COURTHOUSE BEACON NEWS

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

JUNE 2025

CHIEF JUDGE'S CORNER

By: Honorable Erik P. Kimball

Access and Engagement Committee Law Clerk Event

On April 14, 2025, the Court's Access and Engagement Committee hosted its second annual law clerk event. This year the event was hosted at the University of Miami School of Law, with the assistance of Professor Patricia Redmond. More than two dozen students from local law schools attended a presentation by Chief Judge Kimball assisted by numerous current and prior law clerks. Judge Robert Mark also joined the event. The Court wishes to thank Professor Redmond, Judge Mark, Bernice Lee (co-chair of the Committee), and all of the current and former law clerks who took the time to participate in this event. It provided an invaluable opportunity for students to learn about the benefits of clerking.

Tips and Best Practices for Counsel

By: Honorable Erik P. Kimball

Full Relief is Rarely Granted at Summary Judgment. Particularly in a complex matter with multiple counts for relief and multiple defendants, avoid seeking summary judgment on the entirety of a complaint. It is tempting to swing for the fences. But an all-in approach to summary judgment usually results in an unnecessary splintering of the presentation, making it unlikely you will obtain the relief you hope for. Focus on a single claim or an issue common to multiple claims in an effort to narrow the presentation at trial. This approach is much more likely to lead to success.

In Dispositive Motions, Structure Your Argument Around the Elements of the Claims and Make Clear Which Count Each Argument Applies To. When reviewing dispositive motions, I start with the elements of each claim addressed in the motion. You should do the same. This has two benefits. First, you greatly facilitate my consideration of your motion. If I am unable

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Bankruptcy Cases Filed From 01/01/25 to 05/30/25

TOTAL FILED:	6,264
• Chapter 7	3,505
• Chapter 9	0
• Chapter 11	115
• Chapter 12	1
• Chapter 13	2,639
• Chapter 15	4

Additional filing statistics are available on the court website www.flsb.uscourts.gov under the "Court Information" tab at the top of page.

Select: "Case Filing Statistics"

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to understand how your arguments relate to the elements of the claim, I may deny your motion without further analysis. Second, if you use the elements of the claim as your guide, you will more easily identify shortcomings in your own and your opponent's presentations. In addition, clearly state which counts your arguments relate to. I regularly review dispositive motions where the arguments are untethered from the counts of the complaint. Because of this, I will shortly implement an additional procedural order requiring that dispositive motions be presented with headings indicating the affected counts of the complaint and requiring that responses and replies be presented in the same order as the motion they relate to.

A Notice of Unavailability Is Not a Motion to Continue. A notice of unavailability is a courtesy to other parties in the case but does not accomplish anything official. In most cases, I will not be aware that you filed a notice of unavailability. If you want the Court to continue a hearing, you must file a motion stating clearly the basis for continuance. The hearing remains set in the calendar, and you are expected to attend, unless and until I grant a motion to continue or otherwise re-schedule the matter.

Avoid Withdrawing Motions and Responses at the Last Moment. My law clerks and I prepare for my motion calendar well in advance of the hearing day. It is disrespectful, and simply rude, to withdraw a motion or response hours (sometimes minutes) before the hearing. I understand there are circumstances when it is not possible to determine whether a paper should be withdrawn until shortly before a hearing. In all other instances your failure to attend to a matter in a timely way should not create unnecessary work for my law clerks and me. If you are forced to withdraw a filing at the last moment, you should let my courtroom deputy know you have done so.

A Request for a TRO Must be Accompanied by an Affidavit or Verified Complaint. If you wish to obtain a temporary restraining order without notice under Federal Rule of Civil Procedure 65, made applicable by Bankruptcy Rule 7065, the motion must explain why the movant will suffer immediate and irreparable injury, loss, or damage if the matter is not addressed before the opponent can be heard, and the motion must be accompanied by an affidavit or a verified complaint stating specific facts in support of this standard. In the motion, state clearly and certify why notice to the opposing party should not be required. There is no such thing as an *ex parte* preliminary injunction. While this all is obvious from the text of rule 65 itself, I have denied multiple motions for TRO that did not meet the basic requirements of the rule.

Do Not Register Late for Zoom Hearings. Except for matters set on less than one business day's notice, if you do not register by 3:00 p.m. on the business day prior to the hearing, your registration may be revoked and you will not be permitted to appear by video conference. You may have little or no notice of the revocation of your registration. The hearing will not be continued. If you do not attend the hearing, any document you filed in connection with the hearing may be denied, overruled, or dismissed, for failure to prosecute. If you fail to register in a timely manner more than once, I may prohibit you from appearing by video conference for a period of 30 days or more. If circumstances beyond your control require you to register after 3:00 p.m. on the business day prior to the hearing, you must contact my courtroom deputy as soon as you register to ask that your registration not be revoked as late. There is no guaranty that a late registration will not be revoked even if you contact my courtroom deputy. In such circumstances, I strongly encourage you to attend the hearing in person.

FROM THE JUDGES' CHAMBERS

TIPS FOR THE PROFESSIONAL PROFESSIONAL

By: Honorable Laurel M. Isicoff

Every year for as many years as I can remember, I have had the pleasure of speaking to the Bankruptcy Clinics at University of Miami School of Law, St. Thomas University School of Law, and when they have clinics - Florida International University College of Law and NSU Shepard Broad College of Law. During our two hours together, the students, professors and I discuss topics ranging from how to prepare our pro bono clients for their bankruptcy experience, to how to prepare for court, and even how to dress. We consider not only how to communicate with clients, but also how lawyers should communicate with each other, and, of course, with the court. And post-COVID, we also discuss video hearing etiquette (big hint – it's STILL court).

While, for the most part, our bar does a very good job in all the categories that I cover in class, I have seen some slipping so I thought I would go over some gentle reminders. First, I ask each of you to re-read my website practice tips titled "Ten Things I like About You." It is important that you communicate clearly, that you read carefully (how many of you have encountered issues lately just because you failed to proofread a motion or order!?), and that you be PREPARED! We have worked hard to issue orders outlining just what is expected of you when you have an evidentiary hearing – if you read the order when you receive it, you won't miss deadlines or fail to timely submit critical evidence for trial.

Second, please remember the case is not about you. This is your client's case; your client's home; your client's business; your client's money. You cannot make substantive decisions without consulting with, and getting authority from, your client. Even if you know that what you are advising is the right way to proceed, your client must make that decision; you may not do it for them. Conversely, remember that your reputation is more important than any client. If your client asks you to do something that you know is unethical – don't do it. Check the Florida Bar rules and withdraw. Finally (for now), if you feel that exchanges with counsel are beginning to get personal, that is, your conversations are becoming more about what issues you have with what the other attorney is doing, as opposed to the position he or she is advocating on behalf of his or her client – step back and take a breath. Maybe it is time for the two of you to exchange photos of pets and children. Remember Judge Cristol's sanction for lawyers behaving badly with each other – a lunch at which no business was to be discussed.

In closing, I repeat the closing from my "Ten Things" –

I LIKE THE FACT THAT YOU ALWAYS REMEMBER THAT LAW IS A PROFESSION, NOT A JOB. EVERYTHING I LIKE ABOUT YOU REFLECTS YOUR RECOGNITION OF THAT IMPORTANT DISTINCTION.

Thank you.

FROM THE JUDGES' CHAMBERS

CLC's Evidence Essentials: Using Blockchain Records as Evidence in Crypto Disputes

By: Katie E. Barker, Mindy Kubs[1], and Alberto Cosio

As cryptocurrency becomes increasingly integrated into everyday transactions, its presence in legal disputes will likely grow. Whether the issue involves undisclosed crypto holdings, fraudulent transfers, or the tracing and valuation of crypto assets, blockchain records are becoming essential to fact-finding. This article discusses the ever-important question every trial lawyer should be asking prior to a trial – how do I get these records into evidence?

So, what is blockchain? In simple terms, it is an electronic record-keeping system that is shared, secured, and transparent. You can think of blockchain as a digital ledger that records transactions and groups them into "blocks" that are linked together in a chronological chain. A key feature of blockchain is that the information being recorded is decentralized, meaning it is copied and shared across many computers at the same time. This makes the information more reliable because it is much more difficult to tamper with information that must be widely shared simultaneously. Once a cryptocurrency transaction is recorded, it is permanent and immutable, making the blockchain a highly secure and reliable method of tracing crypto assets and transactions. Therefore, it is crucial for attorneys to understand how blockchain records can be admitted into evidence, as they can play a critical role in litigating crypto-related issues.

That task, however, is easier said than done because the use of blockchain evidence in litigation is still relatively new. Luckily, the Department of Justice ("DOJ") issued more comprehensive guidance to their attorneys and agents for use in criminal litigation that translates easily to other practice areas. *See* C. Alden Pelker et al., *Using Blockchain Analysis from Investigation to Trial*, 69 DOJ J. Fed. L. & Prac. 59 (May, 2021) (referred to herein as "*Using Blockchain*"). This article highlights some of that advice as it can be helpful in civil litigation, including bankruptcy matters.

How to Overcome Hearsay Challenges

The DOJ suggests that hearsay objections can be overcome in several ways. First, the DOJ argues that the electronically generated records that comprise blockchain are not hearsay because courts have already widely held that machine-generated evidence is not hearsay. *See Using Blockchain* at *83. Nonetheless, if courts are not persuaded by this argument, the DOJ suggests how the evidence might be admissible under a hearsay exception. More specifically, the DOJ encourages counsel to argue that blockchain evidence is admissible (i) as business records under Federal Rule of Evidence 803(6); (ii) as market reports and similar commercial publications under Rule 803(17);[2] (iii) under the residual exception to hearsay found in Rule 807; or (iv) as an admission of a party opponent under Rule 801(d). *Using Blockchain* at **83 – 88.

Blockchain Records Can Be Authenticated Multiple Ways

Assuming the blockchain evidence withstands a hearsay objection, Federal Rule of Evidence 901 requires it

[1] Katie E. Barker is a rising third-year student at the University of Miami School of Law. She interned in Judge Lopez-Castro's chambers for the spring semester. Katie is on the *University of Miami Law Review* and is an Executive Editor on the Volume 80 Executive Board. Mindy Kubs is Judge Lopez-Castro's career law clerk.

[2] All references to rules are to the Federal Rules of Evidence.

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to be authenticated or identified, meaning the proponent must demonstrate that the item is what the proponent claims it is. The DOJ suggests that the easiest way to authenticate blockchain evidence is to have a witness "versed in virtual currency" download a copy of the blockchain and explain it to the trier of fact. *Using Blockchain* at * 75. According to the DOJ, the testimony of such a witness "would also readily fit within Rule 901(b)(9), evidence about a process or system, and could be bolstered by a discussion of the distinctive characteristics of the blockchain pursuant to Rule 901(b)(4)[.]" *Using Blockchain* at * 75.

Blockchain records, if determined to be business records, may be considered self-authenticating under various subsections of Rule 902. *Using Blockchain* at *75. Rule 902(13) considers records to be self-authenticated if they are generated by an electronic process that produces an accurate result, and Rule 902(14) states that data copied from an electronic device, storage medium, or file authenticated by a digital authentication process is self-authenticating. Each of these subsections requires a records custodian or other qualified person to testify, or provide a certification under penalty of perjury, that the requirements of Rule 803(6)(A)-(C)[3] are satisfied.

Another suggestion by the DOJ is to ask the court to take judicial notice of the blockchain under Rule 201. *Using Blockchain* at *80. Counsel "should be prepared to provide the court with sufficient information to determine that the blockchain source's 'accuracy cannot reasonably be questioned.'" *Id.* at *80 (quoting Rule 201). Judicial notice, however, will generally be limited to the blockchain itself. The proponent of the evidence will still have the burden to provide further evidence regarding the transactions that appear on the blockchain and, if relevant, who was responsible for the transactions.

Suggestions for Presenting Blockchain Evidence

Blockchain evidence is voluminous and may appear convoluted to counsel and the trier of fact. The DOJ recommends using visual aids to assist the trier of fact in understanding technical concepts being presented and advises that blockchain evidence "is a perfect candidate for a summary exhibit, governed by Rule 1006[.]" *Using Blockchain* at *96. "[C]harts showing the flow of funds will likely be among the most useful summary exhibits in the blockchain context." *Id.* at 96. For example, a summary chart could depict the flow of funds from one wallet to the defendant's account, and "[s]ummary charts could also include spreadsheet-style charts summarizing the defendant's blockchain activity, such as the volume and value of transactions with various counterparties." *Id.* at *96.

Conclusion

In conclusion, as the use of cryptocurrency becomes more common, so will evidentiary issues related to it. Consequently, blockchain records will be increasingly important pieces of evidence and may be central to resolving disputes. Given their growing evidentiary significance, attorneys must understand the different methods for entering blockchain records into evidence and be prepared to respond effectively to any challenges.

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[3] Rule 803(6) provides an exception to the rule against hearsay for records of regularly conducted activity if:
(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;
(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
(C) making the record was a regular practice of that activity.

FROM THE JUDGES' CHAMBERS

Two Years In: Reflections from the Still New Judge

By: Honorable Corali Lopez-Castro[1]

As I approach two years since I took the bench, I find myself reflecting on the nuggets of knowledge I have gained from my colleagues on the bench, chambers staff, and those who have appeared before me. It has been a rollercoaster, but I would like to think I have learned a thing or two (or ten). Here are some musings, two years in, with some advice for law clerks, interns, and young lawyers:

1. Gratitude. Starting a new chapter with the Court was equal parts exciting and overwhelming. I do not know how I would have managed without the support of so many members of the Court staff.

Advice – Gratitude takes you a long way. Think about how happy you felt when you received an offer for a summer job or your first job out of law school. When you work late hours, receive tough but fair criticism, and have a hard time finding the right case, remember you have a job!!!!

2. Learning is Growing. One of the things I love about my job is that I learn something new every day—like an obscure Local Rule. If we imagine our minds as a basket, then each day presents an opportunity to add things to that basket of knowledge.

Advice – Everything is new. You probably know very little as to how a law firm works, how cases move through the system, and what type of legal practice you prefer. Remember, every experience is valuable to help you find that answer.

3. Procedures. Procedures are important and help keep the trains running on time. Attorneys should always file their responsive papers at least two days before the hearing as required by the local rules if they expect the court to consider them.

Advice – Deadlines are important. Managing expectations is a skill you need to dominate. If an assignment is "due" on Friday, try to deliver it early. Never, and I say never – wait until the last minute or worse, blow the deadline.

4. Clarity and Persuasion. Writing is a process. I am learning to write in a different style, which can sometimes be challenging. Introductions in papers are underused for some reason. They are very powerful and persuasive when drafted correctly. They should give the Court a summary of what you want and why you should get it.

Advice – Lawyers always work on improving their writing, or at least they should. There is always room for improvement. Try not to take edits and comments from a supervisor personally; just learn from them.

5. Preparation. There is no substitute for preparation. Imagine that your computer malfunctions and you cannot access your exhibits at a hearing or, even worse, at trial. Imagine that you arrive late due to unexpected traffic. These mishaps would throw anyone off their game, but they will not throw you off yours if you are prepared. Always be prepared to discuss the best case in support of your position.

Advice – Avoid unnecessary stress by planning for contingencies and arriving at your hearing or trial early. I promise you that life will be easier if you follow this advice.

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[1] With help from her amazing current and former law clerks, Mindy Y. Kubs, Alexa I. Garcia, and Alberto Pablo Cosio.

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Two Years In: Reflections from the Still New Judge (continued from page 6)

6. Professionalism. Sometimes, attorneys do not realize that we (judges, law clerks, and courtroom deputies) see everything. Try to maintain your composure if you are dissatisfied with a ruling or statement made in court. Do not interrupt others, not only because it affects the quality of the transcript, but because nobody looks good doing so.

Advice – Dress like a lawyer. The partner may elect to dress casually, but remember you are not a partner. Be punctual, it is disrespectful to be late to a meeting. Have you ever waited for someone and noticed how bad it felt? Finally, do not look at your phone when you are speaking with someone. The message you are sending is – I don't care what you are telling me.

7. Everyone has an important seat at the table. Chapter 13 was new to me, and I really appreciate how well the Chapter 13 Trustee, debtor's counsel, and counsel representing creditors collaborate and contribute to the process. Each constituent plays an essential role in making this surprisingly complex chapter work well.

Advice – Your presence at a meeting is both important and an opportunity. If you are attending a meeting about a case, locate pleadings or articles you can read before the meeting. Paralegals and judicial assistants are really helpful in directing you to the right place. If you are asked to attend a meeting, you are expected to contribute and not simply be a potted plant.

8. Kindness. I am always impressed when counsel helps opposing counsel or interacts with opposing counsel in a friendly way. The cases are your clients' cases. Try to recognize when you are becoming too invested and taking things personally. The judge will notice your acts of kindness and professionalism.

Advice – Always help each other out. It is called karma!

9 Big Picture. Oftentimes, we get lost in the weeds and forget the big picture. As you know, I was practicing not too long ago, and I always tried to keep that principle front and center. Try to keep in mind what will help you achieve the result you want. Just because you can object to the admissibility of an exhibit does not mean you should. Just because you can file a motion to compel or object to a continuance does not mean you should.

Advice – You are starting your careers and may be getting lost in the weeds. Don't sweat the small stuff and never be embarrassed to ask for help (we have all been there).

10. Podcasts. They make you smarter, according to a former colleague. If you love to learn, here is one recommendation—Hidden Brain by Shankar Vedantam. Listen to it wherever you get your podcasts.

Advice – My current law clerk recommends How I Built This with Guy Raz. My interns recommend The Mel Robbins Podcast.

FROM THE JUDGES' CHAMBERS

[Originally published in the Federal Bar Association ▪ South Florida Chapter ▪ (May 2025)]

An Interview with the Honorable Corali Lopez-Castro

U.S. Bankruptcy Judge for the Southern District of Florida

By Katie Mitchell

Q: You practiced law for a little more than 30 years before joining the bench. Can you tell us what your decision-making process was for joining the judiciary at that time?

A: I think there were a couple of reasons why I thought it was the right time. There had not been an opening in the Miami division for 16 years. Specifically, my former partner, Laurel Isicoff had been appointed at that time. So, when A. Jay Cristol decided to retire and it was announced, I really had to think about whether this was something that I was going to pursue and whether it was the right time. Professionally, I felt I had done most of the things that I wanted to do: first-chair big cases, manage the firm, mentor young lawyers, and really attract the clients that I wanted to represent. So, it seemed like—okay, maybe this is the right time. Personally, my youngest was about to go to college, and that made me think that maybe this was the right time as well. I think opportunity comes at a time when you do not really know that it is coming, and you have to be flexible enough to look at that opportunity and decide: is this mine? Or am I going to let this pass?

Q: One of the goals you said you accomplished was having managed the firm, Kozyak Tropin & Throckmorton—and you did that three times! Did you encounter anything unexpected your first time in that role? What do you wish younger lawyers knew about management?

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A: They asked me several times to manage the firm and I felt, because of my case load and where my children were in their educational journeys, perhaps it was not the right time. But I do think every partner should experience managing a firm because it really teaches you the business of law. When I said yes the first time, I thought it was my responsibility as a business owner. I remember the first meeting being somewhat contentious and thinking, "Wow, I did not handle this well." And then it got easier. I realized that I had to do a lot more before we walked into that meeting; I wanted to build consensus before we actually went into that meeting to discuss a topic. I think if people have enough time to think about things, they are much less reactive, and we can have more productive conversation. So, the first time, I definitely learned a lot. With respect to your second question, I do think everyone should do this because you need to know, for example, how does billing relate to collections, and relate to keeping the lights on? You have to see how all of this fits together.

The second time was a lot more fun because I already had some experience with it and I thought I had developed my voice as a managing partner and learned how to use that voice productively. Before I was lucky enough to be appointed to this job, I realized that my whisper was a shout and I had to be careful how I expressed my feelings because, as managing partner, those feelings were very strong and had an effect on people. I decided that I would be much more careful with my words. The third time around, the firm was in transition. Some of our founders had retired and other lawyers that had been with the firm had decided to pursue other interests, so it was definitely a period of transition. But I thought I was actually the right person for the managing partner role because I was a bridge: I had grown up with the founders and had also been young enough to relate to some of the younger partners.

Q: You mentioned that your family has been one of the factors you considered when pursuing this job and also when agreeing to be managing partner. I know your husband is also a lawyer and you have three wonderful daughters together. What advice do you have for other lawyers striving to balance their family lives with taking on new professional challenges?

A: Make smart choices. Start with picking the right partner because the right partner will support you and will help you. I think right now, marriages are much more aware of dividing the responsibilities and both parties contributing to all that it takes to have a home, a happy home. Even if you do not have children, you have a lot of responsibilities and you need to pick the right partner. With respect to professional work/life balance, I think I was pretty good at being fiercely protective of my private time. I really needed to be with my girls and raise them; I needed to be with my friends; I needed to be with my husband. Those are the things that made me happy, so I was very protective of that time. I also realized that, sometimes, you cannot do everything. I started thinking about commitments a little differently: if someone asked me to do something—speak at a conference, take on a case, whatever it was—I thought to myself, "How does this affect my family and will this make me happy?" There is nothing worse than saying yes to something and when it comes up, you feel like, "Ugh, why did I say yes to this?" So I became much better at that. I was not always very good about that, but I became much better at it.

Q: As far as being protective of your time, was that harder as a young associate or when you were established as a partner? When in your career did you find yourself able to set those boundaries effectively?

A: One of my goals when I was in practice, I would say more than 12 or 13 years, was that I decided that I wanted my own clients. My own clients were important because I thought I could control my schedule a little better. I was always pretty confident that if I told the client, "I cannot have the meeting on Wednesday at 3:00. It would be better for me do to it on Thursday at 9:00," that the client would be okay with it. I did not have to give a detailed explanation as to why I was asking for that change, and I also was experienced enough to know that not having the meeting on Wednesday and having it on Thursday instead was not the end of the world because of where the case was. Sometimes we are afraid to ask and I think that is something that I would offer as a piece of advice—just being more

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upfront that you need a change can be great. People are very understanding; they have their own families. But sometimes, as women, we are reluctant to show vulnerability. "This does not work for me. Do you mind changing it?" Just asking becomes difficult. I see that sometimes with my daughters and I say, "Just ask. The worst that can happen is they say no." But sometimes we are hesitant to make that request. Everyone should be thinking about "How can I make my life easier?" It doesn't have to be that difficult.

Q: You have been on the bench for a little more than a year now. What adjustments have you had to make from practice to being on this side of the bench?

A: One thing related to that change is that I will read something, and I want to send an email to someone, and I cannot. Before I was lucky enough to begin this job, I always read the advance sheets before I did anything in the morning. I would read, and say "Oh, this would be great for a case," and not to have that aspect of my profession available now is hard for two reasons. One, I love strategizing about cases. And two, I am a very social person. Not being able to talk about the law with other people has been a big change. I have that idea, "Oh, I should email a person about this," and then I think, "No, that is not appropriate; you cannot do that." But this job is much less isolating than I thought it was going to be. By way of example, I just attended the FBA lunch [featuring the three new district court judges] and that was delightful. I love seeing people. I love going to events. The recent investiture [of U.S. Magistrate Judge Marty Fulgueira Elfenbein] was lovely. I still see people. If you are going to be social, there are ways for a judge to be social in an appropriate manner.

I was very surprised how much judicial education is available for judges, and it is amazing. It is the best programming I have ever seen. The Federal Judicial Center does amazing work and I have really been very surprised how generous people are with their assistance, especially when you have questions about certain cases. My colleagues have been available for any question I have had. I feel like I am kind of part of a law firm, but it is a little different. Today I was talking to two other judges, and we were wishing that in our building, it was not just one judge on a floor and that there could be more than one judge on each floor because that would be really fun.

Q: You share a long friendship and history with Judge Isicoff. Has that relationship morphed now that you are back to working in the same capacity together?

A: Definitely. We had this unfortunate wall before. I had cases in front of her, so that made our relationship different. Now, if I have not seen her in a while, I will just get in the elevator and go surprise her and see how she is doing. That has actually been really fun to have her available again. She is an incredible legal mind and, really, she was the brains of the operation for the bankruptcy department [at Kozyak Tropin & Throckmorton] as it related to drafting documents. Sometimes she would look at some of our documents and she would tell us, "This is not going to work." So now, it is great to have her accessible when I am thinking about a difficult legal issue that I have not had before, and she has been very generous. Chapter 13 is something I had no experience with, and it is actually much more complicated than I appreciated—and Judge Isicoff has been great because she has really dug into a lot of the issues involved in Chapter 13.

Q: Speaking of special relationships: when you became a judge, Senior District Judge Huck swore you in informally and Eleventh Circuit Judge Lagoa swore you in formally. Can you tell us about their roles in your life?

A: Judge Huck and I have always had a special relationship. When he worked at Kozyak Tropin, we always got along. I do not know what it was. It is something that we maybe saw in each other, we had a lot of respect for each other, and our friendship has endured. I really love that about Judge Huck. Judge Huck is a person that, when he is in your corner, you cannot lose. He is such a helpful and sincere person. It has been great. By way of example, when I was lucky enough to start this new job, I had an evidentiary hearing coming up and my law clerks were trying to figure out how to turn on the computer and how to understand the process and the technology here, which can be daunting. The first thing Judge Huck did was say,

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"Do you want to use one of my law clerks to help you prepare for that evidentiary hearing?" I thought that was such a kind thing and before he could get the words out of his mouth, I said yes, and I got this amazing bench memo. That was a very kind thing for him to do. But for some reason, we always had a connection when we were working together. He also appreciated, I think, especially when my girls were young, trying to navigate that work-life tug of war. He appreciated that, and I think he was always very supportive of the working women at Kozyak Tropin.

And Judge Lagoa—so, I met [her husband] Paul Huck, Jr., or PJ, when he worked at Kenny Nachwalter. I had a very good friend who has unfortunately passed away, Amanda McGovern, who worked with PJ and the three of us would go to lunch and have so much fun. I still remember those lunches. So I met Barbara through PJ and of course we got along really, really well. As far as our relationship: the other day I went to hear Supreme Court Justice Ketanji Jackson speak, and she talked about advice she would give—she said you should network when you are in law school. I think you should always network, but as [University of Miami Law School] Dean Abril said, "Network, but really establish friendships." It is the friendships that you start in the beginning of your career. Some of my closest friends are those who all started working together. Having that bonding experience when you get a project and you think you did not do it as well as you could have, or when you have your first trial, sharing all those bonding experiences when you are all going through it together—that is a bond like super glue. You cannot break that bond. When PJ and Barbara and I were starting our careers, we had a lot to talk about because we were all going through the same things. Instead of networking, because networking seems very transactional, I say establish friendships. Friendships will carry you through this legal career because law is stressful, but you have to take care of yourself. You have to help your colleagues. If a former partner of mine hurt, I was hurting too. I felt their pain. It was a friendship and I wanted to help that person.

Q: It is obvious that you love this job. Is there anything that you miss about practicing as an attorney?
A: I miss the people, and I miss working on an argument before I was going to court and trying to come up with a theme. I have been trying to encourage lawyers appearing before me to have introductions or to include introductions in their pleadings because it is so important to grab your audience. That first paragraph should tell the judge, "You should grant this motion because of these three reasons," or "You should deny the motion or deny the requested relief because of these three reasons," so when the judge is reading the rest of the pleading, she has those reasons already in her head. People do not always use introductions, and I think they are very important. I miss, whenever I was about to argue a big motion, working on that theme and thinking about how I could grab the attention of the judge so the judge would be listening to me right away, and that would at least give me a fair chance to convince them that my position was correct. I miss that kind of overthinking of my argument.

Judge Barbara Lagoa, Lilly Ann Sanchez, Judge Corali Lopez-Castro, Chief Judge Nushin G. Sayfie

FROM THE JUDGES' CHAMBERS

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The Soon-to-be-Replaced Fort Lauderdale Federal Building and U.S. Courthouse

By U.S. Bankruptcy Judge Scott M. Grossman[1]

A new federal courthouse is under construction in downtown Fort Lauderdale. It is expected to be completed in late 2026, with occupancy expected in early 2027. Before bidding adieu to the iconic existing courthouse at the heart of downtown Fort Lauderdale, however, a retrospective on this quintessential example of 1970s Brutalism architecture — and the issues that have plagued it for decades — is in order.

Upon becoming a state in 1845, all of Florida constituted one judicial district, holding court in Tallahassee, St. Augustine, and Key West.[2] Less than two years later, this district would be divided into the Northern and Southern Districts of Florida.[3] That division then held for over a century, until 1962 when Congress created the Middle District of Florida.[4] By that time, the Southern District of Florida — which includes Fort Lauderdale — held court only in Key West, Miami, West Palm Beach, and Fort Pierce.[5]

As South Florida's population continued to grow after World War II — particularly in Broward County (where Fort Lauderdale is located)[6]— in 1970 Congress added Fort Lauderdale as a place for the Southern District of Florida to hold court,[7] with a staffed divisional office opening in 1973.[8] As of 1970, Broward County had a population of 620,100, more than fifteen times its population of 39,794 just thirty years earlier.[9] By 1980, Broward County's population would exceed one million,[10] and as of today, that number is approaching two million.[11]

Portrait of Judge Ted Cabot.
Source: https://www.floridamemory.com/items/show/22773.

The first district judge to sit in Fort Lauderdale was Hon. Ted Cabot. Judge Cabot was appointed by President Lyndon B. Johnson in 1966 to a new seat in the Southern District of Florida.[12]

Before joining the federal bench in 1966, Judge Cabot was a state circuit court judge in Broward County.[13] He also previously served as an attorney in private practice in Fort Lauderdale, as a member of the Florida Senate, and as the Clerk of the Broward County Circuit Court.[14] When he was appointed to the district bench, however, Fort Lauderdale was not an official duty station for holding court in the Southern District of Florida.

It was through Judge Cabot's efforts, lobbying, and no doubt political connections (including with Congressman J. Herbert Burke), that in 1970 Congress added Fort Lauderdale as a place for holding court, albeit without any federal courthouse at the time. Court proceedings in Fort Lauderdale were originally held in a municipal building adjacent to a fire station — described by some as being like an old gymnasium. The U.S. Attorney's Office, the Federal Public Defender, the U.S. Probation Office, and other federal agencies that regularly appeared in court remained headquartered in Miami, with their staff having to drive about 30 miles to Fort Lauderdale for hearings.

Judge Cabot passed away in late 1971,[15] less than two years after Fort Lauderdale was established as an official duty station. A few months later, President Richard M. Nixon nominated Norman Charles Roettger, Jr., for the open seat created by Judge Cabot's death.[16] Judge Roettger was confirmed by the Senate on May 31, 1972, and he received his commission on June 2, 1972.[17] Judge Roettger then took up residence in the Fort Lauderdale division of the Southern District of Florida, holding court in the gym-like building by the firehouse.

Just as it was Judge Cabot's mission to establish Fort Lauderdale as an official duty station of the Southern District of Florida, it was Judge Roettger's mission to build a federal courthouse in Fort Lauderdale. Within a decade, his dream and vision would be realized.

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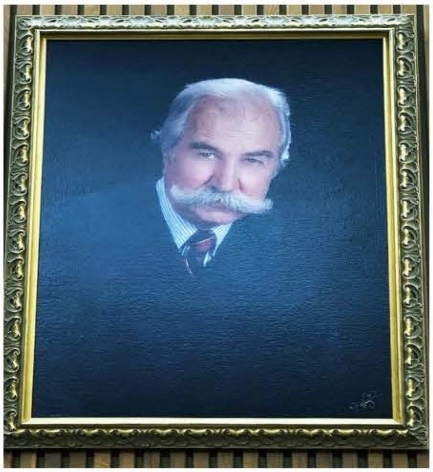

Portrait of Judge Norman Charles Roettger, Jr.

The Federal Building and United States Courthouse opened in Fort Lauderdale in 1979.[18] It sits on a prominent two-acre parcel at the corner of Broward Boulevard and 3rd Avenue, one of the busiest intersections in Fort Lauderdale. Originally, it had only three courtrooms: two for district judges and one for a magistrate judge. The rest of the building was occupied by federal agencies, including the U.S. Attorney's Office, the Federal Public Defender, the U.S. Probation Office, the Federal Bureau of Investigation, and others.

The architect of the courthouse was Jacksonville – based modernist William Morgan, who designed the building in the "Brutalist" style.[19] Brutalism emerged as an architectural style after World War II and became popular in the 1950s and 1960s. It features minimalist construction, "characterized by raw, exposed concrete and bold geometric forms."[20] By the end of the 1970s, however, Brutalism began to fall out of favor.[21] Its downfall has been "blamed not only on its functional shortcomings, expensive maintenance and inability to remodel but also the way this architectural style came to be perceived as a symbol of urban decay and totalitarianism."[22]

The Fort Lauderdale federal courthouse's "monumental, masonry" structure is classic Brutalism.[23] The exterior walls have a "textured raw concrete façade,"[24] with "rough-hewn (bush-hammered), vertical-ribbed cast concrete."[25] Among the most striking features are the multiple "dendriform" (tree-like)[26] concrete columns[27] holding up the roof, beneath which are three floors of "stepped, partly open levels,"[28] above the main-level open plaza. This design was inspired by the "stepped earthen mounds and masonry pyramids in the indigenous architecture of the Americas."[29] The dendriform columns were even "topped with a cluster of downward facing floodlights . . . meant to look like coconuts."[30]

The open plaza at the core of the building — a massive "negative space" — was designed for "public enjoyment," enhanced by "cascading fountains" and native plants, intended to "create a garden effect" that was "an overt reference to gardens in public spaces from the ancient world through the Renaissance and into the modern era."[31] Shortly after the building opened, however, these fountains began malfunctioning, causing leaks and flooding that required frequent repairs. They were eventually drained and haven't been operable for years.

Juxtaposed against the negative space of the public plaza is an L-shaped structure housing courtrooms and offices. It consists of four stories and contains 150,000 square feet of office space, with underground parking for 230 vehicles. The building's interior is decorated with metal and wood slatted ceilings and vertical wood slats.[32] The interior lighting "was intended to be soft and diffuse," with lights "placed in coves and soffits on walls or ceilings."[33] Unfortunately "inadequate or improper light bulbs may have been placed there over the years,"[34] which negated the intention of the original design, and instead resulted in many poorly-lit offices, courtrooms, hallways, and other areas.

Because the courthouse was constructed on top of a riverbed, the building began to experience frequent flooding and other water intrusion issues shortly after it opened. The underground parking garage — which at one

Federal Building and U.S. Courthouse, Fort Lauderdale, FL.
Source: Google Maps.

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time was flat — today has hills and valleys because it was built on the soft riverbed. There have been numerous floods — and several cars destroyed as a result — in the garage, including as recently as April of 2023, when a catastrophic rain event flooded the parking garage and other parts of the courthouse.

Water coming up from the ground hasn't been the only issue. In 2013, during another rainfall event, a courthouse employee took a video from inside a courtroom showing "water cascading from the ceiling, ceiling tiles in pieces on the floor and buckets and trashcans in a courtroom collecting water."[35] Relatedly — although this cannot be blamed on the building itself — the roads and sewer infrastructure immediately surrounding the courthouse have not kept up with the development in downtown Fort Lauderdale. The area frequently floods with heavy rainfall, sometimes deep enough that people cannot cross the street without wading through a river of water.

The building's design — which features outdoor walkways and terraces — also creates challenges during South Florida's hot, muggy summers and rainy season. After entering the building and going through security, attorneys and the public must again venture outside to reach certain courtrooms and offices. It is not unusual to see attorneys walk into court with wet clothes because they had to venture into the open outdoor space to reach the courtroom.

The building's elevators have also been an issue. While already old and sorely in need of repairs, the April 2023 flood destroyed every working elevator in the building, and for the next six months, the four-story building did not have a single working elevator. This forced attorneys, judges, Deputy U.S. Marshals, and even prisoners

Courtroom inside Fort Lauderdale Federal Courthouse.

to share one narrow staircase.

Coordinating staircase access to avoid encountering prisoners has not been the only security challenge for this building. The courthouse was built well before the 1995 Oklahoma City bombing and was not designed to the setback requirements and other standards implemented since that terrible attack. The building abuts the street, with cars, trucks, and other vehicles able to pull up right outside. And with open walkways that face out onto Broward Boulevard — the main east-west thoroughfare through Fort Lauderdale — court employees (including judges) are easily exposed. Moreover, with its glass doors facing a courtyard that opens onto a public street, there have been several break-ins over the years. In the 1980s, a defendant in a pending case broke into the building over the weekend and tried to put poison gas in courtrooms. As recently as two years ago over Labor Day weekend, another individual "broke into the courthouse's main entrance and vandalized the interior and exterior spaces of the building, including smashing windows, breaking doors, causing water damage, and destroying other property."[36]

One positive aspect of the public courtyard, however, is that it has throughout the years been a public assembly space for demonstrations. One of the most noteworthy was the gathering of students from Marjorie Stoneman Douglas High School after the horrific mass shooting in Parkland, Florida in 2018.

While this massive Brutalist structure created a welcoming courtyard for the public, its functional shortcomings and inability to easily renovate proved challenging as the Fort Lauderdale division got busier and more courtrooms had to be constructed. As the court grew, government agencies were forced out, and their office spaces were converted to courtrooms and judicial chambers. Today the Fort Lauderdale Federal Building and U.S. Courthouse has ten courtrooms for thirteen

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judges: five active district judges, two senior district judges, four magistrate judges, and two bankruptcy judges.[37] Creating seven additional courtrooms and ten additional chambers out of this concrete cast building resulted in a disjointed series of labyrinthine passageways, odd configurations, and non-contiguous secure areas. Indeed, many judges must traverse the public areas of the building — even directly out in the open and facing a busy public street — when exiting their chambers. There is even one passageway that the marshals must lock down when transporting prisoners directly past the chambers of the judge who just sentenced them.

Due to these security challenges, space constraints, and myriad other problems, the Fort Lauderdale federal courthouse was barely three decades old before efforts to replace it ensued, resulting in the anticipated opening of the new courthouse in early 2027. Despite all these issues, however, certain members of the local community — including Fort Lauderdale's Historic Preservation Board — have explored the possibility of designating the current courthouse as a historic landmark[38] due to its historical and aesthetic significance. One Fort Lauderdale City Commissioner has called the courthouse "quite stunning, Brutalism at its finest."[39] Whatever the merits of its architectural and historical significance, the functionality, safety, and security concerns will result in the Fort Lauderdale Federal Building and U.S. Courthouse being replaced less than 50 years after its opening. Although few who work in the building will miss it, perhaps one day this classic Brutalist structure on a prime parcel of real estate will be retrofitted for another use befitting its prime location in downtown Fort Lauderdale.

ENDNOTES

1 Judge Grossman is grateful to District Judge William P. Dimitrouleas and Magistrate Judge Lurana Snow for sharing their memories on the history of this courthouse.

2 Act of Mar. 3, 1845, ch. 75, 1845 Stat. 788, § 3, 5.

3 Act of Feb. 23, 1847, ch. 20, 1847 Stat. 131, § 1.

4 Act of July 30, 1962, Pub. L. No. 87-562, 76 Stat. 247.

5 *Id.*

6 *Population and Demographic Data — Florida Products: Census Counts: 1830-2020*, Off. of Econ. & Demographic Rsch. (Oct. 25, 2024), https://edr.state.fl.us/content/population-demographics/data/index-floridaproducts.cfm.

7 Act of June 2, 1970, Pub. L. No. 91-272, 84 Stat. 298, § 10.

8 J.I. Bogart, History of Federal Courts in Florida 4 (1981).

9 Off. of Econ. & Demographic Rsch., *supra* note 6.

10 *Id.*

11 *Id.*

12 Act of Mar. 18, 1966, Pub. L. No. 89-372, 80 Stat. 75, § 2.

13 *History of the Federal Judiciary: Judges: Ted Cabot*, Fed. Jud. Ctr., https://www.fjc.gov/node/1378681.

14 *Id.*

15 *Id.*

16 *History of the Federal Judiciary: Judges: Norman Charles Roettger, Jr.*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/roettger-norman-charles-jr.

17 *Id.*

18 *U.S. District Court, Fort Lauderdale*, Courthouses of Florida, https://courthousesoffllorida.com/courthouse/u-s-district-court-fort-lauderdale/.

19 *William Morgan: Federal Building / United States Courthouse*, 1975-1979, SOSBRUTALISM, https://www.sosbrutalism.org/cms/16448826.

20 Katherine McLaughlin, *Brutalist Architecture: Everything You Need to Know*, Architectural Dig. (July 12, 2023), https://www.architecturaldigest.com/story/brutalist-architecture-101 (quoting Mark Bittoni, principal of Bittoni Architects).

21 Architecture News & Editorial Desk, Brutalist architecture — a retrospective, Architecture & Design (Sept. 5, 2019), https://www.architectureanddesign.com.au/features/list/a-look-at-brutalist-architecture.

22 *Id.*

23 SOSBRUTALISM, *supra* note 19.

24 *Id.*

25 Christopher Eck, Summary Of Discussion Points with Architect William Morgan Regarding the US Courthouse, Fort Lauderdale Interview 1 (2011).

26 *Id.*

27 SOSBRUTALISM, *supra* note 19.

28 *Id.*

29 Eck, *supra* note 25, at 1.

30 *Id.* at 2.

31 *Id.* at 1.

32 *Id.* at 2.

33 *Id.*

34 *Id.* at 3.

35 *Video Shows Flooding Inside Federal Courthouse In Ft. Lauderdale*, CBS News (May 30, 2013, 7:14 PM), https://www.cbsnews.com/miami/news/video-shows-flooding-inside-federal-courthouse-in-ft-lauderdale/.

36 *Man Charged in Federal Court for Destroying Property at U.S. Courthouse and Federal Building in Fort Lauderdale*, U.S. Dep't of Just. (Sept. 8, 2022), https://www.justice.gov/usao-sdfl/pr/man-charged-federal-court-destroying-property-us-courthouse-and-federal-building-fort.

37 Due to space limitations, a federal circuit judge sits in separate space rented by GSA in a commercial building.

38 Matt Hickman, *SOM's Fort Lauderdale Federal Courthouse design wins GSA approval*, Architect's Newspaper (Feb. 4, 2022), https://www.archpaper.com/2022/02/som-fort-lauderdale-federal-courthouse-design-wins-gsa-approval/.

39 *Id.*

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Merchant Cash Advance (MCA)

By now, most local bankruptcy practitioners are familiar with Merchant Cash Advance (MCA) agreements and the challenges those agreements pose in bankruptcy. For those who are newer to practice or have not yet had the experience of dealing with MCAs in bankruptcy cases, an article by Caitlyn Coates and Michael Markham (reprinted with permission) might prove useful. The opinions expressed in that article are those of the authors and do not reflect an official stance by the U.S. Bankruptcy Court for the Southern District of Florida.

For those who wish to dig deeper into the topic of MCAs, the Federal Bar Association published an in-depth study by Tara Trevorrow, Judicial Law Clerk to Judge Mindy Mora, in the Winter 2024 issue of The Federal Lawyer. Link here (subscription required) to that article: https://www.federallawyermagazine.com/fedbar/library/item/winter_2024/4176615/.

Merchant Cash Advance Claims in Bankruptcy

*By Caitlyn Coates and Michael Markham,[1] Guest Contributors**

Merchant cash advances may provide a seemingly immediate fix for a small business struggling with cash flow and who may not qualify for a traditional loan. But is this immediate fix truly a blessing for a struggling business that may not have anywhere else to turn, or is it a more nefarious scheme hiding behind the allure of receiving cash now?

What is a Merchant Cash Advance?

Merchant cash advances are an alternative to traditional financing and are often marketed to small businesses.[2] Typically, a merchant cash advance company will provide a small business with a lump-sum cash payment in exchange for purchasing a percentage of the business's future receivables. In this type of transaction, the business becomes the "seller" or merchant, and the merchant cash advance company becomes the "purchaser." Dissimilar to the hallmark of traditional loans where repayments are made in fixed installments, the basic terms of these agreements provide that the purchaser withdraws a pre-determined amount directly from the seller's account as sales are made and receivables are collected. These pre-determined amounts may be a percentage of sales or a fixed dollar amount. In some agreements, repayment takes the form of automatic ACH withdrawals, giving the purchaser direct access to the seller's bank account. Often, withdrawals are daily or weekly. Consequently, the projected repayment periods are quite short. These short repayment periods can come laden with fees and effectively high interest rates, the high cost of which the seller may not fully realize at the outset of the agreement. Far too often, this rapid rate of payback becomes too much for a small or medium business to sustain, leading it to seek out yet another merchant cash advance to cover its first one.[3] In some cases, this cycle may repeat more than once.

Despite the unsavory repayment terms of these agreements, merchant cash advances have steadily increased in popularity in recent years due to their quick approval process and accessibility.[4] Business owners are usually approved to receive funds from a merchant cash advance company within one or two days. Once approved, the advance is often immediately delivered to the seller. Thus, this alternative to traditional financing provides a fast solution to cash flow or other financing problems a business may have without subjecting it to an extensive approval process.

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How is a Merchant Cash Advance Transaction Characterized in a Bankruptcy Case?

Merchant cash advance transactions are no strangers to the bankruptcy world. In recent years, it seems that most small business debtors under Subchapter V of Chapter 11 have at least one merchant cash advance creditor. Their characterization, along with the determination of the interests of merchant cash advance companies in bankruptcy cases have been the subject of much legal and scholarly discussion.[5] In fact, the issue can arise very quickly in many Chapter 11 cases under the guise of a motion to use cash collateral. Because most MCA Creditors file a UCC financing statement asserting an interest in receivables or other forms of cash collateral, Chapter 11 debtors must often file motions to use the collateral that allegedly secures the merchant cash advance transaction.

What is a Creditor's Interest in a Debtor's Pre-Petition Accounts Receivable?

For a creditor to have an interest in a debtor's pre-petition receivables, the debtor must have receivables as of the petition date. A merchant cash advance company's interest, if any, is subject to competing claims such as those by another creditor of a prior secured debt, like a bank with a blanket UCC lien or an IRS lien.

Bankruptcy Code § 506(a) provides:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

Under § 506(a) of the Bankruptcy Code, where a debtor has little or no receivables (like a restaurant or retail business), there is no value in which an MCA Creditor can assert an allowable secured claim. In a case where a debtor had a significant amount of prior secured debt and petition date receivables of minimal value, the court found the MCA Creditor did not have a secured claim.[6] "There [wa]s no value in the pre-petition receivables to create any allowable secured claim for Creditor."[7] As such, when a debtor has little to no receivables of value to which a security interest can attach, an MCA Creditor likely has no interest in a debtor's pre-petition accounts receivable. Furthermore, even if a debtor does have value in its pre-petition receivables, the MCA Creditor purchased the "future receivables," and arguably still has no secured interest in the pre-petition receivables. Because the MCA Creditor purchased a percentage of future receivables, and typically the pre-determined daily amount is automatically taken from the business' accounts, the buyer has already received its portion of whatever pre-petition receivables the business had.

What is a Creditor's Interest in a Debtor's Post-Petition Accounts Receivable?

In a bankruptcy case, an MCA Creditor may assert that it has a secured claim in a debtor's post-petition accounts receivable. The MCA Creditor would contend that it acquired, pre-petition, the debtor's post-petition accounts receivable. Essentially, the MCA Creditor would be asking the court to rule that the debtor, pre-petition, had the ability to sell an interest in accounts receivable that may or may not come into existence, and if they do, not until post-petition. But if a "[s]ale is the transfer to the buyer of that which is being purchased,"[8] how can a debtor transfer future rights to payment to the MCA Creditor? It simply cannot. Until the rights to a payment arise, there is nothing tangible to be sold. Contemplating this in a practical sense, this is not a present transfer of property. There is nothing presently to transfer in exchange for the cash advance because the debtor does not own the receivables. They do not yet exist.

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Article 9 of the Uniform Commercial Code bolsters and supports this argument. Under U.C.C. § 9-203(b)(2), for a security interest to attach, it is required that a debtor have "rights in the collateral or the power to transfer rights in the collateral."[9] Although U.C.C. § 9-204 permits parties to create a security interest in after-acquired or existing collateral, as the Official Comments to this section explain, § 9-204 "adopts the principle of a 'continuing general lien' or 'floating lien.' It validates a security interest in the debtor's existing and (*upon acquisition*) future assets, even though the debtor has liberty to use or dispose of collateral without being required to account for proceeds or substitute new collateral."[10] Accordingly, until rights to receivables are acquired, an MCA Creditor has nothing more than an unattached security interest.[11] In other words, a merchant cash advance agreement cannot effect a pre-petition transfer or sale of post-petition receivables that were not in existence pre-petition.[12]

The logical next question posited in such a situation is whether, by grant of a security interest or sale, a debtor can effect a post-petition transfer of any interest in post-petition receivables.[13] If a debtor's post-petition receivables are not "proceeds" of pre-petition collateral, the answer is "no." "Proceeds" are defined in U.C.C. § 9-102(64) as: "(A) whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral; (B) whatever is collected on, or distributed on account of, collateral; (C) rights arising out of collateral."[14] Moreover, such proceeds must be identifiable.[15] Therefore, if a debtor's proceeds arise from a service performed post-petition, those proceeds cannot effect a post-petition transfer of an interest in post-petition receivables. If there is no pre-petition perfected interest in collateral, as arguably in any case involving an MCA Creditor, post-petition proceeds cannot be identifiable proceeds of pre-petition collateral.

Is a Merchant Cash Advance Transaction a Loan or True Sale?

Merchant cash advance agreements are products of careful and clever drafting on the MCA Creditor's part in an effort to avoid characterization as usurious loans. Hence, an issue courts are frequently presented with is whether an agreement is a loan in disguise or an actual sale of accounts receivable. The same issue arises in the context of leases disguised as financing arrangements.

It is important to note that the characterization of this type of transaction is a question of state law, as neither the Bankruptcy Code nor federal statute prescribe means for distinguishing between a loan and a true sale.[16] "The deciding factor in the 'sale' versus 'loan' dispute is generally the transfer of risk—if the 'buyer' is absolutely entitled to repayment under all circumstances, then the risk remains with the 'seller' and the transaction is considered a loan."[17] Thus, the economic substance of an agreement rather than its form or terminology, controls this decision.[18]

Courts typically look to three factors in determining whether repayment is contingent or absolute.[19] Such factors are, "(1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy."[20] As is the case with many multi-factor analyses, any one factor alone rarely mandates a certain treatment.[21]

The inclusion of a reconciliation provision in an agreement and the occurrence of actual reconciliations by the debtor typically tip the analysis in favor of finding a true purchase of receivables.22 This is so because of the flexibility a debtor is afforded in its ability to adjust the amount of its daily payment obligation in consideration of actual sales. For example, performing this function is akin to a company adjusting its accounts receivable for uncollected receipts from a sale of merchandise to a customer. Yet, because MCA Creditors can structure their agreements in ways that benefit themselves and push the risk on debtors, the presence of a reconciliation provision in

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an agreement does not always tilt the scale in favor of finding a true purchase. In *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, a reconciliation contained language articulating that the MCA Creditor could adjust the amounts due "at [its] sole discretion and as it deems appropriate." The MCA Creditor retained complete discretion over payment adjustments, and thus, did not assume any risk that it would yield lower revenues than anticipated.

The ability of the debtor to adjust payments does shed light on the second factor. If a debtor can and does adjust the amount of a payment, then the agreement does not have a finite term. The term period changes upon an adjustment of the amount being paid to the MCA Creditor. Fixed terms are a characteristic of loans; whereas indefinite terms suggest the MCA Creditor has assumed the risk of uncollectible receivables.[25]

The third factor focuses on the risk associated with the seller's non-payment. In a true sale, the purchaser bears this risk. Whereas, in the context of a loan, the obligation to repay is absolute. Provisions within these agreements dictating that the debtor's bankruptcy triggers default place a finger on the scale in favor of finding the agreement is in fact a loan. These agreements almost always include one or more personal guarantees that business owners must sign, likewise pointing towards classification as a loan.[26] Provisions such as these suggest that the MCA Creditor has not assumed the risk of loss; rather, the MCA Creditor is absolutely entitled to repayment. It is this very concept of entitlement to absolute repayment that drives the characterization of a merchant cash advance transaction.

Characterizing a transaction as a loan in which a debtor granted a security interest in receivables would not be without problems for an MCA Creditor. Under 11 U.S.C. § 552(a), "property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." In essence, the Bankruptcy Code does not allow a pre-petition interest to extend to property acquired by the debtor post-petition.[27] There is, however, a narrow exception to this general rule in § 552(b) if the buyer demonstrates a connection between pre-petition and post-petition property.[28] As discussed above, a connection is unlikely, for instance, in a case where a debtor provides services.

If the factors weigh in favor of a true sale, any intended transfers of post-petition receivables must have been in accordance with 11 U.S.C. § 363. If any such transfer were made without comporting with the Bankruptcy Code, it would be deemed an unauthorized transfer. Such unauthorized transfers are avoidable according to 11 U.S.C. § 549.[29]

What are the Other Considerations for a Debtor Engaging in a Merchant Cash Advance Transaction?

A bankruptcy court's characterization of a merchant cash advance transaction can be a threshold issue for state law usury claims that could take the form of an objection to a claim or an adversary proceeding in a bankruptcy case. If a transaction is considered a true sale, it is not subject to usury laws.[30] However, if a transaction is considered a loan, then State usury laws are implicated. Depending on the repayment percentage or fixed monthly remittance amount, the interest rates in a merchant cash advance transaction can skyrocket quite readily, far surpassing a State's maximum simple interest per annum. For example, the maximum simple interest rate in Florida for transactions under $500,000 is 18 percent.[31] Therefore, once a court characterizes a transaction as a loan, a debtor may bring a usury claim.[32] Additionally, claims objections may be pertinent. If an MCA Creditor files a proof of claim, a debtor may object to such filing and seek to redesignate the transaction as a loan.[33] Be that as it may, many MCA Creditors do not file proofs of claim to avoid the jurisdiction of the Bankruptcy Court.

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Tax law, accounting standards, and regulatory agencies may provide useful insight to courts for characterizing merchant cash advance transactions. From an accounting standpoint, a traditional loan is recorded on a recipient's books as an increase to cash and the creation of a corresponding loan payable (liability). In a basic sense, as the recipient pays back the loan, it will decrease its cash and the corresponding loan payable, and record interest expense. Alternatively, when a sale occurs, the seller records revenue and the receipt of cash, or if cash was not received, an increase to its accounts receivable. Interestingly, contemplating a merchant cash advance transaction in combination with these two rudimentary concepts, it appears that a merchant cash advance transaction is more akin to a traditional loan transaction.

Yet much of accounting is anything but dealing with rudimentary transactions. An area that the Financial Accounting Standards Board ("FASB") has contemplated is the balance sheet treatment of transferred accounts receivable. Financial Accounting Standards Board Statement 77 ("FASB 77"), "clarif[ies] the circumstances under which a transfer of receivables with recourse should be recognized by the transferor as a loan or, alternatively, as a sale."[34] For a transaction to receive sale treatment, the transferor must "surrender[] control of the future economic benefits embodied in the receivables" to the point where the transferor does not have the option to repurchase the receivables at a later date.[35] In addition, FASB 77 requires that the transferor's obligation under the recourse provisions be reasonably estimable, and it prohibits the transferee from requiring the transferor to repurchase the receivables except pursuant to the recourse provisions.[36] FASB's focus appears to be on determining whether there has been a transfer of the benefits of ownership and predicting actual recourse exposure.[37] Inherently, the accounting profession is concerned with companies' recordkeeping and accurate reflection of their financial positions. Nevertheless, its position on classifications may be a source of support for courts in reaching their own legal determinations on the character of a merchant cash advance transaction.

Takeaways: Risks Potential Sellers Should be Aware of Before Entering into a Merchant Cash Advance Agreement

As merchant cash advance companies continue to rise in popularity and general economic conditions deteriorate, those contemplating entering into an agreement with one would be advised to carefully perform their due diligence. Before turning to a merchant cash advance company for funding, prospective sellers should verse themselves in the other available financing options (or a bankruptcy filing). If, upon performing due diligence on other financing avenues, a merchant cash advance company prevails as the most appealing source of funding, it is crucial that a prospective seller review a tentative agreement with the utmost scrutiny. Remember that merchant cash advance companies often masquerade as nothing more than simple funders of cash up front with reasonable repayment terms. Indeed, this may occasionally prove to be the case, but more frequently, these agreements are laden with harsh and unforgiving terms that may take more of a toll on a business than a traditional loan. In any event, dealing with MCA Creditors can be challenging; nonetheless, a bankruptcy filing will permit a business to more effectively manage merchant cash advance claims within the confines of the Bankruptcy Code.

This article, with footnotes, is available on our website under the new "Guest Contributions" section at https://www.flnb.uscourts.gov/newsletter.

FROM THE JUDGES' CHAMBERS

Honorable A. Jay Cristol Posthumously Honored by Legal Services of Greater Miami

On May 15, 2025, Legal Services of Greater Miami recognized the late Honorable A. Jay Cristol as a true champion of justice by awarding him the Equal Justice Legacy Award. At the same event, Senior Judge Robert N. Scola, Jr. was awarded the Equal Justice Judicial Leadership Award and Tiffani Lee of Holland & Knight was presented with the Equal Justice Leadership Award.

Judge Cristol's longtime friend and fellow bankruptcy judge, Laurel M. Isicoff, presented the award. It was accepted on behalf of the Cristol family by Judge Corali Lopez-Castro, who was appointed following Cristol's retirement.

Judge Isicoff reminded all in attendance that Judge Cristol had led a remarkable life. He passed away on October 21 2024, only three weeks after he celebrated his 95th birthday. And what he did in those 95 years is truly amazing. Judge Cristol was a public servant long before he came to our court, where he served for 37 years. In 1951, he joined the United States Navy as an aviation cadet, earning his Navy Wings of Gold in 1953. During the Korean conflict, Judge Cristol was deployed on an anti-submarine squadron aboard an aircraft carrier. After returning to civilian life, Judge Cristol joined the Naval Air Reserve and in the 1960s he flew operational flights during the Cuban Missile Crisis and volunteer airlift missions to Vietnam.

Even after military service, Judge Cristol continued to fly, both professionally and recreationally. Few people know that he flew air ambulances, transporting the elderly and very ill to hospitals around Florida. And his love of flying remained throughout his life, and he continued flying solo into his early 80s and, with a co-pilot, into his 90s. Judge Cristol also taught at the Naval College well after he retired from the Naval Air Reserves. Judge Cristol was also a founding member of the National Museum of Naval Aviation at the Naval Air Station in Pensacola, Florida and a founding member of the Wings Over Miami Air Museum in Miami, Florida.

On the bench, Judge Cristol was well known for his profound sense of fairness and compassion. It was important to him that everyone who appeared before him (lawyers, clients and pro se parties) felt seen and heard. And, he will always be remembered for his commitment to the cause of pro bono service. Judge Cristol encouraged all bankruptcy attorneys to include pro bono service as a regular part of their practice, and his legacy of pro bono work lives on at the bankruptcy pro bono clinic at the University of Miami School of Law. Judge Cristol was instrumental in establishing and funding the clinic with a permanent endowment to what is now known as "The Eleanor R. Cristol and Judge A. Jay Cristol Bankruptcy Pro Bono Assistance Clinic". Hundreds of students have already participated in the clinic program and gone on to be pro bono champions themselves, and each year the number of new lawyers with an appreciation for pro bono service continues to grow.

Monica Vigues-Pitan, Executive Director of LSGM, Hon. Corali Lopez-Castro, Hon. Laurel M. Isicoff

Monica Vigues-Pitan, Tracy Nichols, Tiffany Lee, Judge Roy K. Altman, Judge Robert N. Scola, Judge Corali Lopez-Castro, Lilly Ann Sanchez (co-chair of the event), Judge Laurel M. Isicoff, Karen Lapekas (co-chair of the event)

New Fort Lauderdale Courthouse Construction Update

On November 8, 2023, dignitaries gathered on the site of the new federal courthouse in Fort Lauderdale for the ceremonial groundbreaking event. The new 11-story building [255,000-gross-square-foot] federal courthouse will be located at N.E. 3rd Avenue and Southeast 11th Street in Broward County (south of the Tarpon River). The courthouse will include twelve courtrooms and seventeen judges' chambers and will support workspace for the 11th Circuit Court of Appeals, U.S. District Court, U.S. Bankruptcy Court, and several other federal agencies, including the U.S. Marshals Service, the U.S. Attorney's Office, and U.S. Probation and Pretrial Services. Substantial completion is expected in November 2026, with a phased-in occupancy beginning in January 2027.

A significant amount of work has since been completed, including "topping off." In building construction, topping off is when the last steel beam is placed at the top of a structure during its construction. A topping off event was held on May 20, 2025. Additionally, the concrete slabs for all 11 floors have been poured, and the exterior precasts are currently being installed.

[Image of site on June 6, 2024]

(Continued on page 23)

New Fort Lauderdale Courthouse Construction Update (continued from page 22)

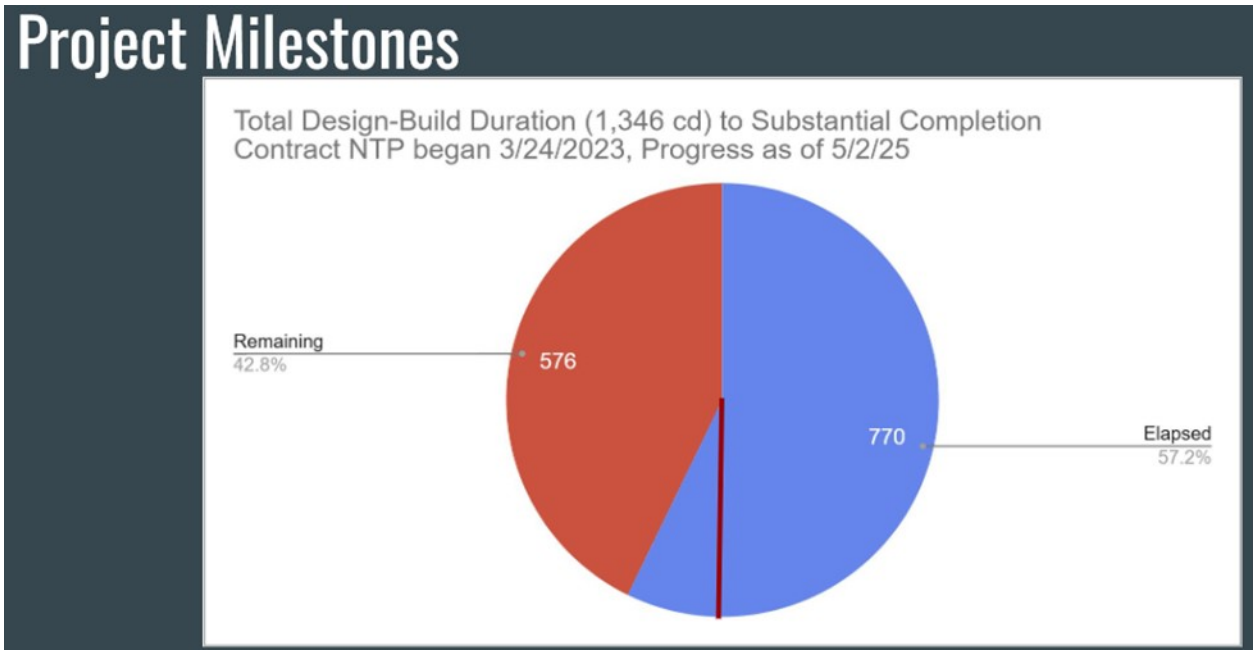
[Image of site on February 21, 2025]

[Image of site on April 24, 2025]

(Continued on page 24)

New Fort Lauderdale Courthouse Construction Update (continued from page 23)

[Image of site on June 17, 2025]



PACER: Multifactor Authentication Tips

By: Cameron Cradic, Chief Deputy Clerk

The PACER Service Center will randomly require those with a PACER e-filing credential to enroll in Multifactor Authentication (MFA). **By the end of this year, it will be a PACER requirement.** Now is a good time to consider the following information and helpful tips.

- MFA uses an authenticator application (app). The following "Resources" link provides details on setup and use: https://pacer.uscourts.gov/announcements/2025/05/02/multifactor-authentication-coming-soon.
- **Attorneys are encouraged to have staff members who e-file on their behalf to sign up for a Filing Agent credential. To do so, click the following link:** https://pacer.uscourts.gov/register-account/non-attorney-filers-cmecf.
- Users with filing privileges and other CM/ECF-level access types are encouraged to enroll in MFA at their earliest convenience to preserve uninterrupted access.
- **PACER support is available, and their contact information is below.**

PACER

Multifactor Authentication Now Available

Multifactor authentication (MFA) is now available for PACER and CM/ECF. PACER account users with filing and all other types of CM/ECF-level access are required to enroll in MFA and are encouraged to do so at their earliest convenience. MFA enrollment is optional for users with PACER-only access, but it is strongly recommended.
Users with CM/ECF-level access who do not voluntarily enroll will be randomly selected to enroll starting in August. By the end of 2025, everyone with CM/ECF-level access must use MFA when logging in.

Updated documentation and learning aids are available.

NOTE: If using third-party software for filing, users should ensure MFA is supported by that software before enrolling in MFA to avoid any disruption in their business processes. If you have any questions, please contact the PACER Service Center at pacer@psc.uscourts.gov or (800) 676-6856. The PACER Service Center hours of operation are Monday through Friday, 8 a.m. to 6 p.m. CT.

Protecting Privacy for Filings

Documents filed in bankruptcy cases, including Proofs of Claim and adversary proceedings, are publicly available under most conditions, and each filer maintains sole responsibility for the document(s) submitted electronically via CM/ECF. As such, ensure that personally identifiable information, commonly referred to as "PII," is redacted from public filings to guard against potential identity theft. The following are specified in Bankruptcy Rule 9037, Protecting Privacy for Filings:

- The last four digits of a Social Security number and a taxpayer identification number;
- The year of the individual's birth;
- The minor's initials; and
- The last four digits of the financial-account number.

Exemptions from the redaction requirement pursuant to Bankruptcy Rule 9037(b) are:

- A financial account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- The record of an administrative or agency proceeding, unless filed with a proof of claim;
- The official record of a state-court proceeding;
- The record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- A filing covered by (c) [*filings made under seal*]; and
- A filing subject to §110.

The rule also contains additional information regarding seal filings, waivers of protection of identifiers, motions to redact a previously filed document, and restricting public access.

UPCOMING COURT HOLIDAY CLOSINGS *

Thursday, June 19 - Juneteenth Independence Day
Friday, June 20 - See General Order 2025-01
Friday, July 4 - Independence Day
Monday, September 1 - Labor Day

*Any additions to the court closing schedule are announced by General Order and posted on the court website

COURT MISSION STATEMENT

To promote public trust and confidence in the administration of bankruptcy cases:
- through easy access to comprehensible, accurate information about the court, its procedures, and records;
- by the efficient, respectful, and dignified conduct of business at all levels of the court, clerk's office, chambers and courtroom;
- through adjudication of bankruptcy cases by a fair and impartial tribunal that is designed to provide relief to the honest debtor, equitable distribution of available assets to creditors, and preservation of jobs and value through successful business reorganizations.

CONTACT "COURTHOUSE BEACON NEWS" PUBLICATION STAFF

If you have any comments regarding this issue or want to suggest ideas for future articles, please contact "Courthouse Beacon News" staff at the following email address: Dania_Muniz@flsb.uscourts.gov.

Please do not use the above email address to file or send papers to the court or to ask questions about court procedure or status of a particular case. Contact the clerk's office at any of the following numbers for assistance in these matters.

Visit the court website www.flsb.uscourts.gov for local filing information. Thank you.

Miami: (305) 714-1800
Ft. Lauderdale: (954) 769-5700
West Palm Beach: (561) 514-4100

Please Note:
Clerk's office staff is not permitted to give legal advice.