



February 16, 2024

FTC OBTAINS \$20.3 M JUDGEMENT AGAINST MERCHANT CASH ADVANCE OPERATOR

The United States District Court for the Southern District of New York, in a case brought by the Federal Trade Commission ("FTC"), entered a Final Judgement against Merchant Cash Advance ("MCA") operator Jonathan Braun for \$3,421,067 for monetary relief to address harm caused to small businesses and \$16,956,000 as a civil penalty. The Final Judgement followed a three day jury trial in January of 2024.

After a summary judgment order issued in September of 2023, three issues remained for trial: (i) the amount of money that should be awarded to the FTC under the Federal Trade Commission Act ("FTC Act") in order to redress the injury to consumers resulting from Braun's violation of Section 521 of the Gramm Leach Bliley Act ("GLB Act") (discussed below); (ii) whether Braun knowingly violated the GLB Act such that it would be proper to impose civil penalties under Section 5 of the FTC Act; and (iii) if Braun acted knowingly. Prior to trial the parties agreed that although the first and third issues were legal issues for the court to decide, the jury would be presented all three issues and render a verdict that would be advisory on the amount of civil penalties and damages but that would be binding on the issue of whether Braun acted knowingly. The jury returned a verdict finding Braun knowingly violated the GLB Act and owed \$3,500,000 in damages and \$7,500,000 in civil penalties. In the Final Judgement, the court stated it gave some weight to the jury's recommendation to award the FTC \$3,500,000 in damages and \$7,500,000 in civil penalties, but the court determined for itself the appropriate damages. The court indicated that its civil penalty determination was influenced by facts not presented to the jury, including prior criminal convictions.

In the original case the FTC alleged that Braun made false and misleading statements that violated Section 5(a) of the FTCA and engaged in unfair acts or practices in violation of Section 5(a) of the FTCA in regard to threats to induce payment, the misuse of confessions of judgement, unauthorized withdraws from bank accounts and making false statements to obtain bank account information. The FTC alleged that Braun violated Section 521(a) (2) of the GLB Act. Section 521(a) makes it unlawful "for any person to obtain or attempt to obtain...customer information of a financial

institution relating to another person...by making a false, fictitious, or fraudulent statement or representation to a customer of a financial institution." The FTC alleged that Braun violated this provision by making false representations about the MCA Agreements--namely that defendants would collect a specified amount from customers and customers would receive a specified lump sum upfront--in order to obtain customers' bank account information to make withdrawals. Braun did not dispute the underlying facts of the FTC's theory. Braun argued that Section 521 was not intended reach this type of misconduct.

The court ultimately found Braun liable on all claims asserted by the FTC. The court entered a summary judgement order against Braun and his co-defendants in September of 2023. In the order the court stated that the undisputed facts established that Braun violated Section 5(a) of the FTC Act and Section 521 of the GLB Act, by both underpaying how much borrowers were entitled to receive from his company and by overcharging how much borrowers were supposed to repay. Braun and his co-defendants entered into MCA Agreements with small businesses, in which defendants provided these customers with upfront lump-sum amounts in exchange for the right to collect the customers' future receivables until defendants recouped a contractually specified amount of money. The contractual agreements provide that customers would agree to permit direct debits and credits to their bank accounts, give information about their bank accounts, grant a lien on their properties and sign Affidavits of Confession of Judgment. The court found there was evidence that Braun and his co-defendants regularly failed to adhere to the contractual terms of the MCA Agreements, required customers to agree to contractual terms that conflicted with representations that defendants made on their website, and over-debited customers' bank accounts, withdrawing daily amounts even after the customer had fully repaid the amount that defendants were contractually owed. The court denied summary judgement as to damages determining there were factual issues to be resolved prior to awarding damages.

The court found that although the advertised terms of the MCAs included no personal guaranty or collateral and no upfront costs, in actuality personal guaranties were often required and upfront fees were charged and deducted from the lump sum payment. The court also found the defendants made threats against customers in order to make collections, inflicting emotional and financial harms upon

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businesses and their owners and defendants made unauthorized daily withdrawals from customers' accounts.

The court entered a permanent injunction against Braun, in October of 2023, that (i) banned Braun from marketing or collecting on certain financing products or engaging in debt collection activities; (ii) prohibited Braun from making various misrepresentations regarding any product or service; (iii) prohibited Braun from making charges without consumers' express, informed consent; (iv) required Braun to remove all negative information from consumers' credit reports; (v) prohibited Braun from obtaining consumers' financial information by using false, fraudulent or fictitious statements or otherwise violating the GLB Act; and (vi) prohibited Braun from disclosing, using or benefitting from customer information of any person that was obtained before the entry of the order in connection with their marketing and sale of mortgage assistance relief services.

The case illustrates the importance of reviewing marketing and websites to ensure that they accurately reflect the terms offered. In addition, MCA agreements must accurately reflect the terms of the arrangement and the actual operational practices. The decision highlights the level of scrutiny given to business to business transactions in which the business is a small business. Thus, companies entering into MCAs with small businesses must ensure that all marketing, websites and agreements are understandable and accurately reflect the arrangement being made.

If you have questions or want agreements, marketing or websites reviewed, please contact us.

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