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| COURT OF APPEALS, STATE OF COLORADO<br>Colorado State Judicial Building<br>2 East 14th Avenue<br>Denver, Colorado 80203 | |
| Appeal from the Denver County District Court<br>Honorable Edward D. Bronfin, District Court Judge<br>Civil Action No. 10CV8380 | |
| **Plaintiffs-Appellants:**<br>**OASIS LEGAL FINANCE GROUP, LLC; OASIS LEGAL FINANCE, LLC; OASIS LEGAL FINANCE OPERATING COMPANY, LLC;** and **PLAINTIFF FUNDING HOLDING, INC., d/b/a LAWCASH,**<br><br>**v.**<br><br>**Defendants-Appellees:**<br>**JOHN W. SUTHERS**, in his capacity as Attorney General of the State of Colorado; and<br>**LAURA E. UDIS**, in her capacity as the Administrator, Uniform Consumer Credit Code. | ▲ **COURT USE ONLY** ▲ |
| **Attorneys for Plaintiffs-Appellants:**<br>Names: Jason R. Dunn, #33011<br>Karl L. Schock, #38239<br><br>Address: Brownstein Hyatt Farber Schreck LLP<br>410 Seventeenth Street, Suite 2200<br>Denver, Colorado 80202<br>Phone No.: (303) 223-1100<br>E-mail: jdunn @bhfs.com<br>kschock@bhfs.com | Case Number: 12CA1130 |

# APPELLANTS' OPENING BRIEF

# CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

It contains 6,672 words.

The brief complies with C.A.R. 28(k).

☒ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

s/ Jason R. Dunn

Jason R. Dunn

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Appellants Oasis Legal Finance Group, LLC, Oasis Legal Finance, LLC, and Oasis Legal Financing Operating Company, LLC (collectively, "Oasis"), and Plaintiff Funding Holding, Inc., d/b/a LawCash ("LawCash") (together with Oasis, "Plaintiffs"), through their undersigned counsel, hereby submit their Opening Brief.

## STATEMENT OF THE ISSUE

The district court below is the first court in the country to find that the nonrecourse purchase of litigation proceeds is a "loan" under the Uniform Consumer Credit Code. Did the court misinterpret the Colorado Supreme Court's decision in *Salazar v. Cash Now* to reach that conclusion?

## STATEMENT OF THE CASE

### I. NATURE OF THE CASE

This case is an appeal of the Denver District Court's judgment interpreting the term "loan" in the Colorado Uniform Consumer Credit Code (the "UCCC"), Colo. Rev. Stat. § 5-1-301(25).

Plaintiffs are national companies in the business of buying interests in the potential proceeds of a seller's pending litigation. Under their contracts, Plaintiffs buy, and the seller sells and assigns, an interest in any future settlement or damage award that the seller might obtain as a result of his or her pending litigation. While the amount the seller receives is set at the time of contract, the amount the purchaser will receive from any future settlement or damage award is based upon a predetermined schedule that factors in how far into the future the settlement or damage award occurs, if at all. Importantly, the purchases are nonrecourse, meaning that the purchaser receives nothing if the seller's lawsuit is unsuccessful, or if the damage award or settlement amount is insufficient to pay the purchaser its full share after attorneys' fees, costs, and any medical liens.

Defendant Laura Udis is the Administrator of the Colorado Uniform Consumer Credit Code (the "UCCC"), the "uniform act"[1] adopted in Colorado to regulate consumer credit transactions such as auto loans, credit cards, payday loans, and signature loans. *See* Colo. Rev. Stat. § 5-1-101, et seq. The UCCC also establishes a licensing scheme for covered lenders, sets maximum rates and fees that can be charged, and gives the Administrator enforcement powers. *Id.* The Administrator is housed in the Colorado Attorney General's Office and is designated as a First Assistant Attorney General.

In 2010, following communications from the Administrator that she believed Plaintiffs' agreements are "consumer loans" subject to regulation under the UCCC,

[1] Uniform Acts are state legislative proposals adopted by the Uniform Law Commission that are intended to be model state legislation. *See generally* www.uniformlaws.org.

Plaintiffs filed a declaratory judgment action seeking a declaration that, among other things, Plaintiffs' transactions were not "loans" within the meaning of the UCCC. Defendants filed a motion for partial summary judgment seeking *inter alia* a determination that Plaintiffs' transactions are "loans" under the UCCC.

The district court granted Defendants' motion, concluding that under the Colorado Supreme Court's 2001 decision in *Salazar v. Cash Now.*, 31 P.3d 161 (Colo. 2001), Plaintiffs' transactions are "loans". (42861687_10CV8380---Lawcash-v.-Suthers---Summary-Judgment-Ord, CD p. 696 ("MSJ Order.")) The district court then directed entry of final judgment, concluding that "[t]he issue of whether the Plaintiffs' transactions were loans as opposed to purchase agreements is a matter of first impression under Colorado law". (47651269_10cv8380-final-judgment, CD p. 1294.) This appeal followed.

## II. STATEMENT OF FACTS

### A. Plaintiffs' business in Colorado and the proceedings below

Oasis and LawCash have been in the business of purchasing rights in litigation proceeds since 2002 and 2000, respectively. (39025125_Exh-A---Affidavit-of-Harvey-Hirschfeld--01058398-, CD p. 450, ¶ 2 ("Hirschfeld Affidavit"); 39025150_Exh-B---Affidavit-of-Gary-Chodes—01058402-, CD p. 454, ¶ 2 ("Chodes Affidavit")). Their purchases generally range in price from

$500 to $5,000, with the majority being less than $1,500. (36365381_Answer-Amended-Complaint, CD p. 116, ¶ 76 ("Answer")). Oasis and LawCash typically limit their purchases to no more than ten-percent of what they believe the case settlement value to be. (37692327_LawCash-website--part3-, CD page 329.) This limit helps ensure that sellers receive a significant share of the settlement proceeds after the purchaser's interest is paid. Sellers typically use the funds for day-to-day living expenses, such as medical bills, mortgage payments, groceries, and automobile expenses. (35473785_Amended---Supplemental-Complaint-for-Declaratory-Judgment--00959231, CD p. 71, ¶¶ 15-16 ("Amended Supp. Complaint")). Indeed, studies have shown that as many as sixty-percent of sellers use the funds to avoid imminent foreclosure on their homes or eviction.[2]

Oasis and LawCash do business with consumers in forty-five states, with each having served hundreds of Colorado consumers. (Answer, CD p. 115, ¶ 66). The companies are two of the leading companies in the industry, and are both founding members of the industry's trade association, the American Legal Finance Association (www.americanlegalfin.com). ALFA serves its member companies by developing best-practices for transparency in contracts and clear disclosures for

[2] *See Facts About ALFA*, AM. LEGAL FIN. ASS'N, http://www.americanlegalfin.com/FactsAboutALFA.asp (last visited October 1, 2012).

consumers, and advocates for reasonable regulation at the state and federal level. Neither Oasis nor LawCash is aware of a single consumer complaint being filed with the Administrator or any other Colorado regulator, law enforcement agency, or consumer advocacy group about their services in the time they have been operating in Colorado.

Given the wide range of consumer lending regulations and statutes across the country, in 2003, Oasis proactively commissioned research as to whether its contracts complied with Colorado law, (Chodes Affidavit, CD p. 454, ¶ 3) and LawCash independently sought an outside legal opinion in 2007, which it shared with Oasis. (Amended Supp. Complaint, CD p. 72, ¶¶ 19-21.) In both cases, Plaintiffs were advised that their contracts were not "loans" under the definition of that term in the UCCC, and thus not subject to Colorado's licensing and regulatory scheme.

Nonetheless, after learning in 2009 that the Administrator was investigating a competitor, Plaintiffs *sua sponte* ceased entering into new contracts in Colorado pending clarification of the law (effective January 2010 for Oasis, and October 2010 for LawCash). (Chodes Affidavit, CD p. 455, ¶ 4; Hirschfeld Affidavit, CD p. 451, ¶ 4.) Subsequent communication with the Administrator indicated that she indeed believed that the contracts were "loans" under the UCCC, and that Plaintiffs were thus required to register as supervised lenders, comply with the various notice and disclosure requirements of the UCCC, and limit their "loans" to the statutorily prescribed interest rates. (Amended Supp. Complaint, CD p. 72, ¶¶ 23-24.)

In August 2010, the Administrator issued a cease and desist order to Plaintiffs, demanding they stop entering into new contracts and cease collecting funds on existing contracts. (Answer, CD p. 118, ¶ 102.) Left with no alternative, Plaintiffs brought this action seeking judicial clarification as to whether their contracts are "loans" under Colorado's UCCC. In addition, Plaintiffs subsequently began escrowing receipts from existing clients into segregated accounts pending the outcome of this case. Plaintiffs continue that practice today, and provide the Administrator with a monthly accounting of such deposits.[3]

**B. Plaintiffs' purchase agreements**

A sample copy of Plaintiffs' purchase agreements were provided to the court below. (35473822_Ex-A-to-Amended---Supplemental-Complaint-for-Declaratory-jmt--00959249-, CD p. 78 ("Ex. A to Amended Supp. Complaint"); 35473838_Ex-B-to-Amended---Supplemental-Complaint-for-Declaratory-Jmt--00959247-, CD p. 91 ("Ex. B to Amended Supp. Complaint.")) The agreements are written in plain, easy to understand language, and explain to sellers every

[3] Plaintiffs had also offered to instead place the funds into the registry of the district court, but the court declined.

aspect of the transaction, including the purchase price that he or she will receive at signing, the amount the purchaser will receive from the litigation proceeds, if anything, as well as any transaction fees that might apply for such things as overnight delivery or wire transfer of the purchase funds. These provisions ensure that the seller fully understands the extent and limitations of their assignment from day one.

More specifically, the Oasis agreement makes clear that the agreement is a purchase and sale. Section 2.1 states: "Purchase and Sale. Seller sells and assigns, and Purchaser buys and assumes, the Purchased Interest." (Ex. A to Amended Supp. Complaint, CD p. 84, § 2.1.) The "purchased interest" is defined as "the right to receive a portion of "the future proceeds in the seller's pending litigation." (*Id*., CD p. 83, §§ 1.4, 1.2.)

Similarly, the LawCash agreement describes the transaction as a sale of a security interest in any future litigation proceeds:

> SECTION 3. SECURITY INTEREST
>
> 1. I hereby grant LawCash a Lien and Security Interest in the proceeds of the Lawsuit.
>
> . . .
>
> 4. I understand that I am not assigning my cause of action (lawsuit) to [LawCash], but rather a portion of the proceeds of the Lawsuit.

(Ex. B to Amended Supp. Complaint, CD pp. 97-98, §§ 3.1, 3.4.) Importantly, the contracts also make clear that the seller has no obligation to pay the purchaser anything if the settlement or damages award is insufficient to cover the purchaser's share. (Ex. A to Amended Supp. Complaint, CD p. 85, §§ 6.1, 6.3; Ex. B to Amended Supp. Complaint, CD pp. 96-97, ¶ C, § 2.1.) Thus, regardless of whether the seller wins, loses, or settles their lawsuit, he or she owes the purchaser nothing, and the purchaser has no right of recourse against the seller to recoup a failed investment should the litigation not produce sufficient proceeds. Finally, the Oasis agreement explains that because the transaction is a sale of an interest in future proceeds and not a loan, the seller is advised that it must treat it as such for tax purposes and in any bankruptcy proceeding, where the transaction must be characterized as an asset of the purchaser rather than a debt of the seller. (Ex. A to Amended Supp. Complaint, CD p. 84, §§ 5.1, 5.2.)

Moreover, Oasis and LawCash purchase assignments only from litigants who are represented by counsel. (Hirschfeld Affidavit, CD p. 451, ¶ 7.) As part of the agreement process, they request information about the case from the seller's attorney and encourage sellers to discuss the agreement with their attorney. (Ex. A to Amended Supp. Complaint, CD pp. 87-88, § 8.11 and Attorney Acknowledgement; Ex. B to Amended Supp. Complaint, CD p. 96, ¶ B.) In fact, the agreements require the seller's attorney to acknowledge and sign the agreement, and give the seller a five day right of cancellation. (Ex. A to Amended Supp. Complaint, CD p. 85, § 7.2; Ex. B to Amended Supp. Complaint, CD p. 98, § 4; *See also* Amended Supp Complaint, CD p. 71, ¶ 18.) Oasis and LawCash also request periodic updates from the seller's attorney, but expressly provide that they have no legal right to influence the litigation and will in no way attempt to influence any decisions as to how the case is litigated or settled, or even if it should be continued. (Ex. A to Amended Supp. Complaint, CD p. 84, § 4.1; Ex. B to Amended Supp. Complaint, CD p. 98, § 3.6.)

## SUMMARY OF ARGUMENT

Not a single state legislature or court in the country has interpreted the term "loan" under the Uniform Consumer Credit Code to include nonrecourse purchases of litigation proceeds, yet the Administrator and district court do here. To reach their strained interpretation, they rely almost exclusively on the Colorado Supreme Court's 2001 decision in *Salazar v. Cash Now*, which examined the term "loan" in a much different context than is at issue here. The district court found that *Cash Now* defined "loan" broadly to include nonrecourse purchase agreements, but in reality, *Cash Now* expressly held that an agreement is not a "loan" unless the purported borrower has an *absolute or contingent* obligation to repay the debt.

Because the sellers here have no such obligation, the agreements are not "loans" under the UCCC. Accordingly, the district court's order should be reversed.

## **ARGUMENT**

## I. STANDARD OF REVIEW

Appellate review of a district court's interpretation of a statutory provision is *de novo*. *Cf. Fowler Irrevocable Trust 1992-1 v. City of Boulder,* 17 P.3d 797, 802 (Colo. 2001). While the court should generally give deference to the Administrator's interpretation of her regulatory statutes, the court is not bound by an agency interpretation that misconstrues or misapplies the law. *Bostron v. Colorado Dept. of Pers.*, 860 P.2d 595 (Colo. App. 1993). Thus, "in the absence of a specific statutory directive, the ultimate legal conclusion in this case . . . is for the court to determine." *Salazar v. Cash Now*, 12 P.3d 321, 326 (Colo. App. 2000), *rev'd on other grounds.*

## II. THE NONRECOURSE PURCHASE OF LITIGATION PROCEEDS IS NOT A "LOAN"

The UCCC was first proposed by the Uniform Law Commission in 1968. Since then, only eleven states have adopted it, including Colorado.[4] All of those states use the same definition of "loan" under their respective UCCC:

[4] The other ten UCCC states are: Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah, Wisconsin, and Wyoming.

> **The creation of debt** by the lender's payment of or agreement to pay money to the consumer or a third party for the account of the consumer;

*See* Colo. Rev. Stat. § 5-1-306(25)(I) (emphasis added). As is the case in the other ten states, Colorado has not defined in statute what constitutes "debt" or the "creation of debt", and the only court to address the definition of "loan" under a UCCC statute is the Colorado Supreme Court in *Cash Now*.

Relying on *Cash Now*, the Administrator argued below that "debt" (and thus a "loan") can be "created" even if the borrower has no obligation, under any circumstance, to ever repay the funds he or she received. (37691160_Sum-Judg---PI-Memo, CD pp. 284-285 ("MSJ Memo.")) That definition is unprecedented nationally; not a single state has amended its statutory definition of "loan" in such a way. Nor has a single court in any of the UCCC states, including the Colorado Supreme Court in *Cash Now*, interpreted "loan" in such a way.

Under the correct reading of *Cash Now*, a "loan" exists *only* if the borrower has an absolute or contingent obligation to repay the lender. Absent such an obligation, no loan exists. Because the purchase agreements at issue here do not create any obligation on the part of the seller to ever repay the funds received, the agreements are not loans.

### A. Under *Cash Now*, a loan exists *only* where the borrower has a contingent or absolute obligation to repay the loan amount

A proper reading of *Cash Now* requires an understanding of three general types of financial transactions involving the transfer of money between two parties. The first is the transfer of funds by one party to another in exchange for an *unconditional and absolute* promise to repay the debt at some future date. This is the typical "loan" contemplated by the UCCC.

The second type of transaction involves the transfer of funds from one party to another in exchange for the second party: (a) assigning to the first his or her interest in some future revenue stream, and (b) agreeing to repay the "loan" if the anticipated revenue stream fails to produce an agreed upon amount that is greater than the "loan". This type of transaction is exemplified by the refund anticipation loan at issue in *Cash Now*, where taxpayers assign their anticipated tax refund to Cash Now in exchange for a lesser sum immediately, and agree to make up any shortfall in the amount promised should the refund be less than anticipated. The Supreme Court in *Cash Now* deemed such transactions "loans" under the UCCC.

The third transaction is the type at issue in this case: the nonrecourse purchase of an interest in any future proceeds that might result from an on-going lawsuit. Here, the purchaser's interest is a speculative, illiquid investment that may or may not bear fruit. The purchaser has no control over the litigation or the seller's claim, and the seller has the right to settle the claim for any amount or abandon it altogether. If the litigation fails to produce the funds necessary to cover the purchased interest (i.e., because the litigation fails, the suit is dropped, or the damage award or settlement is less than anticipated), the seller has no obligation to repay the purchaser, and the purchaser has no right of recourse against the seller for its failed investment. *See generally* Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 Fordham J. Corp. & Fin. L. 55 (2004).

Notwithstanding the Administrator's argument and the district court's ruling to the contrary, *Cash Now* did not explicitly address this third type of transaction, let alone deem it a "loan". In fact, a close reading of *Cash Now* demonstrates that the court actually held that a transaction will be deemed a "loan" under the UCCC *only* if the party accepting the funds has a contingent or absolute obligation to repay that amount, such that the party advancing the funds has a guaranteed right to repayment. Thus, because the contracts here do not place any obligation on the seller (contingent or otherwise) to repay the funds, and thus likewise fail to guarantee Plaintiffs will recoup their investment, *Cash Now* dictates that the agreements are not "loans" under the UCCC.

*Cash Now* involved The Cash Now Store, Inc., a company in the business of entering into contracts with Colorado residents under which Cash Now would pay an immediate sum of money to an individual in return for an assignment of his or her anticipated tax refund. *Cash Now*, 31 P.3d at 164. Under the agreement, the individual had an obligation to repay the company if the amount of the refund was less than the anticipated amount or did not occur at all. *Id.* at 165.

In a case of first impression, both the trial court and a unanimous panel of this court found that the transactions were not "loans" under the UCCC, concluding that because the transactions do not include an "unconditional obligation to repay" on the part of the individual receiving the funds, they do not "create debt" under definition of "loan". *Salazar v. Cash Now*, 12 P.3d 321 (Colo. App. 2000). However, the Supreme Court reversed, holding that the definition of "loan" in the UCCC and relevant caselaw did not support the Court of Appeals' narrow definition of "loan" that limited it to *only* those transaction in which the borrower has an *absolute and unconditional* obligation to repay the amount borrowed. *Cash Now*, 31 P.3d at 165-166.

Importantly, the Supreme Court held that debt was "created" under the facts of that case *only* because the agreement gave the lender a contingent right of recourse against the borrower in the event that the primary payee (the federal government) failed to pay the required amount. *Id.* at 166. In reaching that conclusion the Court relied heavily on the analysis provided in *Income Tax Buyers, Inc. v. Hamm*, 91-CP-40-3193, 1992 WL 12092431 (S.C. Com. Pl. Jan. 14, 1992), stating:

> As with the transactions at issue in *Hamm,* the contracts at issue in the present case impose an *obligation* on the taxpayer to repay Cash Now *only* if the government fails to pay the amount of the anticipated tax refund. As the *Hamm* court explained, even the lender "demonstrates that it does not view the refund as a chose in action because the borrower owes it a sum of money whether the refund or "chose" is valuable to [the lender] or not. **This is debt.**"

*Id.* at 167 (emphasis added).[5] In other words, the court made clear that it is the borrower's *contractual obligation* of repayment that "creates debt", and thus a "loan". Accordingly, under *Cash Now* the nonrecourse purchase of an interest in the potential proceeds from on-going litigation is simply not a "loan" because the seller of the interest has no obligation of repayment, contingent or otherwise.

### B. *Cash Now* did not hold that simply "advancing money" creates debt or a loan

Despite the Supreme Court's holding to the contrary, the Administrator argued, and the district court found, that *Cash Now* defined a "loan" as simply any

[5] A "chose in action" is "a personal right not reduced into possession, but recoverable by a suit at law." *See City & County of Denver v. Jones*, 274 P. 924, 925 (1929).

transfer of money from one person to another. (MSJ Memo, CD p. 281; MSJ Order, CD p. 695.) That conclusion was based on the Supreme Court's statement that: "The official comments to [the statutory definition of 'loan'] indicate that a loan is made when a creditor creates debt by *advancing money* to the debtor." *Id.* at 166 (emphasis added). The district court went so far as to deem that sentence the court's "primary holding", while the Administrator described it as something the court "held" and "concluded", as if to be central to the court's decision. (MSJ Order, CD p. 695; 40277407_Sum-Judg---PI-Motion—Reply-, CD pp. 546-547 ("MSJ Reply"); MSJ Memo, CD p. 281.)

As an initial matter, to the extent the Administrator and the district court intended that any transfer of money between two parties is a "loan", such a reading is nonsensical: every gift of money and purchase of any product would constitute a "loan" under that definition. More importantly, their characterization fails to understand the Supreme Court's purpose in making that statement, and vastly overstate its legal significance. First, when read in proper context, the statement was clearly intended to only buttress the court's conclusion that the definition of "loan" does not include a narrowing requirement that the borrower have an *unconditional* obligation to repay, as the court of appeals had held below. *Cash Now*, 31 P.3d at 166. That is why the court also restated *verbatim* the entire statutory definition of "loan" immediately before making the statement. *Id.* The Court was simply trying to make the point that nothing in the text of the statutory definition itself or even in the official comments hints at such a limitation. The sentence was not a separate pronouncement of law or a holding of the case. Indeed, with respect to the "official comment", the Supreme Court did not even cite the correct source: the comment came from the official comments to the *uniform act* published by the Uniform Law Commission, not from any official comments to Colorado statute (which do not exist). It is hard to imagine that the Supreme Court failed to properly cite the source of its alleged "primary holding", as the district court and the Administrator would have this court believe.

Moreover, it also appears that the Uniform Law Commission itself does not consider Plaintiffs' agreements to be "loans". The Commission recently formed a Study Committee to consider the question of whether to recommend that the Commission draft model legislation regulating Plaintiffs' industry. The Committee's 2012 Final Report (attached hereto as Exhibit A) concluded it should not. In so doing the Committee noted that the phrase "alternative litigation financing" was a more apt description of these transactions than "lawsuit loans," as the former "is more accurate because the transactions actually resemble an assignment of the proceeds of a cause of action, rather than a loan, since one of the hallmarks is that they are almost always 'nonrecourse' in nature..." (Exhibit A at 1). In addition, the Report states that some committee members argued for putting such regulations in the UCCC rather than creating a new scheme, which can only mean that at least in the mind of some Commissioners, Plaintiffs' transactions are not "loans" currently regulated by the UCCC. (Exhibit A at 7).

### C. *Cash Now* did not hold that a "loan" exists even where there is no obligation of repayment

In its briefs below, the Administrator also made much of the statement in *Case Now* that "the definition of loan under the UCCC does not require repayment." (MSJ Memo, CD pp. 285, 287, (citing *Cash Now*, 31 P.3d at 165.)) But again, when read in context of the facts at issue and the surrounding legal discussion at that point in the opinion, it is clear that the Court was merely pointing out that Colorado's definition of "loan" does not require repayment *directly from the borrower*, and can instead be a contingent obligation. At that point in the opinion, the court was distinguishing Colorado's definition of "loan" from the Georgia statute at issue in *Cullen v. Bragg*, 350 S.E.2d 798 (Ga. App. 1986), a case heavily relied upon by this court in the lower *Cash Now* decision. *Salazar v. Cash Now*, 12 P.3d at 326. Under the Georgia Industrial Loan Act, "loan" was defined as "any advance of money in an amount of $3,000 or less *requiring repayment*." *Salazar v. Cash Now*, 31 P.3d at 165 (emphasis in opinion). Implied in that language, of course, is that the repayment is unconditionally required *from the borrower*. The Supreme Court was simply explaining that in contrast, the definition of "loan" in the UCCC does not mandate that repayment must come directly from the borrower, and where the borrower has a contingent obligation to pay, a "loan" can exist.

**D. Plaintiffs' nonrecourse purchases do not create "contingent debt"**

In its briefs below, the Administrator also argued that Plaintiffs' agreements create debt because they meet the dictionary definition of "contingent debt", which is defined as "a debt that is not presently fixed *but that may become fixed in the future with the occurrence of some event*." (MSJ Reply, CD pp. 546-547, (citing *Blacks Law 8th Ed.*)) (emphasis added). Thus, in order for a transaction to create "contingent debt" under that definition, there must be some future event that, if it occurs, triggers a fixed and absolute obligation *of the debtor* to repay that amount.

Although somewhat unclear, the district court seemed to agree, stating:

> While there are potential instances where the Plaintiffs cannot render judgment against [the individual] they have given funds to, their contracts allow for such judgments to be rendered in a myriad of other instances. Thus, while there is risk involved, the Plaintiffs have minimized such risk to a feasible level to continue transacting such arrangements.

(MSJ Order, CD pp. 695-696.) That statement demonstrates that the district court fundamentally misunderstood the nature of Plaintiffs' agreements. First, the statement confuses the fact that the purchaser maintains the right to enforce the contract as written with the fact that the purchaser has *no contractual right* to seek repayment from the seller should the litigation fail to produce funds sufficient to cover Plaintiffs' purchased interest. As with most written contracts, the agreements here grant Plaintiffs the basic right to enforce the contract itself and to recoup their purchase price *from the seller* (but not any anticipated future proceeds *from the litigation*) in the event of fraud or misrepresentation by the seller in forming the contract. (Ex. A to Amended Supp. Complaint, CD pp. 85, 87, §§ 7.1, 8.6; Ex. B to Amended Supp. Complaint, CD pp. 98-99, §§ 5, 7.5.) But these rights in no way give Plaintiffs a right of recourse against the seller should the litigation not produce the anticipated funds. The agreements are thus correctly deemed nonrecourse.

Second, the district court's statement conflates the fact that Plaintiffs' investment return is contingent upon the litigation producing sufficient proceeds with the general question of whether the seller will owe a debt to the Plaintiffs if some contingent event occurs in the future. The former describes a business risk every investor takes, while the latter describes a category of debt typically called "contingent" debt.[6] And although the seller and/or his attorney have a contractual and ministerial obligation to convey funds to the purchaser upon receipt, that obligation does not magically create "debt" simply by their receiving the purchaser's share of the litigation proceeds. Thus, if the litigation defendant fails to pay following judgment, the seller is not obliged to make up that amount. Likewise, if the seller's attorney absconds with the litigation proceeds, the seller has no obligation or liability for that loss. In order for Plaintiffs' agreement to create contingent debt, occurrence of the future uncertain event named in the agreement—the seller's lawsuit being reduced to a judgment—must create an absolute obligation on the part of the seller to pay the amount named in the contract.[7] Moreover, notwithstanding the district court's mischaracterization of the Plaintiff's agreement as contingent debt, most courts that have considered the question have held that contingent debt is fundamentally different than non-

[6] Notwithstanding Black's Law Dictionary, "contingent" debt is more fully described at common law as: One which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor and if such triggering event or occurrence was one reasonably contemplated by the debtor and creditor at the time the event giving rise to the claim occurred. *See generally Brockenbrough v. C.I.R.*, 61 B.R. 685 (W.D. Va. 1986).

[7] *See Britz v. Kinsvater*, 351 P.2d 986, 991 (1960) (on definition of debt "contingently repayable"; promise to pay person providing advance only if a contingent future event (a horserace result) occurs creates an absolute obligation to pay once that event occurs).

contingent debt. For example, when the federal government had to decide whether certain state relief benefits were an "advance on a scheduled payment" or "loans" under the Federal Food Stamp Act, it rejected the argument made by food stamp recipients that since the state benefits had to be reimbursed if the recipient qualified for federal aid, the state benefits were "contingent" loans. *See Biggs v. Lyng*, 823 F.2d 15 (2d Cir. 1987). In fact, the Second Circuit, quoting the very same definitions in Black's Law Dictionary cited by the Administrator here, said that "contingent debts" were not loans because, according to Black's Law Dictionary, the latter "assume[s] a definite obligation to repay and the former does not. *Id.* at 19.

Accordingly, Plaintiffs' agreements do not constitute "contingent debt", they do not "create debt", and they are not "loans" under the UCCC.

## III. THE ADMINISTRATOR'S CASE LAW FROM NON-UCCC STATES IS INAPPOSITE

Given the lack of caselaw in Colorado or any other UCCC jurisdiction discussing the definition of "loan" other than *Cash Now*, the Administrator relied below on caselaw from non-UCCC jurisdictions, where lending is regulated through general usury law. The Administrator argued that such cases regularly deem nonrecourse purchases of litigation proceeds "loans". (MSJ Memo, CD p. 283.) In reality, the term "loan" is defined universally in those cases as a transaction in which the borrower must have either an absolute or contingent obligation to repay the borrowed funds.

**A. The Administrator's three primary cases**

Below, the Administrator relied primarily on three cases involving state usury law. (MSJ Memo, CD pp. 288-292.) Notably, the district court cited none of them.

First, the Administrator relied on the Ohio Court of Appeals' unpublished decision in *Rancman v. Interim Settlement Funding Corp.*, 2001 WL 1339487 (Ohio Ct. App. 2001). While that intermediate appellate decision did find transactions like those at issue here to be usurious loans, the decision was subsequently reversed by the Ohio Supreme Court, which refused to consider whether the transactions were properly characterized as loans or investments, and found instead that the agreement at issue was void under common law principles of champerty and maintenance. *See Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003); *see also* Martin, *supra* at 60-61 (discussing supreme court's implicit acknowledgment in *Rancman* that if repayment was contingent on payout, then transaction not a loan and not usury). Of course, not only have Colorado courts long-rejected the doctrine of champerty and maintenance, *See generally Fastenau v. Engel*, 240 P.2d 1173, 1174 (Colo. 1952), the Ohio legislature responded to that decision by quickly passing legislation allowing such agreements. *See* Ohio Rev. Code § 1346.55.[8] Thus, the Administrator's reliance on the rationale of an unpublished, intermediate court decision of another state that was subsequently rejected by that state's high court and legislature, is of little or no value here.

Second, the Administrator relied on *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767 (N.C. Ct. App. 2008), another intermediate appellate decision involving a company that purchases litigation proceeds. Again, this case is easily distinguishable. Unlike Colorado's UCCC, the North Carolina usury statute expressly regulated both "loans" *and* "advances" as two separate types of transactions. *Id.* at 776 (citing N.C. Gen. Stat. § 24-1.1 (2007)). The *Odell* court held that while a "loan" requires an unconditional obligation to repay, an "advance" requires only a lesser "expectation of repayment". *Id.* at 777. Thus, an "advance" could be deemed usury because that framework requires only a general "understanding that the money owed will be paid". *Id*. Because the agreements at issue in *Odell* involved some "expectation of repayment", there were deemed

[8] Maine and Nebraska have also passed legislation regulating the industry. *See* Me. Rev. Stat. tit. 9-A, § 12-101; Neb. Rev. Stat. § 25-3301 (2010).

usurious *advances*, not *loans* as the Administrator contends. Because Colorado's UCCC does not regulate "advances", *Odell* is simply inapplicable here.[9]

Finally, the Administrator relied on *Echeverria v. Estate of Lindner*, No. 50675, 2005 WL 1083704 (N.Y. Sup. March 29, 2005), an unpublished New York trial court decision that found LawCash's agreements to be usurious. *Echeverria* is inapposite for several reasons. First, as indicated in the first sentence of the decision, the court was not asked to discuss any issue beyond whether the personal injury damages awarded to the plaintiff and against his employer were appropriate. *Id.* at *1. LawCash was not a party to the case, and it appears neither side questioned or briefed the issue of whether the plaintiff's agreement with LawCash was valid under New York law. Thus, any musing by the court about the legality of LawCash's agreement was pure dicta. Second, the agreement was subsequently upheld by the New York Supreme Court after LawCash filed for declaratory judgment seeking payment of the funds owed and Mr. Echeverria had paid the amount due. Third, the trial court's finding that the agreement was usurious was based on the unique facts of that case: the underlying personal injury claim was filed under a strict liability statute, making the litigation proceeds a "sure thing" in the court's view and thus a "loan" rather than an investment. *Id.* at *8. Thus, the

[9] As noted above, the references to "advances" in *Cash Now* does not change that conclusion. *See infra,* pp. 15-16.

Administrator's reliance on *Echeverria* was misplaced. *See also Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc.*, 950 N.Y.S.2d 723 (N.Y. Sup. Ct. 2012) (finding nonrecourse agreement creates "ownership interest in proceeds for claim" and is thus not a loan under New York usury law); *Lynx Strategies, LLC v. Ferreira*, No. 51159, 2010 WL 2674144 (N.Y. Sup. Ct. July 6, 2010); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has A Place in the United States Market*, 53 Vill. L. Rev. 83, 95 (2008) (discussing *Echeverria*); Anthony J. Sebok, *A New York Decision That May Imperil Plaintiffs' Ability to Finance Their Lawsuits: Why It Should Be Repudiated, or Limited to Its Facts*, FINDLAW, Apr. 18, 2005,[10] (arguing that *Echeverria* was either wrongly decided or limited to unique facts).

Accordingly, to the extent that these three cases are relied upon again by the Administrator on appeal, they should be rejected.

### B. The more analogous non-UCCC cases demonstrate that "loan" requires an obligation to repay

Outside the UCCC states, the more appropriately analogous caselaw demonstrates that Plaintiffs' purchase agreements are not loans. For example, in a case closely resembling the facts here, the Montana Supreme Court held it not a loan where a husband and wife agreed to cover the litigation costs in a suit they

[10] Available at: http://writ.news.findlaw.com/sebok/20050418.html

filed with several others against a local bank. *Nyquist v. Nyquist*, 841 P.2d 515 (Mont. 1992). The agreement provided that the couple would be repaid their principle plus twenty-percent annual interest from the proceeds of any judgment in their favor, but also that if the litigation was unsuccessful or the judgment did not cover that amount, the other co-plaintiffs would owe the couple nothing. *Id.* at 518. Notably, while Montana's definition of "loan" requires an unconditional obligation to repay, the Court relied instead on the common law usury principle that a loan cannot exist absent *some* obligation on the part of the purported borrower to repay the debt. *See* M.C.A. § 31-1-101 (definition of loan).

Likewise, a Florida court deemed it not a loan when a woman agreed to cover the cost of her brother's lawsuit in exchange for a share of any resulting proceeds. *Kraft v. Mason*, 668 So. 2d 679 (Fla. Dist. Ct. App. 1996). While much of the court's rationale was based on the finding that the sister (Mason) did not have the corrupt intent to earn more than the legal interest rate that is necessary to prove usury, the court notably also held that:

> Yet another reason the loan was not usurious is that the money to be paid to Mason could be characterized as a bonus to be received for participating in an uncertain transaction. A loan agreement is not usurious when payment depends upon a contingency. Here, when the loan was given, any talk of recovery was pure speculation. Quite possibly, there would be no successful recovery from the antitrust litigation, and Mason might have collected nothing beyond the pay back of the loan.

> *This contingent nature of any 'interest' to Mason makes the agreement non-usurious.*

*Id.* at 684 (emphasis added, citations omitted); *see also In re Transcapital Fin. Corp.*, 433 B.R. 900 (Bankr. S.D. Fla. 2010) (upholding nonrecourse, litigation funding agreement and finding Florida law in accord with basic proposition that a financing agreement is not usurious when repayment made subject to the occurrence of a contingency); *Fausone v. U.S. Claims, Inc.,* 915 So. 2d 626, 627 (Fla. Dist. Ct. App. 2005) ("the law does not regard [the nonrecourse purchases of litigation proceeds] as loans because the corporation that gives money to the plaintiff has no right to recover from the plaintiff in the event the lawsuit is unsuccessful.").

Other federal and state courts apply similar reasoning to conclude that transactions in which there is no possibility of recourse against the purported borrower are not loans. For example, in *Dopp v. Yari*, 927 F. Supp. 814 (D.N.J. 1996), a litigation-funding case, the federal district court provided a lengthy discussion of usury caselaw and other authority (such as Williston on Contracts) in finding that a litigation-financing transaction was not a "loan" under the New Jersey usury statute because there was no obligation to repay.

Likewise, just this year, a federal district court in Michigan found that the return on a contingent purchase agreement similar to those at issue here was not "interest" under the state usury statute. *MoneyForLawsuits V LP v. Rowe*, 10-CV-11537, 2012 WL 1068760 (E.D. Mich. Mar. 29, 2012). The Court based its decision on a conclusion that where there is no guarantee of repayment, the charge is a negotiated rate of return on investment and payable in the event that the contingency occurs, not "interest" under Michigan law (or a "loan" under New York law). Slip op. at 4-5. Notably, the court expressly rejected many of the cases relied upon by the Administrator here (and distinguished above). *See also Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 96-97 (Tex. App. 2006) (holding that whether purported borrower has obligation to repay is "important because it helps a court in determining whether a transaction was a loan or a business investment").

All of the cases above have one consistent thread: where there is no obligation to repay, there is no loan. Such is the case here.

## **CONCLUSION**

In its decision below, the district court opined that it was "guided by a very old principle of Colorado law; 'nothing is my debt unless a judgment for its amount can be recovered against me upon it'". (MSJ Order, CD p. 695.) Ironically, the Plaintiffs couldn't agree more. And because the sellers here cannot have a "judgment for its amount recovered against" them, there is simply no "loan" under the UCCC. Accordingly, the decision of the district court should be reversed.

Respectfully submitted this 23rd day of October 2012.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October 2012, a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF** was served via LexisNexis File and Serve to the following:

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# FINAL REPORT

January 3, 2012

To: Uniform Law Commission Committee on Scope and Program

From: Study Committee on Regulation of Lawsuit Loans, Roger C. Henderson, Chair

Re: Drafting Project Recommendation

## I. INTRODUCTION

On July 11, 2011, the Executive Committee approved the Resolution of the Scope and Program Committee to form a Study Committee on the Regulation of Lawsuit Loans. This Committee was charged to consider and make recommendations concerning the need for and feasibility of drafting a uniform act on the regulation of loans that are primarily made to plaintiffs in personal injury or other related civil actions and that are secured by the lender obtaining an interest in the damages that a plaintiff receives as a result of the action. These transactions, sometimes referred to as "lawsuit loans," are more often identified today in the trade as alternative litigation financing (ALF). This manner of reference is more accurate because the transactions actually resemble an assignment of the proceeds of a cause of action, rather than a loan, since one of the hallmarks is that they are almost always "nonrecourse" in nature, i.e., there is no obligation on the part of the claimant to repay the lender absent a recovery in the cause of action securing the "loan." Although ALF transactions have not been free from controversy, they have become quite common, not only in certain jurisdictions of the United States, but also in a number of foreign countries.

## II. MATERIALS CONSIDERED

The Study Committee was very fortunate to have access to considerable research conducted and recently published by the American Bar Association and Rand Corporation. Those studies are listed below, along with other sources, considered by the Committee, in developing this report.

1. American Bar Association Commission on Ethics 20/20 White Paper (2011), Professors Anthony Sebok and W. Bradley Wendel, Reporters.

2. Rand Institute Occasional Paper, Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns (2010), by Steven Garber.

3. New York Times articles: "Lawsuit Loans Add New Risk for the Injured," January 17, 2011, and "Lobby Battle Over Loans for Lawsuits," March 9, 2011.



**EXHIBIT A**

4. Wall Street Journal article: “Funds Spring Up to Invest in High-Stakes Litigation,” October 3, 2011.

5. BNA Highlights, “Litigation Financing, Admission by Motion Are Examined at Latest Ethics 20/20 Hearing,” February 15, 2011.

6. Oasis Legal Finance, “Recap of Legislative/Regulatory Activities for 2011,” October 28, 2011.

In addition, the Study Committee was provided copies of the ALF regulatory legislation recently enacted by the States of Ohio, Maine, and Nebraska.

## III. NOVEMBER STUDY COMMITTEE CONFERENCE CALL

On November 4, 2011, the Study Committee held a conference call, wherein the following Committee members participated: Commissioners Pamela Bertani, Robert Gardner, Peter Langrock, Frederick Stamp, Sandra Stern, Robert Toyofuku, and Joe Willis. Commissioner Tom Bolt was not available. In addition, Eric Schuller, Director of Government and Community Affairs, Oasis Legal Finance, participated.[1]

In preparation for the conference call, the Chair of the Study Committee distributed a memorandum reviewing and outlining the subject matter to be discussed. In doing so, he pointed out that ALF, in addition to the personal injury and related areas (such as workers compensation, disability, and civil rights), has also been extended on a nonrecourse basis to commercial litigation claimants.[2] Although such financing is available in the commercial area, he pointed out that the focus of the major source of controversy concerns “nonrecourse loans” to individuals prosecuting personal injury and related claims and whether untoward practices are taking place with regard to this category of claimants. Consequently, he suggested that the Committee focus exclusively on the personal injury area initially in the conference call because, in his opinion, there would be no need to address the commercial area if the Committee were to decide that a drafting project is not warranted with regard to individual personal injury claimants. Conversely, if a drafting project regarding the personal injury area is warranted, any extension to other areas of ALF could be addressed later.[3]

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[1]Oasis Legal Finance provides ALF funding to claimants in personal injury, workers compensation, and disability matters.

[2]In addition, financing is available both to plaintiff and defense attorneys to underwrite litigation expenses, but these do not involve nonrecourse loans and are less controversial. Consequently, the Study Committee did not concern itself with this type of financing.

[3]If a drafting committee is created, perhaps it should be charged to decide whether any regulatory scheme adopted for ALF in the personal injury area should be extended to cover such financing in the commercial area. The Study Committee did not take a position on the propriety of doing so.

A. Bifurcating the Issues

(1) Professional Responsibility

The Chair then suggested that the Committee initially address the area of personal injury and related claims, recommending that the task be divided into two spheres: first, the world of lawyers' relations with their clients; and second, the world of consumer credit or finance.

With regard to the first sphere, he noted that the ABA Commission on Ethics 20/20 White Paper limited its enquiry to the consideration of a lawyer's duties in representing clients who are contemplating or have obtained funding from ALF suppliers. The Commission did not consider or take any position with regard to the propriety of ALF itself or related issues, such as consumer credit issues regarding excessive finance charges or inadequate disclosure. In addressing the ethical issues arising from the attorney-client relationship, the Commission reviewed a number of factual scenarios involving professional responsibility and concluded that the issues were adequately governed by existing rules of professional responsibility. In short, the ABA Commission did not make any recommendation to the ABA House of Delegates that any action need be taken regarding ALF transactions.

Perhaps more importantly, the Chair noted that the Uniform Law Commission (ULC) has never undertaken a drafting project regarding rules of legal professional responsibility, leaving the matter exclusively to the ABA and American Law Institute. Given this longstanding position, it is highly doubtful that either the ULC Committee on Scope and Program or Executive Committee would be interested in delving into the area at this late date. Even if this were not so, the position of the ABA Commission on Ethics 20/20 would strongly militate against any drafting project by the ULC regarding professional responsibility since any uniform act would have to be taken before the ABA House of Delegates for approval. Consequently, it was the opinion of the Chair that the Study Committee follow suit and decline to recommend any drafting project with regard to the area of professional responsibility. The members of the Study Committee were in agreement that the ULC should not undertake any project involving the professional responsibilities of attorneys.

(2) Consumer Credit

The Chair then directed the attention of the Study Committee to the second sphere mentioned above involving the world of consumer credit or finance. This was the focus of the Ohio, Maine, and Nebraska legislatures, as well as a number of other states that are currently considering regulatory action. He suggested the following issues serve as an agenda for Committee consideration.

(a) To the extent that the law regarding maintenance and/or champerty still exists, should that situation affect our decision regarding a drafting committee?

(b) You will notice that the legislation enacted to date, does not deal with substantive issues, e.g., usury or fraud. Are there reasons why the legislatures failed to address substantive issues? What type of substantive issues would any drafting committee address?

(c) The statutes and proposed legislation to date appear to be limited to "truth-in-lending" or "sunshine/disclosure" provisions. Are these warranted and, if so, will they be effective? Are there additional types of provisions that any drafting committee should consider and how effective might they be?

(d) Should the current political climate regarding regulatory action by governmental agencies and/or budgetary matters affect our recommendation and, if so, how?

(e) Who are the "stakeholders" in the area of ALF and how would that affect prospects for successfully completing any drafting project, including enactment?

The Study Committee proceeded to discuss the issues as outlined and came to certain conclusions. Subsequent to the conference call, the Chair prepared a draft of a report to the ULC Committee on Scope and Program summarizing the discussion and conclusions as set out below. The draft was distributed to the Study Committee for review in preparation for a second conference call scheduled for December 2011.

B. Study Committee Discussion and Conclusions

(a) The current status of ALF in the United States may be divided roughly into three categories. First, some forms of ALF are currently legally permissible in approximately one-third of the jurisdictions.[4] This is a change from the early common law that outlawed maintenance and champerty as violations of a public policy designed to, among other goals, discourage litigation and protect claimants from unscrupulous action. In contrast, these common law prohibitions still exist in a second category, which also consists of approximately one-third of the jurisdictions. The remainder of jurisdictions makeup the third category, a group where it is less clear to what extent these prohibitions still exist. However, what is clear is that the ALF suppliers and defense interests will weigh-in on any attempt to change the law that either currently benefits them or that would work a change to their detriment. In fact, these entities are already actively involved in the legislative process and will undoubtedly be interested in influencing any drafting project undertaken by the ULC and will, depending on the provisions of any uniform act promulgated by the ULC, either strongly support or oppose its adoption. In the meantime, some legislatures may enact regulatory provisions patterned after one of the states that have already taken such action. Thus, uniformity, even if desirable, will not be easily achieved.

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[4]ALF is to be distinguished from the traditional and widely accepted financial assistance provided to claimants by their attorneys in the form of litigation expenses under contingent-fee agreements and funding of defense costs by liability insurers. ALF is a relatively new form of nonrecourse funding provided by entities other than plaintiffs, defendants, their lawyers, and defendants' insurers, wherein, at least in the area of personal injury actions, the lending entity is entitled to receive a portion of a claimant's recovery.

(b) The legislation enacted to date contains few, if any, provisions addressing substantive issues, such as usury, fraud, or other possible untoward conduct by ALF suppliers. Rather, the legislation is more prophylactic in nature as it mainly tries to ensure that a claimant is adequately informed before entering an ALF transaction. It also specifies certain rights regarding the contract, but it does not create a private cause of action on behalf of a consumer for misconduct by ALF suppliers. Any attempt to include such a provision may prove problematical. The main reason, apparently, why usury or fraud is not addressed is because of the inherent risks involved in personal injury and related litigation that undercut development of a market by which overreaching or unfairness may the judged. The Committee discussed possible ways to address this type of issue in the drafting process, but, wanting for any clear examples, any solution remains somewhat elusive. Thus, in considering any drafting project, one may have to be content with the approach in the legislation enacted to date.

(c) The legislation enacted to date does provide examples of a number of prophylactic measures that are designed to enhance understanding and produce informed action by a claimant considering ALF. These types of provisions are commonly adopted in uniform acts and there is no reason to think that a drafting committee could not design adequate safeguards to help ALF consumers to avoid improvident decisions. Any attempt to bring uniformity with regard to these types of provisions would no doubt be salutary. Whether uniformity could be achieved is not assured and any expenditure of ULC resources in an attempt to do so is a concern.

(d) The current political climate regarding governmental regulation does not bode well for legislative action requiring any new governmental oversight in general, much less for economic activity. Moreover, any proposed legislation requiring governmental funding to enforce any new regulation will probably not be well received in most state legislatures. It should also be noted, for what it is worth, that the last effort of the ULC to deal with consumer credit issues through the Uniform Consumer Credit Code did not meet with wide success.[5] Consequently, the need for any consumer protection legislation probably will have to be more than merely apparent in the great majority of states; in fact, it is more likely that the need will have to be near compelling to spur the type of broad based legislative action required to achieve uniformity.

(e) The primary stakeholders with regard to ALF are fairly easy to identify. Interestingly, the ALF industry has taken the initiative in seeking governmental regulation. This not only has an aura of "first strike" in the sense that they would like to influence, if not dictate, the terms of any regulation, thereby avoiding, in their view, any overly restrictive rules. In addition, this initiative serves another very important goal, given that a substantial number of states currently prohibit ALF transactions and in a number of others the legal propriety of such is not all that clear. Thus, in the course of supporting regulation, their business model will be legitimated in any state adopting such legislation. This means that the prohibitions on maintenance and champerty, to the extent they still exist in an adopting jurisdiction, will be changed, if not eliminated completely. On the other hand, defense interests will surely oppose

[5] The Uniform Consumer Credit Code was first promulgated in 1968 and revised in 1974 at which time it was designated as a model act. No more than 10 states have adopted the act.

any attempt to facilitate personal injury claims through legislative action altering the status quo, viewing it as exacerbating their current situation. For example, according to the New York Times and Wall Street Journal stories mentioned above, the business community, mainly through the United States Chamber of Commerce, has made it quite clear that it strongly opposes ALF. In contrast, one should also anticipate that those in the legal profession aligned with personal injury claimants will support the legalization of ALF, just as those aligned with defendants will not favor such action. In short, the success of any drafting project may well be impacted by the usual warring political forces that have proved so formidable in ULC legislative endeavors regarding personal injury law over the years. Adoptions of ULC products in this area have been rare and there is not much reason to believe that the situation would be much different with regard to ALF legislation.

Subsequent to the November conference call, the Chair prepared a draft of a final report to be submitted to the ULC Committee on Scope and Program in anticipation of another conference call with the Study Committee to review the draft.

## IV. DECEMBER STUDY COMMITTEE CONFERENCE CALL

After the draft report was distributed to the Study Committee, a second conference call was scheduled for December 7, 2011 to discuss the draft and decide on a recommendation to the Committee on Scope and Program. In addition to the Chair, the following Study Committee members participated in the call: Commissioners Pamela Bertani, Peter Langrock, Sandra Stern, and Joe Willis. Commissioners Tom Bolt, Robert Gardner, Frederick Stamp, and Robert Toyofuku were not available. ULC staff members John Sebert, Katie Robinson, and Nicole Julal were also included in the call.

The Study Committee members agreed with the analysis and conclusions expressed in Section III (B) of the draft under consideration, but were not of one mind with regard to whether a drafting committee should be created to address the issues involved in alternative litigation financing. It would be fair to say that the Study Committee felt that a uniform law, or possibly a model statute, on the subject would be beneficial to accident victims and ALF entities as it would clarify the issues and attempt to resolve them in a fair and balanced manner. However, several members felt that it would be difficult to achieve any significant degree of uniformity for a number of reasons.

First, any attempt to regulate the area through governmental oversight would more than likely involve a legislative appropriation of funds. It was seriously questioned whether state legislatures would be receptive to such action given the existing budgetary difficulties they are facing, not to mention the current political attitudes hostile to government regulation in the first place. Although any drafting project could consider creating a private cause of action, i.e., utilizing a "private attorney general" approach, to remedy any wrong doing by ALF suppliers, this would undoubtedly be opposed by the ALF industry, not only in the drafting process but also in the legislative process as well.[6]

[6] To date, none of the legislatures addressing ALF issues have enacted a "private attorney general" approach to enforcement.

Second, it was noted by some Committee members that any attempt to regulate the rates or fees charged by ALF entities would be largely impractical for at least two reasons. Given the uncertainties and risks of recovery in personal injury action, it would be difficult to classify certain rates or fees as usurious. For example, how would one determine whether a discount rate of 40 percent vis-à-vis 25 percent is unfair, and therefore should be unlawful, when it is common knowledge, at least in the legal profession, that such disparities may well be justified in setting contingent fees because of peculiar circumstances. Simply stated, there is little in the way of a market or other criteria to which comparisons may be made.[7] The other reason such an attempt to regulate rates or fees may prove impractical is that the ALF suppliers may easily avoid such strictures by making sure their contracts are not subject to the law of any state adopting such.[8]

Third, if rates or fees are impractical to regulate, the primary type of regulation would necessarily have to resemble those adopted in other consumer credit situations, such as mandatory provisions regarding revocation, prominence of certain provisions, required written explanations, and the like found in "truth-in-lending" legislation. As a result, some Committee members felt ALF really was not something that deserved new treatment, but rather that any regulation should be part of the Uniform Consumer Credit Code. However, it was noted that no more than 10 states have adopted the UCCC since it was promulgated in 1968. Although the Study Committee agrees in general that consumers and suppliers would both benefit from a fair and balanced set of rules dealing with ALF, some members question whether such legislation can be enacted on a broad enough scale to warrant the ULC undertaking a drafting project on the subject.

Fourth, of most serious concern to some members of the Study Committee is the fact that ALF still is illegal in about one-third of the states because it is outlawed under the rules of law pertaining to maintenance and champerty. They also point out that since only about one-third of the states clearly permit ALF transactions, this leaves the remaining jurisdictions in limbo as to the legality. Consequently, any legislation that facilitates ALF transactions will have the potential to be controversial in approximately two-thirds of the states in which it is introduced. This is so because it will be viewed by defense interests, such as businesses and insurers, as changing the personal injury system to facilitate lawsuits by accident victims. Regardless of the pros and cons of such a change, it is a fact that any Conference product that attempts to revise or clarify the law regarding maintenance and champerty will attract the attention of political factions that are already at odds over any attempted change in the tort system that one side or the other believes serves to disadvantage them. The ULC has been singularly unsuccessful with such drafting projects for at least four decades now and there is no reason, in the view of some Study Committee members, to think that things have changed. Therefore, they believe the ULC should not engage in a drafting project involving ALF despite the fact that some would agree

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[7]To date, no legislature has attempted to regulate rates or fees.

[8]As one Committee member observed, this is what happened when individual states tried to regulate bank credit card fees and charges. The banks merely removed these operations to another state where no such regulation applied.

that it would be a salutary endeavor if only the resulting act could be adopted in a significant number of states; something they believe is not in the offing. Others on the Committee acknowledge the difficulties involved, but feel that the potential benefits of engaging in a drafting project are sufficiently achievable and, therefore worth the effort.

## V. CONCLUSION AND RECOMMENDATION

The Study Committee, for the competing reasons stated above, concludes that making any recommendation is not warranted given the differing views of its members. Rather, it feels that it has sufficiently discharged its assignment by having marshaled and studied the available materials and information on the subject of alternative litigation financing, identified the salient issues, and outlined the matters that the Committee on Scope and Program should consider in deciding whether or not to recommend to the ULC Executive Committee that a drafting project be undertaken. This constitutes the final report of the Study Committee on Lawsuit Loans.