receiving a smaller portion of the gain from winning the case. Conversely, the funder pays all of the litigation expenses and will be repaid nothing if the consumer loses, so the funder's allocation of risk is reflected in the higher rate of return than traditional lenders.

Fourth, litigation funding is essentially a multilateral transaction in which the funder's risk of loss depends largely on the actions of a non-party to the litigation funding agreement – namely, the judge or jury ruling on the case or the opposing party deciding whether to settle. This uncertainty regarding the actions of the judge, jury, and opposing party greatly increases the funder's risk in the transaction. In contrast, a traditional lender's risk of loss is based solely on the borrower's abilities and choices with respect to repayment; the lender's risk of loss does not depend on the actions of a non-party to the loan transaction. Fifth, the funder makes a decision regarding whether to finance a particular lawsuit based on information from the funded party only, which gives the funder an incomplete picture of the merits, potential costs, and likelihood of winning or settling the case. The funder usually does not know what evidence or witnesses the opposing party may have, which increases the risk to the funder. In contrast, a traditional lender requires complete financial information from a potential borrower before agreeing to make the loan; the lender does not need information from outside parties in order to decide whether to lend to a potential borrower. Sixth, the funder has no extrinsic metrics or scores by which to gauge the likelihood of winning a case or receiving payment from a judgment, which makes the transaction riskier. In contrast, traditional lenders use reliable tools such as credit scores, previous payment histories, pay stubs, tax records, and other similar financial information in order to make an informed decision before

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making a loan to a consumer. Funders have no such tools at their disposal to measure the value of a litigation matter or the likelihood of repayment. For the foregoing reasons, a litigation funding arrangement should not be classified as a loan, because it is an entirely different type of transaction.

Furthermore, several states effectively regulate litigation funding without expressly capping the rate of return. Examples include Maine, Nebraska, Ohio, and Oklahoma. Richard Blunk details the provisions of these four statutes in a blog post on the Model Litigation Finance Contract blog entitled "Have The States Properly Addressed The Evils Of Consumer Litigation Finance?" (Jan. 20, 2014). His blog post includes a chart summarizing the provisions of those four statutes, and he proceeds with his analysis on the assumption that funders should receive "an appropriate risk-adjusted return." None of these four statutes provide for express rate caps to regulate the rate of return. Instead, they use methods such as prohibiting the funder from basing its return upon the actual amount of the recovery received by the consumer, restricting the duration of the period during which the funder's potential return may increase, or restricting the manner in which the return is calculated. These approaches are preferable to a flat rate cap, because they employ a risk-based analysis to determine the appropriate rate of return. In addition, the National Conference of State Legislatures maintains a website detailing how various states regulate litigation funding. The website currently details the litigation funding regulations in more than 12 states. I urge you to review and consider the legislation and case law of other states that have addressed this issue as you determine how Alabama will regulation litigation funding.

In sum, for the foregoing reasons, I urge you to vote against SB 67. If you have any questions about this letter or my research, please feel free to call me at 617-680-4851 (cell) or email me at sahaniv@wlu.edu. Thank you so much in advance for taking the time to review and consider this letter.

Kindest Regards,

Victoria Shannon Sahani

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