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# Alexander L. Paskay Memorial Bankruptcy Seminar

## **Business: What's New with MCAs**

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## Business Concurrent: What's New With MCAs

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## What is a Merchant Cash Advance (MCA)?

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- Also known as Revenue-Based Financing
- Structured as a buyer-seller transaction, not a loan
- The funder purchases a portion of future receivables
- Repayment is tied directly to business revenue
- Common among small and mid-sized businesses needing fast capital

## History of MCA

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- Emerged after the 2008 Great Recession
- Initially relied on lockboxes tied to credit card sales
- Merchants wanted more flexibility and convenience
- Industry shifted toward ACH-based daily or weekly collection
- MCA became a mainstream alternative funding product

## Who is Behind MCA Financing Today?

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- Early industry backed by private capital and family offices
- Now includes many Fortune 500 and platform-based companies (Uber Eats, DoorDash, Postmates)
- Major fintech players: PayPal, Shopify, Intuit
- Banks increasingly provide revolving credit lines to MCA lenders
- Banks seek indirect exposure due to capital reserve constraints

## Are the MCA's really from NY?

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- Incorporation vs. Operation
  - MCA companies are mostly incorporated in Delaware nationwide, not physically located in NY
- Contractual Law Choice
  - MCA agreements predominantly select NY law for legal governance, regardless of location
- Legal Strategy Importance
  - Choosing NY law is a strategic decision for commercial legal environment benefits
  - Early New York state court decisions validated MCA transactions as sales of future receivables
- Impact on Legal Interpretation
  - The NY jurisdiction affects how courts enforce contracts, especially in disputes in bankruptcy cases

## Why NY law is usually governing law

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- Freedom of Contract
- Sophisticated Commercial Courts
  - Early NY state court decisions validated the MCA transaction as a legitimate sale of future receivables
- Efficient Enforcement Mechanisms
- Legal Framework for MCA

## How does an MCA work?

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- MCA Structure Explained
- Repayment Mechanism
- Risk Allocation
- Legal and Practical Implications

## Is an MCA a loan?

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- Substance over form analysis
- Economic Substance over Law
- Indicators of Loan Recharacterization
- Judicial Scrutiny and Consequences

## Usury Issues

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- If the transaction is deemed a true sale, usury law does not apply.
- If the transaction is deemed a loan, then transaction is subject to usury laws.
- Usury cap on loans exceeding \$500,000, under FL law, is 25% per annum.
  - Example in recent case: In *Sommers v. Global Merchant Cash, Inc.*, debtor received \$650,145.28 as an advance but was obligated to repay \$1,016,000, which constitute an annualized interest rate of 61.13%, more than double the criminal usury threshold under New York law.

## Public Policy Issues

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- Purpose of usury laws is to protect borrowers from predatory lending practices and prohibit excessively high interest rates.
- Goal is to prevent lenders from taking unfair advantage of borrowers in desperate financial straits.
- Avoid predatory, high-interest loans by loan sharks that can lead to debt traps.
  - Consider the significant number of small business debtors and subchapter V debtors who enter bankruptcy with multiple MCA companies as creditors; debtors took an advance from one MCA and then took more advances to repay the first MCA, and so on and so on.
- Historical basis for usury laws.

## Enforcement of MCA Obligations

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- Cash flow issues
- UCC notices
- Reconciliation
- Guaranty enforcement
- Pre-bankruptcy issues

## Why do MCAs often fail to list their name on Form UCC-1s?

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- A UCC-1 financing statement is generally recorded by an MCA to evidence the grant of a security interest in customer's property as additional security for repayment of the financing.
- MCAs often fail to list their name on the UCC-1 for strategic reasons
  - Competitors of MCA will search the public records to see what customers the MCA has advanced to, in order to solicit those customers' financing needs.

## Use of Filing Service as Secured Party

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- To minimize the risk of competitors poaching an MCA's customers, the MCA will use an agent to file a UCC-1 and will have the agent list its name as secured party.
- Problem in bankruptcy cases is that debtor may not have retained the paperwork for the MCA transaction and cannot provide debtor's counsel with the proper name of each MCA which provided financing.
- MCA may have transferred the customer's obligation to an affiliate, further muddying who the actual creditor is.

## Clawback or Avoidance of MCA Payments in Bankruptcy

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- Preference and Fraudulent Transfer Theories
- Preference Transfers Overview
  - Insider preference allegations
- Fraudulent Transfer Claims
- MCA Payment Clawback Challenges
- Defenses

## Recent Cases

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- Loan vs. True Sale
- Recharacterization of MCA to Loan
- Focus on Risk and Protections
- Nondischargeability

## Recent Reported Cases

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- JPR Mech Inc. v. Radium2 Cap, LLC
- IVF Orlando, Inc.
- Haymount Urgent Care PC v. GoFund Advance, LLC
- Lange v. Inova Capital Funding, LLC
- CapCall, LLC v. Foster (In re Shoot the Moon, LLC)
- In re Manion
- In re Bridges
- Sommers v. Global Merchant Cash, Inc.

## Key Takeaways and Practical Implications

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- Operational Nature of MCAs
- Recharacterization Risks
- MCA Operational Structure
- Bankruptcy and Clawback Risk

## Possible Changes to Florida Law

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- Business Law Section of The Florida Bar formed a study group to evaluate whether changes to Florida law were warranted with respect to MCAs.
- Eliminate gratuitous language in s. 679.1021(1) that created conclusive evidence based on provider's characterization of MCA as purchase.
- Evaluating how to require agent on Form UCC-1 to provide name and mailing address of secured party, and to deem service on agent as service on actual secured party.

# Faculty

**Michael R. Dal Lago** the founder of Dal Lago Law in Naples, Fla., has more than 22 years of experience providing customized, comprehensive legal business solutions for national, regional and local businesses in Florida, New York and New Jersey. He has broad experience in an array of industries, including consumer retail, health care and real estate. Mr. Dal Lago has represented mid-market clients in some of the largest and most challenging cases in the nation, such as Lehman Brothers Holdings, Inc., General Motors, Chrysler, Enron Corp., WorldCom, Inc., General Growth Properties and Bernard L. Madoff Investment Securities LLC. Prior to founding his law firm in 2015, he was a corporate bankruptcy partner at a Cleveland-based mid-sized firm in Naples, and worked at a prestigious 130+ attorney law firm, where he practiced for 13 years. Mr. Dal Lago has consistently been recognized in *SuperLawyers Florida* and *Florida Trend's* prestigious "Legal Elite" list, and he is rated AV Preeminent by Martindale-Hubbell. He is a Board Certified in Business Bankruptcy Law by the American Board of Certification and is admitted to practice law in Florida, New York and New Jersey. Mr. Dal Lago is on the Organizing Committee of the Business Law Section of the Florida Bar and is a current board member of the Make A Wish Southern Florida Foundation. He also is the former president of the Southwest Florida Bankruptcy Professionals Association, and he has served on the Boards of The Village School of Naples and Big Brothers Big Sisters of the Suncoast. Mr. Dal Lago received his B.A. in political science from Northeastern University in Boston and his J.D. from New York Law School in 1998.

**Robert C. Furr** is a partner at Furr & Cohen, P.A. in Boca Raton, Fla., and a panel trustee for the U.S. Trustee Program in the Southern District of Florida, regularly appointed as a chapter 11 trustee and designated as a chapter 12 trustee. He has more than 35 years of experience representing businesses and individuals in complex chapter 7 and 11 proceedings, handling multimillion-dollar bankruptcies, mediating adversary proceedings and contested matters, and filing assignments for the benefit of creditors while serving as both assignee and counsel. Board Certified in Consumer and Business Bankruptcy since 1994, Mr. Furr is a Fellow of the American College of Bankruptcy, a past president and editor of *NABTalk* and the National Association of Bankruptcy Trustees, has served in leadership roles with the American Board of Certification and serves on its Executive Committee, and he is admitted to practice in Georgia and Florida and all federal courts in Florida (including the Eleventh Circuit), is AV-rated by Martindale-Hubbell, and is listed in *The Best Lawyers in America* and *Florida Super Lawyers*. A frequent lecturer, he has spoken to various professional groups and authored numerous articles on insolvency and bankruptcy. Mr. Furr received his J.D. from Emory University in 1975.

**Gregg Mora** is chief operating officer and chief financial officer of Dynamic Capital in Miami. He previously worked at MCA Protect as a CFO. Mr. Mora attended Fordham Gabelli School of Business.

**Hon. Mindy A. Mora** is U.S. Bankruptcy Judge for the Southern District of Florida in West Palm Beach, appointed on April 6, 2018. She practiced in the areas of bankruptcy, commercial finance, and securitized real estate finance and litigation from 1982-2018 prior to her appointment to the bench by the Eleventh Circuit Court of Appeals. Judge Mora is a Fellow of both the American College of

Bankruptcy and the American College of Commercial Finance Attorneys. She previously chaired the Business Law Section of The Florida Bar, which represents the interests of more than 5,000 business lawyers within the State of Florida. Throughout much of her legal practice, she has been active in the development of Florida's commercial laws, most recently as a member of The Florida Bar Business Law Section task force that prepared draft Florida legislation adopting a modified version of the Uniform Commercial Real Estate Receivership Act and a modified version of UCC Article 12. Judge Mora is a member of the National Conference of Bankruptcy Judges and has served on its Technology, New Member, Education and Executive Director Search Committees. She also participates as a member of the Business Law Sections of both the American Bar Association and The Florida Bar, the Association of Commercial Finance Attorneys, the Bankruptcy Bar Association of South Florida, and the International Women's Insolvency and Restructuring Confederation. Presently, Judge Mora is actively involved in the Business Law Section of The Florida Bar by serving as the judicial co-chair of both the Bankruptcy/UCC Committee and the Long-Range Planning Committee. From 2018-20, she served as the judicial chair of the Bankruptcy Court's Local Rules Committee, which promulgated amendments to the local rules that were adopted by the bench of the U.S. Bankruptcy Court for the Southern District of Florida. Since 2021, Judge Mora has served as the judicial chair of the Bankruptcy Court's *Pro Bono* Committee, which promotes *pro bono* service by lawyers appearing in the court and facilitates ongoing communication with various legal aid organizations throughout South Florida. She regularly lectures on commercial law and bankruptcy topics to lawyers and other judges throughout the U.S. Judge Mora is admitted to the bars of Florida, New York and California. She received her B.B.A. from George Washington University in 1979 and her J.D. from New York University School of Law in 1982.

**J. Ryan Yant** is a shareholder at Carlton Fields, P.A. in Tampa, Fla., who concentrates on bankruptcy, creditors' rights, insolvency and financial restructuring, and commercial litigation. He routinely represents secured and unsecured creditors and debtors in chapter 7, 11 (including subchapter V), 12 and 13 matters, and he handles adversary proceedings and contested matters such as fraudulent transfer and preference actions, nondischargeability litigation, and officer-and-director disputes. Mr. Yant has substantial courtroom experience as lead counsel in trials and contested matters across Florida, Georgia, California and federal courts (including the U.S. Court of Appeals for Veterans Claims), and he advises on judgment and lien enforcement, assignments for the benefit of creditors, and related business disputes. He also represents merchant cash advance companies, is active in the Tampa Bay Bankruptcy Bar Association and ABI, and previously clerked for Judges K. Rodney May and Roberta A. Colton in the U.S. Bankruptcy Court for the Middle District of Florida. Mr. Yant received his B.S. *cum laude* in 1986 from the University of Florida, his M.B.A. with honors in 2013 from Stetson University and his J.D. *cum laude* in 2013 from Stetson University College of Law.