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New York Law Journal

How New York's Appellate Departments Examine Revenue Purchase Agreements

By Jacob H. Nemon

March 9, 2026

March 15 will be the eighth anniversary of the First Department's decision in *Champion Auto Sales, LLC v. Pearl Beta Funding, LLC*, 159 A.D.3d 507 (1st Dept. 2018), the first New York intermediate appellate court to determine—albeit with little substantive analysis—that a revenue purchase agreement (RPA), also known as a merchant cash advance, was not, and could not be, criminally usurious because it was not a loan.

Since Champion Auto, RPA litigation has exploded in New York lower courts. A veritable body of caselaw guiding the substantive analysis of what constitutes a loan versus purchase of future receivables has developed in three of four Appellate Division departments. This survey of the cases will assist both litigators in their arguments and transactional attorneys refining their RPAs.

RPA Transactions

In an RPA, the funder purchases the "purchased amount" of a merchant's future receivables at a discount "purchase price," and the merchant remits the purchased amount to the funder as a "specified percentage" of its daily, weekly or monthly receivables until the full purchased amount is delivered. As a convenience, the parties agree to a "remittance amount" that is as a good faith estimate of the specified percentage of the merchant's

average daily, weekly or monthly receivables in the period prior to funding.

To constitute an RPA, the remittance amount must be subject to reconciliation (sometimes referred to as adjustment) at the request of the merchant if its average receivables fluctuate, in order to reflect the specified percentage of the changed average receivables. In other words, the remittance amount must be capable of being tied to the actual receivables if business slows down—which could indefinitely delay the period over which the purchased amount is delivered—and reduced to zero if the business completely fails.

While the RPA transaction structure is straightforward, it is routinely challenged by merchants arguing that their agreement is really a disguised loan, and as such, should be subject to

New York's criminal usury cap of 25% interest per annum. If they succeed in their arguments, criminal usury is a complete defense to enforcement.

Second And Fourth Departments

In *LG Funding, LLC v. United Senior Props. of Olathe, LLC,* 181 A.D.3d 664, 666 (2d Dept. 2020), the Second Department developed a three-factor test for determining if an agreement is an RPA or a loan, that has been the authoritative test there and in the Fourth Department for six years: (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. See *True Bus. Funding, LLC v. Guerrero A Constr. Corp.,* 239 A.D.3d 787, 788 (2d Dept. 2025); *Bridge Funding Cap LLC v. SimonExpress Pizza, LLC*, 240 A.D.3d 1186, 1188-89 (4th Dept. 2025); *Samson MCA LLC v. Joseph A. Russo M.D. P.C.,* 219 A.D.3d 1126, 1128 (4th Dept. 2023); *Principis Capital, LLC v. I Do, Inc.,* 201 A.D.3d 752, 754 (2d Dept. 2022). This test has also been adopted by the Second Circuit. *Fleetwood Servs., LLC v. Richmond Capital Grp. LLC*, 2023 U.S. App. LEXIS 14241, at *3 (2d Cir. 2023).

LG Funding found an issue of fact whether the agreement's reconciliation was illusory. That is, whether, upon request of the merchant, it was left to the discretion of the funder to reconcile the remittance amount or a mandatory contractual right of the merchant. LG Funding also found a question whether the provision making bankruptcy an event of default or allowing the plaintiff to enforce a personal guaranty demonstrated it was a loan.

However, in the four recent state cases cited above, the Second and Fourth Departments have strictly applied the three-factor test—and not any other factors—in concluding that the RPAs unequivocally were legitimate purchases of receivables.

In a recent decision (wherein this author represented the funder), the Second Department added a caveat onto the first factor. To challenge the reconciliation factor, the merchant must produce nonconclusory evidence that it actually engaged in the RPA's reconciliation process or court review will be precluded. *Apollo Funding Co. v. Dave Reilly Constr., LLC*, 241 A.D.3d 1508, 1509 (2d Dept. 2025). Courts should not engage in hypothetical questioning whether the RPA funder would have granted reconciliation requests if the merchant does not itself demonstrate it had diminished receivables and was denied its rights. A merchant that never invoked reconciliation cannot later claim it was illusory.

The Second and Fourth Departments have repeatedly held that agreements that fail the three-factor test may be recharacterized. In *Crystal Springs Capital, Inc. v. Big Thicket Coin, LLC*, 220 A.D.3d 745, 747 (2d Dept. 2023), the agreement was held to be a loan because the funder "was 'under no obligation' to reconcile the payments… ."

In *Oakshire Props., LLC v. Argus Capital Funding, LLC,* 229 A.D.3d 1199, 1201 (4th Dept. 2024), the funder's motion to dismiss was denied for failing each of the three factors: (i) the reconciliation "provision appears illusory inasmuch as [funder] may not be subject to any consequences for failing to comply with its terms and, further, [funder] has sole discretion to adjust the amount of the daily payments[,]" (ii) "there was an implied finite term in the agreement inasmuch as plaintiffs allege that the daily payment amount was set to ensure that [funder's] targeted return would be met in a predetermined period of time…[,]" and (iii) the funder "had a means of recourse in the event [merchant] went out of business inasmuch as the agreement allowed [funder], in its sole discretion, to continue making daily payment withdrawals even if the daily payment amount exceeded [merchant's] sales…"

Recently, two dissenting justices of the Fourth Department signaled they would apply a different test: "the more appropriate test under these circumstances—where the parties agree to a fixed daily or weekly payment as an 'estimate' of revenue—is to evaluate: (1) whether the 'estimate' of the defendant's revenue is reasonably based upon the defendant's prior accounts receivable or anticipated future earnings (rather than simply conjured from the void); and (2) not whether a reconciliation provision exists, but whether it is illusory—that is, whether there is an actual, practical ability for the defendant merchant to reconcile and adjust the amount owed based on actual revenue." *Bridge Funding Cap*, 240 A.D.3d at 1191.

This dissent did not address who bears the burden of proof under their proposed test. For example, if the merchant executes an RPA representing that the remittance amount reflects a good faith estimate of the specified percentage of its past receipts, would the merchant bear the burden of marshalling evidence why it should not be bound by its representations or the funder have to show evidence from its underwriting process of how the numbers were reached?

On the second factor, would these dissenters require—as the Second Department did in Apollo Funding—that the merchant demonstrate that it engaged in the reconciliation procedure or be precluded from challenging whether it is illusory?

First Department

While the First Department was first to hold an RPA was not a loan in Champion Auto, it never adopted or rejected the three-factor test, despite consistently citing LG Funding with approval. Instead, the First Department weighs case-specific allegations.

In two cases involving the same notorious funder, the First Department looked past whether the agreements met the formal requirements for an RPA, such as the presence of reconciliation provisions. *People v. Richmond Capital Grp. LLC*, 2026 N.Y. Slip Op. 00990 (1st Dept. Feb. 19, 2026); *Davis v. Richmond Capital Grp., LLC*, 194 A.D.3d 516, 517 (1st Dept. 2021).

Instead, the court considered evidence or allegations that the funder refused to permit reconciliation, required daily payments that did not represent good faith estimates of receivables, had agreements making bankruptcy an event of default or made repeated nonpayment an event of default, or had provisions authorizing collection on personal guaranty in the event of the merchant's inability to pay or bankruptcy.

In *Kapitus Servicing, Inc. v. Ragtime Gourmet Corp.,* 242 A.D.3d 638, 638-39 (1st Dept. 2025), the court denied summary judgment. finding one factor weighing against the agreement was a guaranty granting a security interest in all personal property in the event of a default. On the other hand, the court found the agreement's provision that ensures only a percentage of the merchant's daily receipts is collected each day weighed against any determination that it may be a loan.

Third Department

The Third Department does not appear to have addressed RPAs in any published opinions. However, it is a matter of time before a decision comes down adopting the three-factor test of the Second and Fourth Departments, the case-specific approach of the First Department, or fashion another test along the lines of the Bridge Funding dissent.

Given the volume of RPA litigations in New York State courts, there will certainly be more refinement of these tests by the Appellate Divisions. And possibly by the Court of Appeals as well.

After the submission date for this article, the First Department adopted the *LG Funding* three-part test in *Kapitus Servicing, Inc. v. Suburban Waste Servs., Inc.*, 2026 N.Y. Slip Op. 01127 (1st Dept. Feb. 26, 2026).

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