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REVENUE-BASED FINANCE IN BANKRUPTCY AND BEYOND

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INTRODUCTION

The Merchant Cash Advance (MCA), which is increasingly referred to as revenue-based finance,[1] is a relatively new and highly controversial form of small business financing. The transaction is structured not as a loan, but rather as a *sale* of future receivables.[2] In exchange for cash up front, the merchant pledges its future business income to the funder, and the funder is repaid through daily or weekly ACH transfers from the merchant's bank account.

MCAs are marketed to small businesses with bad credit.[3] Proponents argue that they fill a void in small business lending, providing a financial lifeline to businesses that are not eligible for traditional financing sources. MCAs are also advertised as being more flexible and adaptable than traditional bank loans. Consider this hypothetical, which is based loosely on an advertisement from a revenue-advance company's website:

> Emily[4] owns a coffee shop in a popular New England ski town. She wanted to increase her marketing footprint and took out a $6,000 MCA to fund an advertising campaign. Emily received her advance almost immediately and her repayments were a flexible 10% of her daily revenues. So, in the winter months when business was booming, she paid off her advance more quickly, and in the warm-weather months, when revenue was down, she was able to pay less. Emily repaid her advance in full in six short months and is now working with her funder to finance her business's expansion to new locations.

For all I know, the website depiction on which this hypothetical is based features a real client, and the charming depiction of small-business success is a veritable win for this funder, the client, and the industry. Available case law suggests, however, that many merchants' interactions with MCA funding companies have not been so positive. First, the costs of this type of lending are often astronomical—with effective interest rates of several hundred percent—and the daily repayments are often unsustain-

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able for the small businesses. Second, many merchants have learned to their detriment that the advertised flexibility in repayment offers little meaningful relief. When merchants have needed, desperately, to ratchet down the daily draws, many have faced either contractual bars to adjustment or simple refusal by their funders. Failure to maintain a sufficient deposit account balance has led to aggressive enforcement actions, and merchants' desperate attempts to avoid financial ruin has led to follow-on legal problems, including denial of a discharge in bankruptcy.[5]

MCAs are appearing in bankruptcy and non-bankruptcy courthouses with increasing frequency. State courts in New York, Connecticut, and other jurisdictions are inundated with MCA enforcement actions against merchants who could not keep up with their payments.[6] Federal courts have increasingly confronted these transactions in the context of RICO class actions filed by borrowers, including the CEO of MyPillow, Mike Lindell.[7] Senior secured lenders have sued MCA companies for impairing their rights in the underlying receivables.[8] There have also been enforcement efforts against certain MCA funders by state attorneys general, the Federal Trade Commission, and the Securities and Exchange Commission.[9] Bankruptcy courts, for their part, are encountering debtors whose MCA obligations are stacked mile-high as they enter bankruptcy, generating a variety of actions by and against the funders.

In my April 2022 *Bankruptcy Law Letter*, I argued that many MCA agreements are loans in sale's clothing and therefore are vulnerable to usury challenges that could void the underlying transaction.[10] At the time, just three years ago, a weighty body of authority refused to recharacterize MCA agreements as loans. Only a small number of bankruptcy courts and commercial law scholars had begun challenging the prevailing characterization of these transactions as sales by looking beyond the contractual language to deeper commercial realities. I concluded that courts:

> should not take the contract's representations about risk allocation at face value and must instead consider them in light of the broader transactional realities of the agreement. Bankruptcy courts are accustomed to this type of skeptical analysis and have generated some of the more thoughtful decisions on these matters to date. Bankruptcy courts' future opinions on these matters, so long as they are published or publicly available, could bring welcome coherence [to the characterization of MCA agreements].[11]

Although that issue's analysis cut "against the grain of much of the existing MCA case law,"[12] the ground has shifted substantially in the years that have followed. This issue of the *Bankruptcy Law Letter* surveys the legal landscape of MCA transactions in bankruptcy, providing updates and commentary on MCA-related issues that bankruptcy courts might face.

THE STRUCTURE OF A MERCHANT CASH ADVANCE

Merchant Cash Advances are a form of receivables-based financing.[13] The transaction is structured as a purported sale of future earnings in exchange for up-front funding. The merchant receives an immediate infusion of cash, typically much more quickly than a traditional bank loan would arrive (assuming the merchant is eligible for traditional financing). In exchange, the merchant pledges to the funder a specified percentage of its daily revenue.[14] The funder typically receives repayment through regular ACH sweeps from the merchant's bank accounts.[15] Daily bank transfers are a common feature of MCA transactions.

MCAs have some similarity to a factoring arrangement, but they are distinct in several respects. First, an MCA involves the sale of a specified *percentage* of total receivables (or total receipts)[16] rather than identified receivables. Second, the receivables are not collected from the account debtors directly, as is often the case in factoring arrangements. Rather, as noted, repayment is accomplished by withdrawals of funds from the borrowers' bank accounts. Third, in light of this structure, MCA funders typically undertake no due diligence regarding the creditworthiness of the account debtors.

The amount of each daily draw (often termed the "Daily Amount") is ostensibly calculated[17] to represent the percentage of the merchant's projected daily receivables that have been "sold" to the funder.[18] The rate of repayment is theoretically adjustable as the merchant's actual revenue varies according to the terms of a "reconciliation" provision.[19] An example of a reconciliation provision appears here:

> The Initial Daily Amount is intended to represent the Specified Percentage of [Merchant's] daily Future Receipts. For as long as no Event of Default has occurred, once each calendar month, [Merchant] may request that [Funder] adjust the Daily Amount to more closely reflect the [Merchant's] actual Future Receipts times the Specified Percentage . . . No more often than once a month, [Funder] may adjust the Daily Amount on a going-forward basis to more closely reflect the [Merchant's] actual Future Receipts times the Specified Percentage . . . After each adjustment made pursuant to this paragraph, the new dollar amount shall be deemed the Daily Amount until any subsequent adjustment.[20]

As we will explore later, some of these reconciliation provisions may be illusory in application. But regardless of whether the contract permits the adjustment of the daily payment (and, by extension, the term of repayment) to reflect actual receipts, the funder is ultimately entitled to receive a specified total amount.

MCA agreements commonly feature "events of default," terms more commonly found in a lending contract, which permit acceleration of the MCA repayment obligations and allow the funder to pursue additional remedies. Default might occur under an MCA if the merchant "admits in writing its inability to pay its debts," is adjudicated bankrupt, terminates its business, or changes its deposit accounts.[21] Default of an MCA can open up a range of remedies to the funder. Indeed, MCAs have become notorious in recent years for their aggressive remedial provisions.[22] MCA transactions are commonly accompanied by confessions of judgment, which allow the funder to obtain judgment upon the counterparty's default without the formalities of bringing suit.[23] Likewise, MCAs are typically backed up by security interests in a large pool of the merchant's collateral—not just the assigned receivables—and one or more personal guaranties.

Not surprisingly, MCAs can have a significant and immediate effect on businesses' operations and further deepen a business' cash flow problems. When a merchant fails to generate sufficient revenue to support the daily withdrawals of its MCA lenders, and if it is unable to reconcile or otherwise adjust payments, it may take out additional MCAs to avoid default on the earlier MCA. It is not uncommon for a debtor to enter bankruptcy with several MCA obligations outstanding, sometimes having pledged more

than 100% of their receivables to various funders.[24]

SELECT BANKRUPTCY ISSUES PRESENTED BY MCAS

Many MCA funders lie low through the bankruptcy case, taking no action.[25] Others aggressively assert their interests.[26] But as highlighted in this section, a constellation of issues involving MCAs and the businesses they fund can arise in bankruptcy. When MCAs come to the fore of a bankruptcy case, a central question tends to dominate: what *is* an MCA, and what are the nature of the MCA funder's rights in the debtor's property? Put more specifically, is an MCA a "true" sale of receivables, or instead a loan in disguise?

This issue is fundamental to all sorts of bankruptcy matters, beginning with the scope of the estate. If the debtor's receivables have been "sold" to a funder, then they are arguably not property of the estate and not subject to the Code's cash collateral rules.[27] Few courts have held as much because, among other things, fewer than all of the receivables have been pledged to any individual funder.[28]

The loan-sale distinction is also relevant to the question whether § 552 of the Bankruptcy Code applies to the transaction. Section 552 limits a prepetition *security interest* from attaching to property acquired by the estate but would not affect the rights of a pre-petition buyer.[29] How this provision fits onto a transaction that purports to be a sale of receivables *not yet acquired by the debtor* is unclear. Yet one court has observed that a bankruptcy filing would disrupt the rights of an MCA funder in post-petition property, no matter the transaction's classification:

> If we concede that the Agreement effects, as it purports, a "true sale" of Debtor's receivables and does not constitute merely the purported grant of security interests therein, then any purported transfer of post-petition receivables that was not approved by the Court using the law and procedure provided by 11 U.S.C. § 363, is an *unauthorized post-petition transfer of estate property and avoidable pursuant to 11 U.S.C. § 549*. Were there to be any such unauthorized transfer, then Creditor's claim would be fully disallowable pursuant to 11 U.S.C. § 502(d).[30]

MCA funders might attempt to argue that any transfer of receivables occurred prepetition, when the purported sale was made. But that construction is inconsistent with the concept of *nemo dat quod non habet*: one cannot give what they do not have.

MCA classification has also arisen in the context of preferences and fraudulent transfers. The MCA withdrawals preceding a bankruptcy will frequently be preferential in effect, as they allow the funder to receive more than it would have if the transfers had not taken place.[31] The question is whether MCA sweeps amount to a transfer of interest of a *debtor* in property, and whether they occur on account of an antecedent *debt*. Some MCA funders have argued that because they purchased the receivables outright, the debtor no longer has an interest in them. Some courts have observed that this position is inconsistent with the underlying transaction, which typically assign to the MCA provider only a *percentage* of future receivables. Because the seller/debtor retained a residual percentage of the receivables belonged to the debtor, preference liability might arise from the withdrawals.[32]

MCA funders have also argued that they are not "creditors," and the repayments of future receivables are not on account of antecedent debts. But several courts handling this issue have found that preference liability may arise even if the underlying transaction were a sale, because the merchant's unfulfilled obligations under MCA transactions fall within the capacious definition of "debt."[33]

MCAs arise in a host of other bankruptcy contexts that are not necessarily dependent on the loan/sale distinction. For example, MCA transfers have been challenged as constructively fraudulent transfers in bankruptcy and non-bankruptcy litigation.[34] A key issue in these actions is not the characterization of the transac-

tion as a loan or a sale, but rather whether the merchant receives reasonably equivalent value for the rights the MCA funder obtains. Some courts have been reluctant to find that the transfers are for less than reasonably equivalent value, acknowledging that the merchant receives a vital cash infusion in the transaction.[35]

As one court explained:

> An assessment of reasonably equivalent value must take into account any intangible value that a party receives. Funding Metrics provided a funding option to the Debtor when no other lender would, providing Goodnight a tenuous lifeline to remain in business. However draconian the terms of that funding may seem in hindsight, that lifeline is a value received by the Debtor.[36]

But the Minnesota District Court held that an MCA to a deeply insolvent debtor lacked reasonably equivalent value, and the Minnesota Court of Appeals affirmed.[37] The court emphasized the effective interest rate of 84%, which (while tame by MCA industry standards) was "far in excess" of the rate for similar transactions.[38] It also highlighted that a large portion of the funding extended was immediately spent to pay off daily-payment obligations to pre-existing creditors. Although the borrower's cash flow was temporarily improved from the MCA by lowering the company's daily payments, that change was primarily attributable to the longer loan term provided by the most recent MCA transfer. Taken as a whole, the transfer was tantamount to extending the terms of the prior loans at a cost of an additional $700 per day.[39]

Another pressing question is whether obligations owed to MCA companies in bankruptcy ought to factor into the subchapter V debt-limit calculation.[40] To be eligible for subchapter V of chapter 11 of the Bankruptcy Code, a debtor must, among other things, have "aggregate noncontingent liquidated secured and unsecured debt as of the date of the filing of the petition . . . in an amount no more than $3,024,725."[41] One court has held that "[f]or eligibility purposes, a proof of claim filed as a true sale would not generally be included in the Subchapter V debt limit calculation."[42] On that basis, the court found that several MCA transactions should not factor into the debtor's debt limit.

It is not clear why obligations owed under an MCA transaction, even if it is a true sale, ought not qualify as a debt. The Bankruptcy Code defines "debt" as "liability on a claim."[43] "Claim," as readers well know, has a capacious definition that sweeps in obligations beyond those owed by traditional loans. As discussed more below, the loan/sale distinction in an ordinary case is tied to *whether* the seller/borrower has residual obligations to the buyer/lender. But if the bankrupt seller owes some residual obligation to the buyer, then that obligation would qualify as debt.[44] And if the obligation is debt, the question for subchapter V eligibility purposes is whether it is contingent or unliquidated.[45]

This analysis raises a fundamental analytical point involving MCAs: determining whether an MCA should count toward the debt limit is so challenging because our intuition is that a sale of accounts should not be accompanied with residual liability. Not only that, but MCA funders take pains to state that they are taking on the risk of the merchant's business not generating sufficient receivables to repay the advance. All of this leaves readers with the reasonable intuition that if an MCA borrower's business fails, the merchant would not owe anything to the funder and there would be no claim in a later bankruptcy case. The cognitive dissonance arises because the MCA's default and acceleration clauses, among other terms in the MCA agreements, strap merchants and their principals with extensive residual obligations. The following sections begin to explore how this feature is a strong indication that recharacterization of MCA transactions as secured loans is appropriate.

THE TRUE-SALE ANALYSIS: AN ANALYTICAL FRAMEWORK

The prior section explored how many bankruptcy issues involving MCAs turn on whether the transaction is properly characterized as a

sale or should be recharacterized as a secured loan. Much of the case law on MCA recharacterization has developed in state courts, which tend to encounter it when determining whether the transaction is usurious and void under applicable law. The analysis is technical and fact intensive, and is guided by a body of case law that is "remarkable for its incoherence."[46] This section, which builds upon my earlier *Law Letter* on the topic, attempts to identify analytical tools that are useful in applying the true-sale doctrine to MCA transactions.

When weighing whether a transaction styled as a sale is a true sale, the core of the inquiry is to assess which party—buyer or seller—holds the risks, benefits, obligations, and other attributes we typically associate with ownership.[47] When an item of property is sold, the buyer takes on the upside and downside risk of that item's future performance. With a secured loan, in contrast, the lender's entitlement to payment is not dependent on the performance or value of the underlying collateral.[48] Further, in a typical sale transaction, the buyer controls the asset and must take on the obligations associated with ownership, such as servicing accounts.[49]

Many courts evaluating MCA transactions focus their analysis narrowly on three dimensions of the agreement: (1) Whether the agreement includes a reconciliation provision, which purports to adjust the merchant's payments if the merchant's business falters; (2) Whether the agreement's term is finite; and (3) Whether the funder has recourse if the merchant declares bankruptcy.[50] Professors Hilson and Sepinuck explain in detail why these terms may not have the probative value that courts attribute to them.[51]

A broader point is that when courts attempt to conduct a true-sale analysis mechanically, by looking for the presence or absence of these or other factors, they can easily overlook the commercial realities of a transaction. This is a particular risk in MCAs, because MCA agreements are carefully drafted to demonstrate compliance with this test. Consider the following common language, which (together with any reconciliation provision) strongly suggests compliance with the three-factor test described above:

> [Merchant] is selling a portion of a future revenue stream to [Finance Company] at a discount, not borrowing money from [Finance Company]. There is no interest rate or payment schedule and no time period during which the Purchased Amount must be collected by [Finance Company].[52]

and

> If Future Receipts are remitted more slowly than [Finance Company] may have anticipated or projected because [Merchant's] business has slowed down, or if the full Purchased Amount is never remitted because [Merchant's] business went bankrupt or otherwise ceased operations in the ordinary course of business, and [Merchant] has not breached this Agreement, [Merchant] would not owe anything to [Finance Company] and would not be in breach of or default under this Agreement.[53]

If a court looks more closely at the transaction, it may be the case that adjustments to the payment amounts were functionally unavailable, or that breach was inevitable, or that a business failure or bankruptcy filing would permit enforcement against the guarantor or other collateral, rendering these clauses inaccurate and superfluous. It is thus important to approach a true-sale analysis by remembering that "the substance of MCA transactions may belie the contracts' careful descriptions of risk allocation."[54] Courts must look beyond the contract's window-dressing to evaluate the true commercial nature of these transactions. The ultimate question, again, is whether the buyer has acquired the risks and rewards of the purchased receivables (in line with a true sale) or has instead contracted for a repayment that does not vary based on the performance of the assets (in line with a secured loan).

As discussed at greater length in my earlier *Law Letter*, a number of factors can help courts gauge a transaction's allocation of risk.[55] These include:

(1) the seller's right to excess collections,

including whether the contract permits the seller to repurchase the property or retain other residual rights in the property,

(2) the buyer's risk of loss, which could be facially present but effectively placed back on the seller through chargebacks, price adjustments, guaranties, or indemnification provisions,

(3) the extent of any pre-transaction credit inquiries relating to the account debtors, which demonstrates the buyer's interest in the credit worthiness of account debtors,

(4) the allocation of servicing obligations, as seller servicing (particularly if the seller commingles the proceeds of collection before remitting payment to the buyer) may be consistent with a lending relationship,

(5) the language of the agreement, although courts tend to view this factor with some skepticism, and

(6) other indicia that the seller has retained control of the assets.

The existence of a UCC financing statement filed by the merchant is not, however, indicative that the transaction is a loan. Article 9 of the UCC applies to both sales of and security interests in receivables, which makes it both common and prudent for a purchaser of accounts to perfect its interest by filing.[56] With that said, the *scope* of the security interest may be probative to the ultimate risk that a debtor has taken on. In *In re Shoot the Moon*, for example, the court found the fact that the funder had broad remedial rights against all of the merchant's collateral, together with personal guaranties, to support a finding that the funder took on essentially no risk that the receivables transferred would not perform.[57]

In the case of MCAs, one additional point bears mentioning: a transaction that transfers a *percentage* of unidentified receivables presents a fundamentally lower risk to the buyer than the sale of *identified* receivables would provide. Consider a cash-strapped supplier who ships inventory to various retailers with payment due within 30 days of delivery. If the supplier sold those receivables, the purchaser would obtain the supplier's rights to be paid from the retailers for goods sold. Some of the retailers will pay on time; some will pay late; and some will not pay at all. In a typical, true sale of receivables, the buyer acquires the package of receivables with these realities in mind. It likely investigates the retailers' credit worthiness and adjusts the payment price to reflect the risk of nonpayment. It often takes on the duty of collecting payment. And, as emphasized throughout, the buyer enjoys the risks and rewards that come when the receivables are collected. Put simply, most of the factors in the list above are present and signify a true sale.[58]

In an MCA, this is not how it works. The funder takes an interest in an unspecified share of receivables, which means, quite simply, the funder always gets the good ones. The funder draws its payment from whatever money the debtor has available, which include accounts that have been paid, funds from other MCA companies, and any other monies that happen to be in the debtor's deposit account. In this way, the MCA funder's recovery is in no way tied to the performance of any individual account. If 20% of the accounts go uncollected, or 50%, or 70%, the funder's ultimate recovery remains payable from the first dollars received by the merchant. A reconciliation of the MCA, if available, could adjust the *timeframe* for repayment, but would not alter the principal amount owing.[59] And, frequently, insufficient account balances or missed payments constitute default. In this respect, the risk to the MCA funder "is derivative or secondary, that is, the borrower remains liable for the debt and bears the risk of non-payment by the account debtor, while the lender only bears the risk that the account debtor's non-payment will leave the borrower unable to [pay]."[60] Even that risk is mitigated by the extensive collateral packages, personal guaranties, and other remedies that accompany MCA transactions.

SHIFTING TIDES IN MCA RECHARACTERIZATION

When my earlier *Law Letter* on MCA transactions was published, the weight of case law characterizing MCA agreements concluded that MCAs are true sales.[61] Courts reasoned that the merchant's obligation to pay for the advance is dependent on the collection of the underlying accounts, thus placing the transactional risk primarily on the funder.[62] At that time, a small number of courts had begun to find recharacterization appropriate for the reasons discussed in the prior part.[63] Several courts reached that conclusion after finding the contractual reconciliation clauses, which purported to adjust the amounts owing by the merchant, were either wholly discretionary on the part of the funder[64] or tied to other contractual provisions that make them ineffective.[65] Some courts observed that the extensive collateral packages, guarantees, and contractual default provisions baked into MCAs resulted in a risk profile far more akin to a loan than a sale.[66] But these were outlier cases.

The landscape has shifted significantly since that prior article, with a groundswell of cases in New York courts supporting recharacterization of MCAs as secured loans. The trend appears to have started with several actions filed in the U.S. District Court for the Southern District of New York, which confronted MCA characterization in the context of class actions for violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act.[67] The thrust of the plaintiffs' argument was that the MCA transactions were disguised loans void under New York law for criminal usury, and therefore were "unlawful debts" for purposes of RICO.

Haymont Urgent Care v. GoFund Advance, LLC is instructive. In considering whether plaintiffs had sufficiently pled that an MCA agreement was a usurious loan, the court refused to confine its analysis to the narrow, three-factor test popular in New York courts. It noted that factors such as the indefinite loan term, reconciliation provision, and lack of recourse in bankruptcy facially support a sale characterization, but "the actual operation of the contracts muddies this picture."[68] Namely, although the contract featured a reconciliation clause, it was invokable only five days per month. This could be unworkable in transactions with repayment periods less than one month, or if a merchant hit a rough patch between reconciliation windows. Not only that, but the reconciliation clauses vested the funder with the discretion to request documentation as a condition to reconciliation, which the court noted could supply a pretext for denying reconciliation.[69] Looking beyond the reconciliation provision, the court emphasized that the receivables pledged were not identified in the contract, which means that there is no transfer of "risk of nonpayment by any specific customer."[70] Likewise, merchants have the responsibility of servicing the accounts and can use any revenues for whatever they like, so long as the daily remittances are made.[71] Finally, the MCA featured aggressive loan-like remedies that sprung into effect if the merchant defaulted. All of these allegations, taken together, were sufficient to plead that the transactions functioned as loans.[72]

Other SDNY cases have reached similar outcomes.[73] *Fleetwood Services, LLC v. Ram Capital Funding, LLC* is a particularly thorough and thoughtful opinion on the allocation of risk in an MCA transaction.[74] All of these cases, however, are useful tools to understand the interrelationships between various MCA provisions—particularly the limitations of contractual reconciliations—and how to assess the risk allocation in a sale of future receivables.[75]

New York state courts have found this shift in focus persuasive. In *HiBar Capital v. Parkway Dental Services*, the Supreme Court of New York permitted reargument and ultimately vacated its prior order that refused to set aside a default judgment obtained by the MCA funder. The court noted that "[f]ederal courts have engaged in a more thorough and exacting scrutiny of merchant cash advance agreements, looking at the agreements in a holistic and comprehensive manner

and the conclusions they have reached are compelling."[76] It ultimately concluded that "there are surely questions raised whether the agreement comports with the requirements necessary to be considered a genuine cash advance agreement."[77]

Another New York state court noted, in an opinion denying the funder's motion for summary judgment, that it "has dozens of matters on its docket filed by the various entities under which Plaintiff operates," all of which were seeking judgment on defaulting borrowers. The court surmised that "Plaintiff has a business of making loans under a variety of aliases to desperate small businesses, bleeding them dry, and then getting personal judgments against the owners."[78] It concluded that the contract "smacks of chicanery" and refused to "be used as a cudgel to enforce potentially illegal or unconscionable contracts."[79]

This shift in decision-making in New York courts has been accompanied by several significant public enforcement actions, which have driven some of the most aggressive MCA companies out of the market. The Federal Trade Commission, the New York Attorney General, and the New Jersey Attorney General have pursued actions against Yellowstone Financial and its affiliates, resulting in settlements that include Yellowstone paying over $1 billion in penalties, canceling outstanding MCA obligations, ceasing litigation, and terminating judgments and liens.[80] The Yellowstone companies and certain of their principals have also agreed to cease participation in the MCA market. Enforcement actions have also been pursued against Richmond Capital and its various affiliates, among others, generating several large judgments finding the transactions were usurious loans.[81] Sales of participations in MCAs have also drawn the attention of securities regulators, some of which have found that MCA companies have sold unregistered securities.[82]

The implications of this sea change on the MCA market are only beginning to emerge. First, the term "Merchant Cash Advance" is disappearing from the market, replaced by less tainted terminology such as revenue-based finance. Second, from the perspective of funders, New York courts may be the "worst place to litigate MCA disputes."[83] This new state of affairs has led some funders to look to other forums, such as Connecticut, to select in their form contracts.[84] It has also ushered in a curious recalibration on choice-of-law battles in pending cases. MCA funders have begun to argue that the New York choice of law provisions baked into *their standard forms* are now void on the basis of usury, opening the door to apply more favorable law.

At a later stage of *Haymount Urgent Care PC v. Gofund Advance, LLC*, discussed above, the funder argued that it was entitled to summary judgment on RICO liability because the plaintiffs' arguments, if successful, would void the underlying MCA agreements, *including* the parties' selection of New York law to govern the transaction. In the absence of a valid choice of law clause, the "center-of-gravity" test would supply the relevant legal rule. In this case, North Carolina law should apply. But North Carolina usury law does not apply to loans exceeding $25,000. As such, the funders argued, the contract is *not* invalid and—shazam—there can be no RICO liability. Surprisingly, the District Court for the Southern District of New York has credited this argument.[85] It will be interesting to see if other courts permit such *post hoc* choice of law revisions or instead hold parties to their bargains.[86]

CONCLUSION

As this overview and update makes clear, the ground has shifted significantly with regard to MCA agreements both inside and outside of bankruptcy. Recent cases construing MCAs demonstrate a more thoughtful and nuanced approach than the cases that preceded them, and the MCA market is responding. It remains to be seen whether these market responses will address the broader concerns underlying MCAs by lowering costs and offering true payment

flexibility. In the meantime, courts confronting MCAs can keep in mind a few key factors to continue to improve the state of the law in this area.

First, courts often base their recharacterization analysis on a particular contractual clause, such as an illusory reconciliation provision. These types of rulings limit the applicability of any analysis to agreements bearing similar terms[87] and drive funders to iterate their core documents to avoid the impact of damaging cases. The more recent case law does a good job of widening the lens of the analysis to examine the overall risk allocation in the contract. Cases like *Fleetwood Services* and *Haymount Urgent Care* are good models to follow. In the bankruptcy space, *In re Watchmen Security* applies a similarly broad focus.[88]

Second, any court or litigant that has dealt with MCAs can attest that they take a great deal of time and energy to figure out. As such, any court that issues a ruling, whether it relates to the true sale analysis or another bankruptcy implication of MCAs, has valuable perspective to share. Judges can advance collective understanding of these difficult transactions by capturing their rulings in written opinions and ensuring that, whether published or not, they are available on sites like Westlaw.

A REMEMBRANCE

I first began thinking about MCAs in preparation for a Federal Judicial Center presentation in 2022. The panel of speakers for the event included Professor Juliet Moringiello of Widener University Commonwealth Law School, a scholar who is no doubt well known to many BLL readers. Juliet was a true joy to work with on that project. I am deeply saddened to learn of her passing in late February of this year. Juliet was a tirelessly active scholar who enriched the fields of bankruptcy and commercial law in so many ways, including through her work on the Uniform Law Commission, the UCC's Permanent Editorial Board, the Federal Judicial Center's Education Advisory Committee, the American Bar Association, the American Bankruptcy Institute, and countless other activities over the course of her career. She was also a dedicated classroom teacher and faculty member at Widener University Commonwealth Law School. But most fundamentally, she was a kindhearted person, a thoughtful mentor, and a lot of fun. She leaves a large void in our community, and I will miss her.

ENDNOTES:

[1]See, e.g., What is Revenue-Based Finance? Elevate Funding, https://elevatefunding.com/what-is-revenue-based-finance/ ("We specialize in Revenue-Based Finance (formerly known as Merchant Cash Advance), a boutique alternative financial product.").

[2]As a matter of commercial law, the construction of a sale of future receivables is deeply problematic. One cannot transfer property rights they have not yet acquired. One can, of course, pledge future collateral as security for a loan or contract for a sale to occur at a future time. But in either case, the interest of the lender or buyer does not arise until the debtor or seller acquires an interest in the property subject to the transaction. See John F. Hilson & Stephen L. Sepinuck, A "Sale" of Future Receivables: Disguising A Secured Loan as a Purchase of Hope, 9 Transactional Law. 14, 15-16 (2019).

[3]Zachary R. Mider & Zeke Faux, Sign Here to Lose Everything Part 1: I hereby Confess Judgment, Bloomberg Businessweek, November 20, 2018, https://www.bloomberg.com/graphics/2018-confessions-of-judgment/?srnd=confessions-of-judgment; United Capital Source, LLC v. Benisvy, 48 Misc. 3d 1203(A), 18 N.Y.S.3d 582 (Sup 2015) (describing the advertising practices of MCA brokers); see also Doyle v. JTT Funding, Inc., 2019 WL 13037025, at *1 (C.D. Cal. 2019) (alleging that MCA company engaged in robocalling and repeated telephone solicitations).

[4]Emily goes by another name on the website on which this hypothetical is based, and she operates a different type of seasonal business in a different town. Most of the key details have been changed to avoid targeting this company, whose funding terms are not advertised and might vary from the MCAs discussed in this paper.

[5]See, e.g., In re Devine, 633 B.R. 626, 636 (Bankr. C.D. Cal. 2021), aff'd, 2022 WL 2444993

(B.A.P. 9th Cir. 2022), aff'd, 2023 WL 5453139 (9th Cir. 2023) (discharge denied to debtor who, among other things, opened a new bank account to avoid the daily levies from MCA funders). *In re GFS Industries*, a leading case for the pressing question whether the exceptions to discharge apply to subchapter V debtors, originated from an MCA funder's allegations that the debtor made material misrepresentations concerning its financial status and the existence of other MCA lenders as part of its funding application. In re GFS Industries, LLC, 647 B.R. 337, 339 (Bankr. W.D. Tex. 2022), motion to certify appeal granted, 72 Bankr. Ct. Dec. (CRR) 65, 2023 WL 1768414 (Bankr. W.D. Tex. 2023) and rev'd and remanded sub nom. Matter of GFS Indus., L.L.C., 99 F.4th 223 (5th Cir. 2024).

[6]See, e.g., MCA Servicing Co. v. Nic's Painting, LLC, 2024 NY Slip. Op. 50598(U) (Sup. Ct. N.Y. Apr. 23, 2024) (observing the significant docket presence of an MCA funding company).

[7]Jesus Mesa, My Pillow's Mike Lindell Sues Lenders, Alleges 'Loan Sharking' Terms, Newsweek, October 29, 2024, https://www.newsweek.com/my-pillows-mike-lindell-sues-lenders-alleges-loan-sharking-terms-1976885.

[8]See, e.g., BMO Harris Bank N.A. v. Radium2 Capital, LLC, 2024 WL 1216580, at *1 (S.D. N.Y. 2024).

[9]*See infra* text accompanying notes 81-83 (discussing these developments).

[10]Kara J. Bruce, The Murky Process of Characterizing Merchant Cash Advance Agreements, 42 No. 4 Bankruptcy Law Letter NL 1 (April 2022).

[11]Bruce, supra note 11, at 8.

[12]Bruce, supra note 11, at 7-8.

[13]Cloudfund, LLC v. Mobile Rehab, Inc., 2024 N.Y. Misc. LEXIS 4817, *1.

[14]See In re Hill, 589 B.R. 614, 619, 66 Bankr. Ct. Dec. (CRR) 65 (Bankr. N.D. Ill. 2018).

[15]Hill, 589 B.R. at 619.

[16]While receivables are rights to payment for goods sold or services rendered, receipts could be intended to sweep more broadly to encompass anything deposited into a borrower's bank account. Further, even if the transaction is characterized as a sale, the repayment comes from any funds in the deposit account, not necessarily those tied to revenue from goods sold or services rendered. See, e.g., Fleetwood Services, LLC v. Ram Capital Funding, LLC, 2022 WL 1997207, at *3 (S.D. N.Y. 2022).

[17]Litigants have asserted that some MCA lenders do not estimate the daily payment in good faith, and tailor the specified percentage to prevent the debtor's ability to reconcile. Verified Petition, People of the State of New York v. Yellowstone Capital LLC, No. 450850/2024 (N.Y. Sup. Ct., filed Mar. 5, 2024) [hereafter NY AG Petition].

[18]For example, MCA lenders can begin by evaluating the borrower's average monthly sales and then multiply that amount by the "specified percentage," i.e., the percentage of receivables pledged in the MCA agreement. That number can be divided by the number of business days in a calendar month, representing an approximate daily withdrawal amount. See In re GMI Group, Inc., 2019 WL 3774117, at *1 (Bankr. N.D. Ga. Aug. 9, 2019) (describing a similar formula to calculate the daily withdrawal amount).

[19]See, e.g., Anderson v. Koch, 2019 WL 1233700, at *4 (Minn. Ct. App. 2019).

[20]In re GMI Group, Inc., 606 B.R. 467, 485 (Bankr. N.D. Ga. 2019). Reconciliation clauses are often excerpted in MCA opinions, and there are many varieties.

[21]See, e.g., *Fleetwood Servs.*, 2022 WL 1997207, at *3.

[22]See, e.g., *Fleetwood Servs.*, 2022 WL 1997207 (cataloguing allegations of intimidating and threatening loan collection activity); Bruce, supra note 11 (same).

[23]D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972) (describing confession-of-judgment clauses as "an ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing . . . with the appearance, on the debtor's behalf, of an attorney designated by the holder"). Under New York law, which applies to many MCA transactions, a contracting party signs an "Affidavit of Confession" that consents to the entry of a judgment upon a future breach. N.Y. CPLR § 3218. Confession of judgment clauses are barred in consumer credit transactions, and many jurisdictions have eliminated their use entirely. See FTC Credit Practices Rule, 16 C.F.R. § 444.2(a)(1). New York law permits them.

[24]See, e.g., NY AG Petition, supra note 18, at paragraph 353 (detailing several concurrent MCAs advanced by Yellowstone and affiliates, many of which totaled to over 100% of the merchants' receivables).

[25]See, e.g., In re McKenzie Contracting, LLC, 2024 WL 3508375, at *3 (Bankr. M.D. Fla. 2024) ("The Court notes at the outset that MCA claimants Capybara Capital, LLC, Vox Funding, LLC, and Fox Capital Group, Inc. have not: (i) objected

to Debtor's Subchapter V designation, (ii) briefed the issue of whether their MCA agreements are true sales or loans, or (iii) participated in this contested matter in any way.").

[26]See, e.g., Matter of GFS Industries, L.L.C., 99 F.4th 223 (5th Cir. 2024) (MCA funder seeking adjudication of non-dischargeability, alleging that the borrower made material misrepresentations concerning whether a bankruptcy filing was imminent and failed to disclose the existence of other, more senior, MCA lenders from which GFS obtained funding); In re Werman, 2023 WL 4038586, at *2 (Bankr. N.D. Ohio 2023) (same); In re Dockum, 2024 WL 3633220, at *7 (Bankr. D. Vt. 2024) (same, except that the MCA funder had received a default judgment on its fraud claim against the debtor); In re Trapp, 2022 WL 1437645, at *7 (Bankr. W.D. Wis. 2022) (finding amounts owed to MCA funder to be non-dischargeable due to fraud and conversion).

[27]In re R&J Pizza Corporation, 2014 WL 12973408 (Bankr. E.D. N.Y. 2014) (concluding that because the transaction was a true sale, the funds collected were not cash collateral); Richard D. Aicher & William J. Fellerhoff, Characterization of a Transfer of Receivables as a Sale or a Secured Loan upon Bankruptcy of the Transferor, 65 Am. Bankr. L.J. 181, 184 (1991) (discussing a debtor's use of sold or pledged receivables in bankruptcy).

[28]See In re GMI Group, Inc., 2019 WL 3774117, at *13, n.13 (Bankr. N.D. Ga. 2019) (observing that the MCA funder did not object to the debtor's use of cash collateral, apparently acknowledging that the debtor retained some interest in its receivables); Matter of Cornerstone Tower Services, Inc., 2018 WL 6199131, at *3 (Bankr. D. Neb. 2018) (observing that the funder "never took any action to exclude any portion of Cornerstone's receivables from the bankruptcy estate"). MCA funders' arguments on cash collateral are not always consistent with their other litigation strategies. See, e.g., In re Muir House, Inc., 389 B.R. 403, 406 (Bankr. M.D. Pa. 2008) (denying the MCA funder's motion to restrict debtor's use of cash collateral and noting the motion's inconsistency with the funder's arguments regarding the effect of § 552 on the transaction).

[29]11 U.S.C.A. § 552(a). This rule does not apply to proceeds, products, and offspring of property. See id. § 552(b).

[30]In re Watchmen Security LLC, 2024 WL 4903363, at *8 (Bankr. S.D. Ind. 2024).

[31]See, e.g., In re Shoot The Moon, LLC, 635 B.R. 797, 829, 70 Bankr. Ct. Dec. (CRR) 187 (Bankr. D. Mont. 2021) (evaluating the outcome in a chapter 7 liquidation if the transfers had not been made, finding that the sale proceeds would not have been sufficient to satisfy the senior secured lender as well as the MCA funder, and concluding that the MCA sweeps had a preferential effect on the funder).

[32]*GMI Grp.*, 2019 WL 3774117, at *13 n.13.

[33]See In re Hill, 589 B.R. at 619 (holding that even if the transactions do not qualify as loans, they created a debt owed to the funder); In re A Goodnight Sleepstore, Inc., No. 17-03274-5-JNC, 2019 WL 342577, at *3 (Bankr. E.D.N.C. Jan. 25, 2019) ("The right to payment under the Agreements . . . gives rise to a 'claim' under the Bankruptcy Code and provides the foundation for a 'debt' for purposes of the [avoidance] proceeding" and therefore the transfers were made on account of an antecedent debt); see also Matter of Cornerstone Tower Services, Inc., 2018 WL 6199131, at *11 (Bankr. D. Neb. 2018) (setting for trial the issue of whether MCA transfers were made in the ordinary course of business).

[34]See, e.g., BMO Harris Bank N.A. v. Radium2 Capital, LLC, 2024 WL 1216580, at *1 (S.D. N.Y. 2024) (secured lender with an interest in the debtor's receivables sued subsequent MCA funder, asserting conversion and fraudulent transfer claims; claims were found to be time-barred).

[35]See, e.g., In re Hill, 589 B.R. at 630 (trustee has failed to meet her burden that the MCA draws were for less than reasonably equivalent value).

[36]Goodnight Sleepstore, 2019 WL 342577, at *3.

[37]Anderson v. Koch, 2019 WL 1233700 (Minn. Ct. App. 2019).

[38]*Anderson*, 2019 WL 1233700, at *6.

[39]*Anderson*, 2019 WL 1233700, at *2.

[40]This can be a dispositive factor. See, e.g., In re McKenzie Contracting, LLC, 2024 WL 3508375 (Bankr. M.D. Fla. 2024) (debtor had $8,074,372.57 of filed claims, but $1,631,540.97 arose from MCA transactions. If those debts were factored into the debt-limit calculation, then the debtor would be eligible for relief. If they were not, then the debtor would be over the applicable debt threshold at the time).

[41]11 U.S.C.A. § 101(51D). This number recently reverted back from its COVID-era increase of $7.5 million and is periodically adjusted for inflation pursuant to 11 U.S.C.A. § 104.

[42]In re McKenzie Contracting, LLC, 2024 WL 3508375, at *2.

[43]11 U.S.C.A. § 101(12).

[44]For a detailed exploration of the term debt, see the forthcoming article by Kate Sablosky Elengold, Involuntary Debtors (draft on file with author). See also In re A Goodnight Sleepstore, Inc., 2019 WL 342577, at *5 (Bankr. E.D. N.C. 2019) ("The Bankruptcy Code does not require a court to decide whether these MCA transactions constitute 'sales' or 'loans,' just whether a 'debt' exists (or existed). . . . The terms of the Agreements give rise to a right to payment, through either the daily transfers, or the confessions of judgment and default fee. The right to payment under the Agreements thus gives rise to a 'claim' under the Bankruptcy Code and provides the foundation for a 'debt' for purposes of this adversary proceeding.").

[45]In re Heart Heating & Cooling, LLC considered this question for MCAs that were stipulated as loans and held that the amounts owing under several transactions were not contingent and not unliquidated. See No. BR 23-13019 TBM, In re Heart Heating and Cooling, LLC, 2024 WL 1228370 (Bankr. D. Colo. 2024).

[46]Kenneth C. Kettering, True Sale of Receivables: A Purposive Analysis, 16 Am. Bankr. Inst. L. Rev. 511, 512 (2008).

[47]Kenneth N. Klee and Brendt C. Butler, Asset-Backed Securitization, Special Purpose Vehicles and Other Securitization Issues, 35 U.C.C.L.J. 23, 49 (2002) (Courts drawing this distinction are attempting to pinpoint "the extent to which the risks and benefits associated with ownership have either been retained by the [seller] or transferred to the [purchaser].").

[48]Id.

[49]Bruce, supra note 11 ("If the property is a cow, it must be sheltered, fed, and milked. If the property is an account, it must be serviced.").

[50]See, e.g., LG Funding, LLC v. United Senior Properties of Olathe, LLC, 181 A.D.3d 664, 122 N.Y.S.3d 309, 312 (2d Dep't 2020); Mazzoni Center v. LCF Group, Inc., 2024 WL 4821475, at *7 (E.D. Pa. 2024).

[51]John F. Hilson & Stephen L. Sepinuck, A "Sale" of Future Receivables: Criminal Usury In Another Form, 9 Transactional Law. 1 (Aug. 2019).

[52]*GMI Grp*., 606 B.R. at 473.

[53]*GMI Grp*, 606 B.R. at 473.

[54]Bruce, supra note 11.

[55]Bruce, supra note 11, at 5.

[56]See Steven L. Harris & Charles W. Mooney, Jr., When Is a Dog's Tail Not a Leg?: A Property-Based Methodology for Distinguishing Sales of Receivables From Security Interests That Secure an Obligation, 82 U. Cin. L. Rev. 1029, 1038 (2014) ("[T]he UCC sponsors' predominant motivation for bringing sales of virtually all types of receivables into Revised Article 9—by expanding the definition of 'accounts' and adding sales of payment intangibles and promissory notes—was to provide for the first time a coherent, accessible, and uniform body of law to govern these transfers as well as to subject most of them to Article 9's public-notice regime."). This treatment of sales of receivables also carried over similar treatment from pre-UCC statutes enacted in the wake of Corn Exchange Nat. Bank & Trust Co., Philadelphia v. Klauder, 318 U.S. 434, 439-40, 63 S. Ct. 679, 87 L. Ed. 884, 144 A.L.R. 1189 (1943). See 1 Grant Gilmore, Security Interests in Personal Property § 10.7, at 315 (1965). But there are a handful of circumstances under Article 9—such as certain automatic perfection rules, enforcement duties, and the collectability of surpluses and deficiency—where the distinction can become relevant. See, e.g., U.C.C. §§ 9-309(3), (4) (providing for automatic perfection of sales of payment intangibles and promissory notes); 9-406(e) (restricting the applicability of section 406(d) to certain sales of receivables); 9-408 (restricting the applicability of section 406(a) to certain sales of receivables); 9-607(c) (providing that a secured party must act in a commercially reasonable manner only when it has a right of recourse against the debtor, typically in a secured-lending arrangement and not a sale); 9-608(b) (providing that when a transaction is a sale of receivables, "the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency" after the proceeds of collection are applied). There are also a variety of regulatory, accounting, and taxation implications that flow from these characterizations. See Robert D. Aicher William J., Characterization of A Transfer of Receivables as a Sale or a Secured Loan Upon Bankruptcy of the Transferor, 65 Am. Bankr. L.J. 181, 183 (1991).

[57]In re Shoot The Moon, LLC, 635 B.R. 797, 817, 70 Bankr. Ct. Dec. (CRR) 187 (Bankr. D. Mont. 2021) ("As a whole, [the contract's remedial features] provide CapCall with at least conditional recourse and expanded legal rights against the Shoot the Moon entities and the personal guarantors. Plus, they allocate great risk to the Shoot the Moon counterparty while protecting CapCall with much more than just the receivables. CapCall's panoply of rights, remedies, and potential control is highly unusual in the context of an asset sale. Such an overall arrangement is consistent with a debtor-creditor relationship, not a seller-buyer relationship.).

[58]True sales can have recourse provisions or allocate servicing rights in a manner that di-

verges from this model and still be true sales.

[59]See Hilson & Sepinuck, supra note 2.

[60]Haymount Urgent Care PC v. GoFund Advance, LLC, 609 F. Supp. 3d 237, 247, R.I.C.O. Bus. Disp. Guide (CCH) P 13644 (S.D. N.Y. 2022), appeal withdrawn, 2024 WL 5343741 (2d Cir. 2024).

[61]See, e.g., Womack v. Capital Stack, LLC, 2019 WL 4142740 (S.D. N.Y. 2019) (supporting its conclusion with a string cite of 28 recent court decisions characterizing MCA transactions as sales).

[62]See, e.g., Wilkinson Floor Covering, Inc. v. Cap Call, LLC, 59 Misc. 3d 1226(A), 108 N.Y.S.3d 288 (Sup 2018) (looking to the fact that "plaintiffs' obligation to repay them [sic] future receivables is conditioned on plaintiffs' receipt of such" to evidence that the agreements were not loans).

[63]Indeed, bankruptcy courts are responsible for some of the most thoughtful cases on these topics in the early days. See Bruce, supra note 11 (collecting authority).

[64]LG Funding, LLC v. United Senior Properties of Olathe, LLC, 181 A.D.3d 664, 666, 122 N.Y.S.3d 309 (2d Dep't 2020) (The fact that the funder retained discretion over any payment adjustments led the court to conclude that the funder did not assume any risk that the merchant would generate lower revenues than expected.); AH Wines, Inc. v C6 Capital Funding LLC, 2020 N.Y. Misc. LEXIS 4642, **11-12 (N.Y. Aug. 9, 2020) (concluding that the reconciliation provision was solely in the discretion of the funder and, as such, is illusory and indicative of a secured loan).

[65]For example, one court noted that the reconciliation clause was available only if the debtor had not defaulted on the terms of the MCA, and that default was a functional certainty under the terms of the transaction. In re GMI Group, Inc., 606 B.R. 467, 486 (Bankr. N.D. Ga. 2019).

[66]In re Shoot The Moon, LLC, 635 B.R. 797, 816, 70 Bankr. Ct. Dec. (CRR) 187 (Bankr. D. Mont. 2021). The *Shoot the Moon* court also noted that the course of performance demonstrated a debtor-creditor relationship between the parties. Id. at 817.

[67]See, e.g., Lateral Recovery LLC v. Queen Funding, LLC, R.I.C.O. Bus. Disp. Guide (CCH) P 13646, 2022 WL 2829913 (S.D. N.Y. 2022).

[68]Haymount Urgent Care PC v. GoFund Advance, LLC, 609 F. Supp. 3d 237, 249, R.I.C.O. Bus. Disp. Guide (CCH) P 13644 (S.D. N.Y. 2022), appeal withdrawn, 2024 WL 5343741 (2d Cir. 2024).

[69]*Haymount Urgent Care*, 609 F. Supp. 3d at 248.

[70]*Haymount Urgent Care*, 609 F. Supp. 3d at 249.

[71]*Haymount Urgent Care*, 609 F. Supp. 3d at 249.

[72]*Haymount Urgent Care*, 609 F. Supp. 3d at 250.

[73]See, e.g., Lateral Recovery LLC v. Funderz.net, LLC, 2024 WL 216533, at *12 (S.D. N.Y. 2024) (looking beyond the agreement's facial compliance with the three-factor test identified above, and concluding that the transaction was a secured loan); Lateral Recovery LLC v. Queen Funding, LLC, R.I.C.O. Bus. Disp. Guide (CCH) P 13646, 2022 WL 2829913 (S.D. N.Y. 2022) (same); Lateral Recovery, LLC v. Capital Merchant Services, LLC, 632 F. Supp. 3d 402, 461 (S.D. N.Y. 2022) (same).

[74]Fleetwood Services v. Ram Capital Funding LLC, 2022 U.S. Dist. LEXIS 100837 (S.D.N.Y. June 6, 2022) (taking a holistic review of the loan's terms and prior performance, finding that the totality of the agreement indicated that the merchant took on an absolute repayment obligation in the nature of a secured loan).

[75]The NY AG Complaint, cited supra at note 18, is another useful source to examine how one now defunct MCA funder allegedly structured its deals.

[76]Hi Bar Capital LLC v. Parkway Dental Services, LLC, 2022 WL 3757589, at *3 (N.Y. Sup 2022).

[77]Id. at *4.

[78]MCA Servicing Co. v. Nic's Painting, LLC, 2024 NY Slip. Op. 50598(U) (Sup. Ct. N.Y. Apr. 23, 2024).

[79]Id.

[80]People v. Yellowstone Cap. LLC, No. 450760/2024 (N.Y. Sup. Court Jan. 16, 2025); Stipulated Order for Permanent Injunction and Monetary Judgment, FTC v. Yellowstone Cap. LLC, No. 20-06023 (S.D.N.Y. May 4, 2021); Consent Order, In re Yellowstone Cap. LLC, No. HUDC-C-180-20 (N.J. Dept. of L. and Pub. Safety, Division of Consumer Affairs, Dec. 27, 2022).

[81]People v. Richmond Cap. Grp., et al., No. 451368/2020 (N.Y. Supreme Court, February 7, 2024) ($77 million judgment against MCA companies Richmond Capital Group, Ram Capital Funding, Viceroy Cap. Funding, and their principals for violations of New York Executive Law, resulting in rescission of unlawful contracts and

restitution of account draws); Federal Trade Commission v. RCG Advances, LLC, 695 F. Supp. 3d 368 (S.D. N.Y. 2023) (After summary judgment was entered against Richmond, its affiliates, and its owner, a jury trial awarded over $20 million in monetary relief and civil penalties against the MCA's owner.). There have also been several FTC settlements with MCA companies and their principals. See, e.g., Stipulated Order for Permanent Injunction, Monetary Judgment, and Civil Penalty as to Defendants RCG Advances, LLC and Robert L. Giardina, FTC v. RCG Advances, LLC, No. 20-04432 (S.D.N.Y. June 1, 2022). Stipulated Order for Permanent Injunction and Monetary Judgment As to Defendants Ram Capital Funding LLC and Tzvi Reich, No. 20-04432 (S.D.N.Y. January 5, 2022).

[82]Securities and Exchange Commission v. Complete Business Solutions Group, Inc., 2024 WL 4826059, at *25 (S.D. Fla. 2024); Press Release: New Jersey Bureau of Securities Orders Philadelphia-Based Small-Business Funding Company to Stop Selling Unregistered Securities in the State, https://www.njoag.gov/new-jersey-bureau-of-securities-orders-philadelphia-based-small-business-funding-company-to-stop-selling-unregistered-securities-in-the-state/ (discussing enforcement actions by both the New Jersey and the Pennsylvania regulators); c.f. Jennifer Bennett, SEC Lands Partial Early Win in Merchant Cash Advance Fraud Fight, Bloomberg Law, Dec. 3, 2021 (summarizing SEC action against MCA firm for the sale of unregistered securities, in which a court found genuine issues of material fact precluding summary judgment on the question of securities violations).

[83]Jacob H. Newman, SDNY is the New Worst Place to Litigate MCA Disputes, New York Law Journal, March 10, 2023, https://www.law.com/newyorklawjournal/2023/03/10/sdny-is-the-new-worst-place-to-litigate-mca-disputes/?kw=SDNY%20Is%20the%20New%20Worst%20Place%20To%20Litigate%20Merchant%20Cash%20Advance%20Disputes&LikelyCookieIssue=true. This is an abrupt about-face from the prior view that New York was, by far, the best place for MCA funders to litigate their disputes. See, e.g., Jacob H. Newman and Jeffrey S. Boxer, The Worst Place To Litigate Merchant Cash Advance Disputes Is Out-of-State, So Fix Your Contracts Already!, New York Law Journal, Aug. 18, 2021, (https://www.law.com/newyorklawjournal/2021/08/18/the-worst-place-to-litigate-merchant-cash-advance-disputes-is-out-of-state-so-fix-your-contracts-already/?slreturn=20250111165605).

[84]For a discussion of how and why Connecticut has risen in prominence in the MCA world, see Matthew B. Gibbons & Mark K. Ostrowski, Client Alert: Merchant Cash Advance Litigation In Connecticut, Shipman & Goodwin LLP, August 20, 2024, https://www.shipmangoodwin.com/insights/merchant-cash-advance-litigation-in-connecticut.html.

[85]Haymount Urgent Care PC v. GoFund Advance, LLC, 690 F. Supp. 3d 167 (S.D. N.Y. 2023), appeal withdrawn, 2024 WL 5343741 (2d Cir. 2024). The court noted that "a decision of choice-of-law should precede any decision on the validity of the MCA agreement," but because the selection of New York law might invalidate the contract, the choice of law provision should be ignored. In support of this principle, the court referenced a comment to the Restatement (Second) on Conflicts of Laws, which provides that the choice of law provision can be ignored because it would defeat the expectations of the parties:

> "The parties can be assumed to have intended that the provisions of the contract would be binding upon them . . . . If the parties have chosen a law that would invalidate the contract, it can be assumed that they did so by mistake."

Restatement (Second) of Conflicts of Law § 187 cmt. e. Respectfully, such a comment seems like a rather thin reed to permit a funder to abandon a forum's law that no longer is as favorable as it was at the time of contracting.

[86]At least one court has prevented a litigant from waiving its forum selection clause when, in hindsight, another forum would have better served its interests. See Avicanna Inc. v. Mewhinney, 2019 COA 129, 487 P.3d 1110, 1115 (Colo. App. 2019). For a thoughtful discussion of that case, see John Coyle, Throwback Thursday: Canada, Cannabis, and Forum Selection Clauses, Transnational Litigation Blog June 23, 2022. For a related decision involving MCAs, see Williams Land Clearing, Grading, and Timber Logger, LLC v. Apex Funding Source LLC (In re Williams Land Clearing, Grading, and Timber Logger, LLC), No. 23-00024 (Bankr. E.D.N.C. Feb. 8, 2024) [Doc. No. 62] (refusing to permit MCA funder to avoid New York choice of law on North Carolina public policy grounds).

[87]See, e.g., Matter of Polk, 2020 WL 854015, at *1 (Bankr. M.D. Ga. 2020) (distinguishing earlier MCA case recharacterizing transaction because the reconciliation clause in this contract was different).

[88]See In re Watchmen Security LLC, 2024 WL 4903363 (Bankr. S.D. Ind. 2024) ("[I]t is clear that the Debtor and its principal, as guarantor, bore the entire risk of non-payment of the 'sold' (undifferentiated 9%) receivables with Creditor bearing no risk that it would be limited to recovery from the 'sold' receivables.").

