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May 5, 2011

**via EMAIL ethics2020@americanbar.org**

American Bar Association  
Working Group on Alternative Litigation Financing  
ABA Commission on Ethics 20/20  
321 N. Clark Street  
Chicago, IL 60654-7598

**RE: Trade Organization: Alliance for Responsible Consumer Legal Funding**

Dear Members of the ABA Commission on Ethics 20/20:

Before the emergence of the legal funding industry, little attention was paid to how injured plaintiffs managed financially while waiting years for their cases to be resolved. Persons injured as a result of a tort, such as an automobile accident, often incur financial difficulty in paying health care costs for treatment of their injuries, living expenses such as rent or mortgage payments, car payments and even basic necessities like groceries, gasoline for their cars, and utilities. The legal funding industry has provided an alternative to draining valuable taxpayer resources like public assistance, disability, and welfare to consumers in these situations. Many of the consumers that seek legal funding options have bills and obligations to pay that are due today, rather than one or two years down the road when their personal injury claims may settle or come to a resolution. Obtaining a legal funding allows for injured persons to pay for these basic necessities during the pendency of their legal claims.

The Alliance for Responsible Consumer Legal Funding ("ARC") was formed recently as a trade organization for the industry. The fundamental goals of ARC are not only to establish and maintain the highest ethical standards and fair business practices within the legal funding industry, develop awareness of the industry, and ensure that facts about the industry are accurately disseminated, but also to focus on legislation and regulation efforts in representing the legal funding industry to regulators, legislators, the media and the public, and to work towards establishing legal and regulatory frameworks in individual states that meet the needs and concerns of everyone involved in legal fundings.

### **Introduction and Mission Statement**

The main purpose of ARC is to promote the development and expansion of the legal funding industry in a manner that fosters high standards of professionalism and ethics within the legal funding industry, and in a manner that protects the interests of both consumers and the industry. ARC represents its Members to ensure the proper regulation of the legal funding industry in the United

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States. ARC aims to accomplish this mission by advocating at the state level for rules containing appropriate pricing and a high degree of consumer protection—including adequate licensing and disclosure requirements, and suitable limitations on fees—and at the federal level by working with policymakers to help ensure the alignment of federal and state regulatory efforts affecting the legal funding industry.

### **Legislation Efforts**

The purpose of legislation is to provide a consistent set of rules that every legal funding company must follow. It provides for strict licensing requirements, regulatory oversight, and fines to be levied against companies who do not follow the rules. A uniform set of rules and consumer safeguards, coupled with oversight by a regulatory body such as the Attorney General, will ensure that consumers will be given the utmost level of protection during the legal funding process, while allowing legitimate legal funding businesses to operate and provide such services to the consumers.

#### Past

Recent legislation and governing bodies around the United States has addressed the inconsistent application of outdated or inapplicable law to litigation funding. In New York, attorney General Elliot Spitzer contacted the legal funding industry to discuss a concern that confusing contractual language might cause consumers to make uninformed decisions to sell a portion of the proceeds of their lawsuits. After meeting with representatives from several of funding industry leaders and learning of the benefits provided by legal funding, the Attorney General issued a press release praising the industry. The New York Attorney General declared that the transactions were not loans because there is no absolute obligation by a consumer to repay them. Since the 2005 meeting, legal funding has become an accepted product throughout the State of New York. *See In the Matter of Plaintiff Support Services, Inc., et. al.* (Feb. 15, 2005).

In Maine, the passage of the Maine Consumer Credit Code Legal Funding Practices Act made it clear that legal funding was exempt from lending laws as non-recourse legal funding was not a loan. *Title 9-A, Maine Revised Statutes*, §12-101. The legislation required that the Director of the Bureau of Consumer Credit Protection gather data and report back to the Joint Standing Committee on Insurance and Financial Services with their findings. That report, dated March of 2009, confirmed that limiting the return on legal funding was unwarranted after the analysis of the relevant data showed that the non-recourse nature of these transactions creates tremendous risk of loss for legal funding entities. *See Maine Bureau of Consumer Credit Protection Report* (March 2009). The Bureau made a point to highlight the non-recourse nature of the fundings, differentiated them from loans, and, in turn, provided a great service to cash strapped Maine consumers. *Id.*

The legal funding industry was also successful in validating the legal funding industry in Ohio. A 2003 decision from the Ohio Supreme Court in *Rancman v. Interim Settlement Funding Corp.*, 389 N.E.2d 217 (Ohio 2003) temporarily forced a stop to legal funding in Ohio. There, the Ohio Supreme Court held that a company long out of business had officiously interfered with ongoing litigation. In the ruling, the Supreme Court invited the legislature to review the issue. In realizing the mistake made by their Supreme Court, Ohio lawmakers, working with the legal funding industry, the Ohio

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State Bar, the Ohio Trial Lawyers, and the insurance industry, enacted legislation which effectively reversed the court's holding that non-recourse fundings are loans. *Ohio Rev. Code Ann.* § 1349.55 (2008). This decision allowed the legal funding industry to reenter Ohio and resume assisting plaintiffs who were in desperate need of financial support. In a victory for Ohio consumers, thousands of Ohio residents now have access to legal funding.

In the most ambitious and comprehensive legislation to date, the State of Nebraska has passed an entire set of rules embodying the best practices of the industry, as well as procedural safeguards combined with regulatory authority. The statute standardizes disclosures of statements, notice, and consumer rights in all the contracts. It also requires registration of legal funding companies and a regulatory body to enforce the laws set therein. The Nebraska legislation is now the new benchmark for striking a working balance between consumer protections along with the legal funding industry. *See Neb. Rev. Stat.* § 25-3301 (2010).

### Present

In the past year, there were ten (10) total bills at play this legislative session. Tremendous progress was made this session which will help as we move into 2012. While some of these bills were introduced as novel bills from the legal funding industry, a handful of "bad bills" emerged largely as a response to a series of misguided, misinformed, and skewed articles in the New York Times. ARC recognizes the need for regulation, and understands that these bills will continue to appear, with or without industry representation. The legal funding industry will be benefitted by trade representatives being able to come to the table with a framework for reasonable regulation and actively participating in the rulemaking process.

The biggest hurdle in introducing legislation to regulate the legal funding industry has been to overcome misconceptions and false perceptions that some media outlets have casted about the industry. Many opponents to legislation have cited to such falsities as legal funding fostering litigation, or putting consumers in a cycle of debt or being indebted beyond their means, or coercing consumers in taking funding without understanding what they are doing.

The fact of the matter is that legal funding does not impact or foster litigation as the laws will limit funding to consumers who already have a good faith legal claim and have retained an attorney. There is no cycle or debt or getting indebted beyond their means because the legal funding company purchases the contingent right to receive proceeds of a legal claim or action upon resolution of said legal claim. The consumer is not required to make any payments whatsoever to the funding company until such resolution occurs. If the consumer, for whatever reason, failed to recover any proceeds from their legal claim, or if they recovered less than the contracted payment amount, the funding company's recovery would be contractually limited to the amount of proceeds available. And also, the contract disclosures would be standardized, and the consumers are represented by attorneys to ensure complete transparency and understanding of the parties involved.

In order to successfully introduce and pass legislation that will benefit both the legal funding industry and the consumers it serves is through education, such as one-on-one meetings with legislators, panel discussions and presentations, media outlets, etc. Helping legislators and policy makers understand the business and its goals is critical to the success of ARC's legislative efforts.

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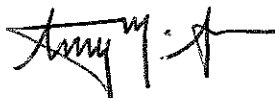
### Future

As the current legislative session comes to a close, there are things that ARC plans to do that will propel its efforts in the coming session. A major component is to monitor trends in legislation in both the legal funding industry and other similar and emerging industries. Also, while ARC is relatively new in the legal funding industry, it is attempting to band together many different players in the industry to have one collective voice. Regulation is a reality, whether bills are getting introduced by the industry or by industry opponents. As legislation impacts every player in the industry, and banding together will help ensure the success of passing harmonious bills which would strike a balance between consumers, the legal funding industry, and the regulators.

### **Conclusion**

Given the harsh economic conditions that many consumers find themselves in, the ability to sell and assign a portion of an asset (the proceeds from their case) can be the tool that lets them hold off financial distress and foreclosure. As is evidenced by the evolution in New York, Maine, Ohio, and Nebraska, legal funding continues to gain acceptance across the entire country, and garnered the approval of courts, lawmakers, and legislators. This trend also clarifies that non-recourse funding transactions are not loans or advances and should not be regulated as such. Trade organizations like ARC are taking a proactive stance to further the industry interests along by working with legislators and regulators to create a balance between consumer protection and industry interests. The trend is decidedly in favor of acceptance of the legal funding industry as courts, legislators and lawmakers have repeatedly validated the industry as beneficial to consumers.

Sincerely,

A handwritten signature in black ink, appearing to read "Amy M. Au". The signature is stylized with a long horizontal stroke extending to the right.

Amy M. Au, Esq.  
President