CLIENT ALERT • COMMERCIAL FINANCE / MERCHANT CASH ADVANCE

Calling It a "Receivable" Does Not Make It So

A New York Bankruptcy Court Lets a Merchant Recharacterize an MCA as a Usurious Loan — What Greenwich Retail Means for How Funders Document, Reconcile, and Enforce

Dated: June 2026 | SP Legal Advisors PLLC | Counselors at Law

At a Glance: The "Receivable" Label Is Not a Safe Harbor

- **Substance controls over form.** In *Greenwich Retail Group*, the U.S. Bankruptcy Court for the Southern District of New York held that a merchant plausibly alleged a "receivables sale" was in reality a usurious loan — the labels, recitals, and "true sale" waivers in the agreement did not control.
- **"Real risk," not theoretical contingency, separates a sale from a loan.** A funder must take a substantial, realistic market risk that is different from the ordinary non-payment (credit) risk every lender bears. The risk that a merchant might suffer "corporate death" is not enough.
- **Mechanical factor-counting is out.** Reconciliation, a finite term, and bankruptcy recourse are relevant but "neither exclusive nor decisive." Courts now also ask whether the deal has the features one would expect in a genuine *sale*.
- **The stakes are severe.** Under New York law a usurious transaction is **void** — the funder may forfeit both principal and return — and contractual waivers of the criminal-usury defense embedded in the agreement are unenforceable.
- **Governing law matters.** All four agreements were governed by New York law by their own choice-of-law clauses. Funders operating under other states' law, or litigating in other federal districts, face different recharacterization and usury frameworks — a point addressed below.

Why This Decision Matters

For years, much of the merchant cash advance (**MCA**) industry has relied on a familiar architecture: a written agreement that recites a purchase of "future receivables," disclaims any loan or interest, sets a reconciliation mechanism, and has the merchant waive any argument that the transaction is not a true sale. The premise has been that careful drafting — the right words on the page — keeps the deal outside the usury laws. A recent decision from the United States Bankruptcy Court for the Southern District of New York puts real pressure on that premise.

In *Greenwich Retail Group LLC v. Moby Capital, LLC (In re Greenwich Retail Group LLC)*, Judge Michael E. Wiles denied, in relevant part, a funder's motion to dismiss a merchant's claim that its MCA was in substance a usurious loan.[1] The court did not hold that every MCA is a loan. It held that this merchant had plausibly *alleged* one — and, in getting there, it articulated a substance-over-form framework that should inform how funders document, fund, reconcile, and enforce going forward. The court's through-line is blunt: a label is not a fact. As the opinion put it, a court must judge a transaction "by its true character, rather than by the form it purports to take or by the names, labels or characterizations that the parties have elected to apply to it."[2]

The Decision in Brief

Posture and parties

The debtors — Greenwich Retail Group LLC and an affiliate, Madison Westside LLC — filed Chapter 11 and then sued several MCA funders in an adversary proceeding, asserting (among many counts) that their funding agreements were disguised loans that violated New York's usury laws. Four funders moved to dismiss. Notably, only one of them — Itria Ventures LLC — moved to dismiss the core claim that its transaction was a loan rather than a true sale, so the recharacterization analysis centers on the Itria agreement.[3]

The agreement at issue

Itria's "Receivables Sale Agreement" recited a purchase of $640,000 of "Receivables" for a purchase price of $500,000, with roughly $489,500 actually advanced after a fee. The funder's own "Offer Summary" projected a payoff in about 308 days and an "estimated annual percentage rate" of return of 65.25%. Repayment was to come through fixed weekly payments of $14,545.45 plus certain credit-card processor remittances. The agreement defined "Receivables" expansively (essentially all receipts, accounts, contract rights, and even insurance proceeds), bound two merchants jointly and severally, secured the obligation with a lien on substantially all assets, added performance guaranties from the owners, and included confessions of judgment. It also recited that the deal was a true sale and had the merchants waive any argument to the contrary. The other three agreements followed similar patterns, with implied rates of return the debtors alleged ranged from roughly 112% to 133%.[4]

The core holding

The court rejected a mechanical test under which any limitation on recourse, or any theoretical contingency to repayment, would automatically make a transaction a sale. Reading the New York Court of Appeals' usury cases, the court explained that a transaction can be a loan if there is an absolute right to repayment *or* if the principal "in some way be secured as distinguished from being put in hazard."[5] The dispositive question is whether the funder took on a **substantial and realistic market risk** — something beyond the ordinary credit risk of non-payment that every lender accepts.

> *"Courts that … focus mechanically on the existence of theoretical 'contingencies' without assessing both the nature of those contingencies and whether those contingencies are substantial and realistic[] are focused on form rather than substance, which is the opposite of what the New York Court of Appeals has commanded …"* — In re Greenwich Retail Group LLC

Crucially, the court added a half of the inquiry it found often neglected: a court "must also consider whether the transaction has the features one would expect to see in a sale. A court that does not do so has only examined half of the relevant question."[6] Measured that way, the Itria deal looked like a loan: no specific receivables were identified or investigated, the funder did not assess the payors' creditworthiness, it had no right to collect from the merchant's customers, it gained no upside if collections accelerated, and it was entitled to repayment "in virtually every imaginable circumstance." The only posited "risk" — that the merchant might cease to have any receipts at all — was, the court observed, just the risk of the borrower's "corporate death," which "is a risk that every lender takes" and does not remove a deal from the usury laws.[7]

The court also flagged factors specific to these facts: the two merchants were jointly and severally bound with no separate purchase or reconciliation rights ("really a mutually-guaranteed loan"); the merchants appeared to be in breach from the moment of signing because of undisclosed prior encumbrances, arguably giving the funder full recourse throughout; and the reconciliation right was plausibly illusory (a one-quarter lookback cap, a "credit" rather than a refund, and an allegation the funder had no staff to perform reconciliations).[8]

The Consequences Are Severe: Void, Not Merely Voidable

New York treats usury harshly. A usurious transaction is **void** under General Obligations Law § 5-511, and a lender that violates the usury laws may be barred from recovering even the principal it advanced.[9] As the court reiterated, this reflects "the 300-year-old rule in New York that, where usury is established, the transaction is entirely void, preventing recovery of both principal and interest."[10] New York's criminal-usury cap is 25%.[11]

Two practical qualifications matter. First, limited liability companies and corporations cannot assert *civil* usury, and a borrower generally cannot use *criminal* usury affirmatively to claw back amounts already paid — it operates as a defense to what remains unpaid.[12] The court dismissed the civil-usury and the "recover prior payments on usury grounds" theories accordingly. Second, and more sobering for funders, the court allowed the merchant to pursue prior payments through a different door — fraudulent transfer — by alleging that the merchant's *failure to assert* available usury defenses (as payments came due and when judgment was entered) was itself a transfer of value for which it received nothing, and therefore avoidable in bankruptcy.[13] That theory, if it succeeds, would let an estate reach payments the usury statute alone could not.

Embedded waivers do not cure the problem

Many MCA agreements have the merchant waive any contention that the deal is not a true sale or is usurious. The court treated such embedded waivers skeptically: "Usurious agreements are void in their entirety, so it would be very odd to say that a usury violation could be cleansed just by adding waiver language to the originally usurious agreement itself. The prevailing rule in New York … is that such waivers are not enforceable."[14] In other words, the very instrument under attack cannot bootstrap its own validity.

Governing Law — and Whether It Changes the Analysis Elsewhere

Each of the four agreements in *Greenwich Retail* selected **New York law**, and no funder contested that choice at the pleading stage. The court therefore applied New York's usury statutes and the New York Court of Appeals' substance-over-form line of authority throughout.[15] Because the agreements pointed uniformly to New York, the court had no occasion to run a conflict-of-laws or "true lender" analysis. For funders whose form agreements likewise select New York law, this decision is directly on point regardless of where a future dispute is filed: a bankruptcy court sitting in another district will generally apply the law the parties chose, including New York's recharacterization and usury rules.

Does the venue change the outcome?

The forum and the governing law are different questions, and the distinction drives the cross-border analysis:

- **A New York choice-of-law clause largely travels with the deal.** A merchant who files bankruptcy in, say, New Jersey or Florida does not automatically escape New York usury law; the bankruptcy court will ordinarily honor a valid New York choice-of-law clause and apply New York's void-for-usury rule. The *substance-over-form* reasoning of *Greenwich Retail* is persuasive (not binding) authority in other districts, but it is grounded in New York Court of Appeals precedent those courts must apply when New York law governs.

- **Different governing law means a different test.** Where an agreement selects another state's law — or where a court declines to enforce the New York clause — the recharacterization and usury frameworks can diverge materially. States differ on their usury ceilings, on whether business entities may raise usury at all, on the consequences of a violation (void versus a more limited penalty), and on the multi-factor "true sale" test courts apply. Some jurisdictions have developed their own MCA-specific case law that weighs reconciliation and contingency differently than this opinion does.
- **"True lender" and anti-evasion doctrines add a second layer.** Independent of usury, some states scrutinize which party is the "true lender" and may disregard a choice-of-law clause as contrary to a fundamental public policy of the state with the greater interest — typically the merchant's home state. That analysis can override a New York (or other) choice-of-law selection in a way the usury inquiry alone does not.

Bottom line on governing law: the *Greenwich Retail* framework applies wherever New York law governs, in any federal district. Where a different state's law applies, the same substance-over-form instinct is widely shared, but the specific test, the available defenses, and the consequences of a violation must be analyzed state by state. Funders with a multistate book should not assume a single national answer.

Structuring Considerations in Light of the Decision

The points below are framed as considerations the opinion surfaces, not as a guarantee of any particular outcome. Whether a given transaction is a sale or a loan is intensely fact-specific, and *Greenwich Retail* was decided only at the motion-to-dismiss stage on the merchant's allegations. With that caution, the decision highlights several features courts now examine:

What the Court Looked For

- **Genuine, exercisable reconciliation.** Reconciliation that is capped, discretionary, slow, or unstaffed invites the argument that it is illusory. The court treated a one-quarter lookback and a "credit"-instead-of-refund mechanism as cutting against true-sale status.
- **Real, identifiable risk on the funder.** A purchase that pays out "in virtually every imaginable circumstance" resembles a loan. Courts ask whether the funder bears something beyond ordinary credit risk and what, concretely, that risk is.
- **The hallmarks of an actual sale.** Identification of specific receivables, diligence on the payors' creditworthiness, a right to collect from account debtors, and shared upside if collections accelerate are features of a sale that were absent here.
- **Recourse that is not effectively total.** Broad representations and covenants whose breach triggers full recourse — especially where a breach exists at signing — can make limited-recourse language meaningless.
- **Coherence between the documents and the economics.** An "Offer Summary" stating an APR, fixed periodic payments, joint-and-several liability, all-asset security, guaranties, and confessions of judgment together read like lending. The court read the deal "in its totality."
- **Waivers are not a backstop.** Embedded true-sale and usury waivers were treated as unenforceable in an allegedly usurious agreement; they should not be relied on to do the work that the transaction's substance must do.

Recommendation: Funders should consider a deal-by-deal and form-by-form review with counsel — examining whether reconciliation is real and operational, whether the funder bears identifiable risk beyond non-payment, whether the documentation reflects a sale in fact and not only in name, and how confessions of judgment, guaranties, and all-asset liens interact with the recharacterization analysis in each state where the funder does business. Portfolio-level diligence on choice-of-law exposure and on the enforceability of waivers is likewise worth undertaking before, not after, a dispute arises.

Key Takeaways for MCA Funders

1. **Labels will not save a transaction.** Recitals of "sale," disclaimers of "interest," and true-sale waivers are not dispositive; courts judge the deal by its true character.
2. **"Real risk" is the fault line.** Be prepared to articulate the specific, realistic market risk the funder bears beyond ordinary credit risk. "Corporate death" of the merchant is not that risk.
3. **Reconciliation must be more than a clause.** A reconciliation right that is capped, discretionary, or unstaffed can be attacked as illusory.
4. **Usury is existential in New York.** A violation can void the deal and forfeit principal; the 25% criminal cap, void-ness, and the unenforceability of embedded waivers all compound the exposure.
5. **Bankruptcy opens additional fronts.** Even where usury alone cannot recover past payments, fraudulent-transfer theories — including the novel "waiver of a usury defense as a transfer" theory — may reach them, and a prepetition confession-of-judgment will not necessarily preclude estate claims.
6. **Know your governing law and your forum.** The decision binds where New York law governs and is persuasive elsewhere; under other states' law the test, defenses, and penalties differ, and true-lender doctrines may override a choice-of-law clause.

The Bottom Line

Greenwich Retail is a motion-to-dismiss decision, not a final judgment, and it does not declare the MCA model unlawful. But it is a clear signal of how a sophisticated commercial bankruptcy court reads these agreements: it strips away the labels and asks what the parties actually did. The agreements most exposed are those that recite a sale while functioning, economically and operationally, as secured loans with all-asset liens, guaranties, fixed payments, confessions of judgment, and reconciliation rights that exist on paper but not in practice. The most defensible transactions will be those where the substance — real risk transfer, genuine reconciliation, and the ordinary indicia of a purchase — matches the form. Funders should treat this decision as a prompt to review their forms, their funding and reconciliation practices, and their multistate choice-of-law exposure with counsel now, while the review is preventive rather than defensive.

> *Calling a transaction a sale of "receivables" does not make it one. The question a court will ask is whether the funder truly bought a stream of payments and took a real risk — or simply made a loan in a costume.*

How SP Legal Advisors Can Help

Our Commercial Finance practice advises MCA funders, syndicators, and ISOs on agreement architecture, true-sale and usury exposure, reconciliation and servicing practices, multistate choice-of-law and true-lender risk, confession-of-judgment enforcement, and litigation and bankruptcy strategy. We are available to review your form agreements and funding workflows against the framework *Greenwich Retail* applies.

Attorney Advertising — Important Notices

This client alert is provided by SP Legal Advisors PLLC for general informational and educational purposes only. It does not constitute legal advice, does not create an attorney-client relationship, and should not be relied upon or acted upon without seeking professional counsel regarding your specific facts and circumstances.

This communication may constitute Attorney Advertising under the New York Rules of Professional Conduct (22 NYCRR § 1200, Rule 7.1), under the New Jersey Rules of Professional Conduct and Committee on Attorney Advertising guidelines, and under the Pennsylvania Rules of Professional Conduct (Rule 7.1 et seq.). The choice of a lawyer is an important decision and should not be based solely upon advertisements. Prior results do not guarantee a similar outcome. Before making your choice of attorney, you should give this matter careful thought.

To the extent any portion of this communication is deemed to constitute a statement regarding outcomes, no aspect of this advertisement has been approved by the highest court of any state. SP Legal Advisors PLLC attorneys are admitted to practice in the jurisdictions indicated in our firm materials; this alert is not a solicitation to provide services in any jurisdiction in which our attorneys are not authorized to practice. Responsible attorney: SP Legal Advisors PLLC.

Endnotes

1. Greenwich Retail Grp. LLC v. Moby Cap., LLC (In re Greenwich Retail Grp. LLC), 2026 Bankr. LEXIS 417, 677 B.R. 473 (Bankr. S.D.N.Y. Feb. 20, 2026) (Wiles, J.) (Adv. Proc. No. 25-01106 (MEW); Ch. 11 Case No. 25-11295 (MEW)).
2. Id. (the court must judge a transaction by its true character rather than by the names, labels, or characterizations the parties apply); see also Adar Bays, LLC v. GeneSYS ID, Inc., 37 N.Y.3d 320 (2021); Schermerhorn v. Talman, 14 N.Y. 93 (1856).
3. In re Greenwich Retail Grp. LLC, 2026 Bankr. LEXIS 417 (describing the four motions to dismiss; only Itria Ventures LLC moved to dismiss the disguised-loan/recharacterization claim).
4. Id. (describing the Itria Receivables Sale Agreement dated July 29, 2024, the \$640,000 purchased amount, \$500,000 purchase price / ~\$489,500 net advance, the 65.25% "estimated annual percentage rate," weekly payments of \$14,545.45, the expansive definition of "Receivables," the all-asset security interest, guaranties, and confessions of judgment; and the comparable Newco, Square Advance, and Smart Business agreements).
5. Id. (quoting and construing Rubenstein v. Small, 273 A.D. 102 (1st Dep't 1947): a loan exists where there is an absolute right to repayment or where the principal is in some way secured as distinguished from being put in hazard).
6. Id. (a court "must also consider whether the transaction has the features one would expect to see in a sale"; a court that does not "has only examined half of the relevant question").
7. Id. (the funder was entitled to recovery "in virtually every imaginable circumstance"; the only posited risk was the merchant's "corporate death," a risk "every lender takes"); see Seidel v. 18 E. 17th St. Owners, 79 N.Y.2d 735 (1992).
8. In re Greenwich Retail Grp. LLC, 2026 Bankr. LEXIS 417 (joint-and-several obligation as "really a mutually-guaranteed loan"; apparent Material Breach at signing from undisclosed prior encumbrances; allegations that reconciliation was illusory).
9. N.Y. Gen. Oblig. Law § 5-511; In re Greenwich Retail Grp. LLC, 2026 Bankr. LEXIS 417 (usurious transactions are void and a lender may be barred from recovering even the original principal).
10. In re Greenwich Retail Grp. LLC, 2026 Bankr. LEXIS 417 (quoting Adar Bays, LLC v. GeneSYS ID, Inc., 37 N.Y.3d 320 (2021)).
11. N.Y. Penal Law §§ 190.40–190.42 (criminal usury; 25% annual rate threshold).
12. N.Y. Gen. Oblig. Law § 5-521(1) and N.Y. Ltd. Liab. Co. Law § 1104(a) (corporations and LLCs may not interpose a civil-usury defense); Intima-Eighteen, Inc. v. A.H. Schreiber Co., 172 A.D.2d 456 (1st Dep't 1991) (criminal usury available defensively, not to recover amounts already paid); Adar Bays, 37 N.Y.3d 320.
13. In re Greenwich Retail Grp. LLC, 2026 Bankr. LEXIS 417 (permitting fraudulent-transfer claims under 11 U.S.C. §§ 544, 548 and N.Y. Debt. & Cred. Law § 274(a), including the theory that a failure to assert available usury defenses was an avoidable transfer of value; and holding the prepetition state-court judgment non-preclusive and Rooker-Feldman inapplicable).
14. Id. (embedded waivers of usury defenses in an allegedly usurious agreement are unenforceable; "usurious agreements are void in their entirety").
15. Id. (all agreements selected New York law; no defendant contested New York law at the pleading stage; the court applied New York usury and substance-over-form authority throughout).