

Loving or Hidden Figures: **Collection Account Management Agreements**

Materials Presented to
Feig Law and Robins Kaplan LLP
MCLE Marathon

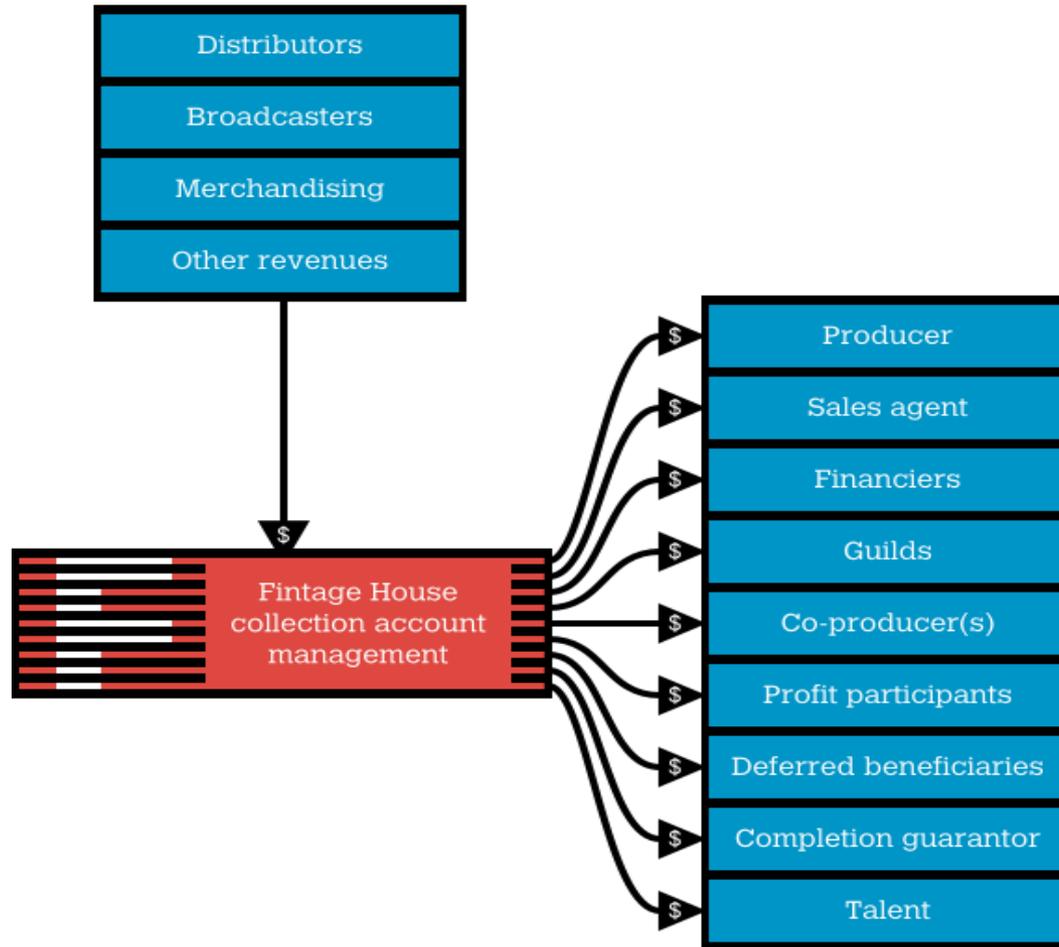
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What is a CAMA?

- Collection Account Management Agreement
- Distribution, Merchandising, Other Proceeds Assigned to CAMA Manager to Protect Participants
 - Fintage House
 - Freeway Entertainment Group
- Payment Waterfall to Participants
- Claims by Assignor Creditors vs. Participants

Payment Waterfalls



Is it a trust agreement?

- Common law trust requires:
 - (a) a manifestation of intent to create a trust by the settlor,
 - (b) property that is held by the trustee (the trust “corpus” or trust “res”), and
 - (c) an identified beneficiary.
- intent to create a trust must be “clear and unequivocal” or “definite and particular.”
- No particular form, phraseology, or formal language is required
- the words “trust,” or “trustee” are not indispensable but mere use of the term “trust” does not, however, conclusively establish such intent

Is it a trust agreement?

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- Courts apply an objective rather than a subjective test and analyze the following factors:
 - The terms and overall tenor, the surrounding circumstances, the parties' conduct, the purpose of the transaction, the ease or difficulty of ascertaining possible trust purposes and terms;
 - The specificity or vagueness of the possible beneficiaries and their interests, the scheme of distribution provided by the CAMA, the relationship between the parties; and
 - Whether the result of construing the CAMA as a trust or not would be such as a person in the situation of the producer would be likely to desire.

Is it a security agreement?

- A “security agreement” is an agreement that creates or provides for an interest in personal property that secures payment or performance of an obligation. UCC §9102(a)(73); UCC §1201(b)(35).
- An express grant of a security interest is not required
- No particular language is required
- Focus is on the intent of the parties “to secure an obligation.”

What did the parties intend?

- Did the owner divest itself of all rights to the proceeds forever? The parties to the CAMA are often referred to as beneficiaries and the Manager is often directed to hold the proceeds in “trust.” Do the beneficiaries receive payments forever?
- Or did the owner intend to grant a security interest in the project proceeds to secure the obligation to pay the parties contracted with, leaving the owner with the balance of the proceeds after all the other parties are paid in full.
- The parties to the CAMA did not want the producer to control the proceeds until they are paid in full, which is why they insisted on the CAMA and the Manager collecting the proceeds directly from the distributor.

If the CAMA is a security agreement, are the participants' rights protected?

- A security interest must “attach” to the collateral to be enforceable between the debtor and the creditor. To have priority as against other secured parties, including a trustee or debtor in possession in a bankruptcy case, the security interest must also be “perfected.”
- A security interest attaches when: (a) value is given; (b) the debtor has rights in the collateral (or the power to transfer rights in the collateral to the secured party); and (c) the debtor “authenticates” the security agreement . UCC §9203. “Authenticate” means to sign, execute or otherwise adopt with the intent to identify the person and accept the record.

Protecting the CAMA by perfecting the security interest

- A security interest is “perfected” when it has attached and the requirements for perfection under the UCC are satisfied. UCC §9308(a).
- Generally, perfection is done by filing a financing statement with the secretary of state for the state in which the debtor is located/organized. UCC §9310. Sometimes, perfection occurs automatically upon attachment. UCC §9309. With respect to certain collateral, perfection requires “control” over the collateral. UCC §9314.
- Priorities are: (a) a perfected security interest takes priority over an unperfected security interest and (b) as among more than one perfected security interest, the first to file a financing statement or otherwise perfect will prevail. UCC §9322.

If the CAMA is a security agreement, are the participants' perfected under the UCC?

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- Perfection depends on the type of collateral. Proceeds of a distribution agreement that are assigned to the will likely take one of three UCC forms: an account, a general intangible, or a deposit account.
- “Account” is a right to payment of a monetary obligation, whether or not earned by performance, for property that has been or is to be sold, leased, licensed, assigned or otherwise disposed of. The proceeds that are the subject of most CAMAs are the proceeds from the distribution licensing of the project.
- Filing a UCC 1 Financing Statement perfects a security interest in an account

If the CAMA is a security agreement, are the participants' rights protected under the UCC?

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- General Intangible

- A “general intangible” under the UCC is the catch-all category that covers all intangible assets that are not included in other categories. UCC §9102(42).
- While a secured party may take possession to perfect a security interest in certain forms of tangible personal property like goods, instruments, money, tangible chattel paper and tangible negotiable documents (UCC §9313), the UCC requires the filing of a financing statement to perfect a security interest in collateral that is not tangible like general intangibles. UCC §9310.

If the CAMA is a security agreement, are the participants' rights protected under the UCC?

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- Deposit Account

- The proceeds received by the CAMA Manager are usually deposited into an account at a bank in the name of the CAMA Manager. Thus, the participants' collateral that secures the payment and performance of the producer may also be considered a “deposit account” under UCC 9102(a)(8) and §9102(a)(29).
- Perfection in a deposit account requires “control” by the secured party. UCC §9312(b)(1). UCC §9104(a) defines “control” as (i) the secured party is the bank with which the deposit account is maintained, (ii) the debtor, secured party and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or (iii) the secured party becomes the bank's customer with respect to the deposit account, i.e., the account is in the secured party's name.

Who can file the UCC 1 Financing Statement or Otherwise Perfect?

- Each CAMA participant (secured party) can file or obtain control to perfect the security interest that secures the obligations owed to that participant.
- Arguably, the CAMA manager acting as the representative of all the participants (secured parties) also may file a financing statement or obtain control to perfect on their behalf. Priorities are controlled by the CAMA.
- The CAMA participants need to change provisions that disclaim any duty or liability of the CAMA Manager to file a financing statement or perfect.
- Does the Manager acting as a “double agent” for participants and the owner/producer make the CAMA an escrow agreement rather than a trust or security agreement?

If the owner/producer files bankruptcy, how will the CAMA be attacked? Can it be “Blown Up?”

- The participants are unsecured creditors that share pro rata with all other unsecured creditors
 - The participants will argue the CAMA is a valid trust. This leaves the proceeds outside of the bankruptcy estate under section 541 of the Bankruptcy Code and they cannot be used by the debtor or trustee.
 - As a lien creditor, the debtor or trustee will argue that the CAMA is not a valid trust but a disguised security agreement and the secured parties/participants failed to perfect their security interests. This can allow the debtor/trustee to use the CAMA proceeds in the bankruptcy case.
 - Did the participants perfect their security interests on the deposit account in which the distribution proceeds are located?

If the producer files for bankruptcy protection, how will the CAMA be attacked? Can it be “Blown Up?”

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- Is the CAMA an executory contract that can be assumed or rejected under section 365 in the bankruptcy case?
 - The characterization of the CAMA as a trust, security agreement or executory contract can be critical.
 - Courts look beyond form to the economic substance. Where an agreement is in substance a security agreement, it is a financial accommodation contract that cannot be assumed under section 365.
 - If the producer’s only significant obligation is instructing the distributors to deposit proceeds directly into the CAM, the CAMA likely will not be considered an executory contract that can be rejected. If he has more to do, it may be executory.

If the producer files for bankruptcy protection, how will the CAMA be attacked? Can it be “Blown Up?”

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- The CAMA as an avoidable preferential transfer under section 547 of the Bankruptcy Code:
 - (i) a transfer of an interest of the debtor in property, (ii) to or for the benefit of a creditor, (iii) on account of an antecedent debt, (iv) when the debtor is insolvent, (v) made within 90 days of the bankruptcy filing, and (vi) such transfer allows the creditor to receive more than he would have under a chapter 7 liquidation, had the transfer not occurred. Preferential transfers include the granting by the debtor of a security interest in favor of a creditor.
 - The owner/producer’s execution of the CAMA, payment assignments, payment directives and granting of security interests may qualify as preferential transfers.

If the producer files for bankruptcy protection, how will the CAMA be attacked? Can it be “Blown Up?”

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- The CAMA as an avoidable fraudulent transfer
 - Section 548 of the Bankruptcy Code and analogous provisions of the Uniform Fraudulent Transfer Act in most states apply to two kinds of fraudulent transfers
 - 1. A transaction in which the owner/producer intends to hinder, delay, or defraud creditors. Courts infer fraudulent intent from the circumstances and indicia surrounding the transaction.
 - 2. A “constructive” fraudulent transfer is a transfer made or obligation incurred (i) for which the debtor-producer did not receive reasonably equivalent value in exchange, and (ii) (a) made while the producer was insolvent, (b) made while the producer was engaged in business or a transaction for which the producer’s remaining property was an unreasonably small capital, (c) where the producer intended or believed that it would incur debts beyond its ability to repay, or (d) made such transfer for the benefit of an insider, under an employment contract, and not in the ordinary course of business.