IS IT CREDIT?

JIM HAWKINS*

ABSTRACT

Earned wage access companies advance money to workers based on wages they have already earned but have not yet been paid. Then, one of three things happens to reimburse the earned wage access provider: (1) the worker's employer sends the provider money directly, (2) the provider withdraws money from the worker's bank account on payday, or (3) nothing. The last of these is the most interesting. If the earned wage access provider does not receive the funds from the worker's employer or bank account, the worker just walks away. Even more remarkable, many providers do not charge any mandatory fees to use the product.

Earned wage access companies say they serve as an alternative to high-cost, short-term credit providers, such as payday lenders and pawnshops, but some consumer advocates and scholars see these transactions as payday loans in disguise. They have different packaging, critics assert, but the same substance, so federal and state lending laws should govern them. Earned wage access follows a centuries-long trend of products that look a lot like credit in some ways but not in others. Unfortunately for regulators, courts, and businesses, the academic literature on consumer credit does not give us a test or set of factors to assess the most fundamental question: Is it credit?

This Article takes up that task.

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* Alumnae College Professor in Law, University of Houston Law Center. I am grateful for feedback on this Article from Kellen Zale, Aman Gebru, Emily Berman, David Kwok, Leah Fowler, David Dow, and Joe Sanders, and from presentations of this topic to over two hundred state and federal judges in San Diego and Miami at the Law and Economic Center's Manne Madness Regional and Championship Tournaments. For exceptional research assistance, I thank Ana Calleja.

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INTRODUCTION

Every few years, a new consumer financial product emerges that does not fit neatly into traditional definitions of credit.[1] Companies started offering rent-to-own contracts in the 1980s[2] and payday lending in the 1990s,[3] and Property-Assessed Clean Energy (PACE) financing[4] and income sharing agreements (ISAs) gained popularity in the twenty-first century.[5] Each time, the innovators argued these credit or credit-like products were not actually credit.[6]

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1. *See* Adam J. Levitin, *The New Usury: The Ability-to-Repay Revolution in Consumer Finance*, 92 GEO. WASH. L. REV. 425, 445 n.119 (2024) ("The problem is that because usury laws are so clear, they create an incentive for businesses to come up with transactional workarounds.").

2. *See* James P. Nehf, *Effective Regulation of Rent-to-Own Contracts*, 52 OHIO ST. L.J. 751, 755 & n.19 (1991).

3. *See* Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 861-62 (2007).

4. *See* Prentiss Cox, *Keeping Pace? The Case Against Property Assessed Clean Energy Financing Programs*, 83 U. COLO. L. REV. 83, 103 (2011).

5. *See* Emily Rosenman, Dan Cohen, Tom Baker & Ksenia Arapko, *Promises and Profit in "Debt-Free" Higher Education: The Geographies of Income Share Agreements in the United States*, 112 ANNALS AM. ASS'N GEOGRAPHERS 2305, 2307 (2022) (income sharing agreements).

6. For a discussion of the debate over rent-to-own contracts, see Jim Hawkins, *Renting the Good Life*, 49 WM. & MARY L. REV. 2041, 2048 (2008) ("A debate has raged for years about whether rent-to-own transactions are leases or credit sales. Traditionally, academics have allowed this debate to consume the discussion of renting-to-own." (footnote omitted)). For payday loans, see *Clement v. Amscot Corp.*, 176 F. Supp. 2d 1292, 1300 (M.D. Fla. 2001) ("This Court is unaware of any prior interpretations by the staff definitively making payday loans part of credit as that term is defined by the [Truth in Lending Act (TILA)] and Regulation Z. This case presents a situation in which no final commentary addressing payday loans existed prior to the final March 2000 revision which made payday loans part of credit under the TILA and Regulation Z. There is no question that in Florida the effect of the TILA and Regulation Z has been unclear with respect to those properly registered under Chapter 560 of the Florida Statutes."). For PACE financing, see FortiFi, Inc., Letter from Christopher A. Ward, Chief Executive Officer, FortFi, Inc., to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau 59 (July 26, 2023), https://www.regulations.gov/comment/CFPB-2023-0029-0108 [https://perma.cc/DZF9-3T4M] ("A homeowner who voluntary agrees to the imposition of a PACE assessment does not thereby become 'indebted' to the local taxing authority; if the homeowner sold the house the day after the transaction was consummated, that 'natural person' would never owe a penny. Accordingly, PACE assessments do not involve the right of a 'natural person' to 'incur debt and defer its payment.'"). For income sharing agreements, see MORRISON & FOERSTER LLP, REGULATORY TREATMENT OF EDUCATIONAL ISAS UNDER FEDERAL AND SELECT STATE CONSUMER CREDIT STATUTES 1 (2019), https://assets.contentstack.io/v3/assets/blt5775cc69c999c255/blt4c6d242934db68c2/190408-regulatory-educational-consumer-credit-statutes.pdf [https://perma.cc/TC6G-J36W] ("ISAs should not be viewed as 'credit' for purposes

This phenomenon is not limited to the last century. Further back, Islamic finance scholars developed mechanisms to offer financing that complied with the Qur'an's prohibition on charging interest,[7] and Italian bankers acted as "fee bankers" instead of lenders in the Middle Ages to avoid the Catholic Church's prohibition on interest.[8] In just the last few years, Buy Now, Pay Later (BNPL)[9] and virtual rent-to-own products[10] have captured the attention of academics and regulators by skirting the fringes of traditional lending.

The script reads the same way every time.[11] A new product emerges, often generated by some new technology. The product's developers say the product is not credit and therefore outside the scope of lending laws. Consumer advocates, plaintiffs' lawyers, and concerned policymakers respond that the product is credit and covered by existing law. Lawsuits or legislation ensue to answer the basic question: Is it credit?

The answers are rarely satisfying, and new products emerge as soon as the ink dries on the last set of legislation or judicial

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of federal and state laws because 'credit' generally involves an unconditional obligation to repay.").

7. *See* CHARLES R. GEISST, BEGGAR THY NEIGHBOR: A HISTORY OF USURY AND DEBT 276-77 (2013); *see also* Scheherazade S. Rehman, *Globalization of Islamic Finance Law*, 25 WIS. INT'L L.J. 625, 634-35 (2008) ("*Murabaha* works essentially as follows: in the Western financial tradition, if a person wishes to finance the purchase of an item, he or she goes to the bank and asks for a loan at a set rate of interest, which is paid back over time. The bank typically gets a lien on the item until it is paid off. With *murabaha*, the bank buys the item and then 'sells' it to the customer at cost plus. The 'plus' is the bank's profit, and works the same as a rate of interest.").

8. *See* GEISST, *supra* note 7, at 69-70; *see also id.* at 4 ("There is a great temptation to criticize various usury and interest ceilings as being inconsistent over the centuries. The medieval church adopted a ban on usury, similar to the one in the Muslim world, only to see it circumvented with great frequency between the twelfth and nineteenth centuries.").

9. *See* Colleen E. Mandell & Morgan J. Lawrence, *Expanding Access for the Credit Invisible with Just Four Easy Payments? The Unregulated Rise of Buy Now, Pay Later*, 35 LOY. CONSUMER L. REV. 275, 277 (2023) ("BNPL and its interest-free installment payments are a form of short-term financing that mimics the once popular layaway plan, while modernizing the format with its technological components.").

10. *See* Carrie Floyd, *New Tech, Old Problem: The Rise of Virtual Rent-to-Own Agreements*, 65 B.C. L. REV. 763, 800 (2024) ("Although consumers should be able to terminate [a rent-to-own] agreement or purchase the product at any time—after all, this is the central characteristic of [a rent-to-own] agreement—the [virtual rent-to-own] model corrupts the ability of consumers to return their rental. [Virtual rent-to-own agreements] purport to allow consumers to return their rental; in practice, however, it is impossible or impracticable for consumers to do so." (footnote omitted)).

11. Well, in the ancient world, it involved more Latin.

pronouncements. The academic literature on debt and credit does not offer a test or factors to help policymakers, courts, and companies assess whether new products constitute credit.[12] As David Graeber points out in his influential book, *Debt: The First 5,000 Years*: "Consumer debt is the lifeblood of our economy. All modern nation-states are built on deficit spending. Debt has come to be the central issue of international politics. But nobody seems to know exactly what it is, or how to think about it."[13] Credit and its counterpart debt remain fuzzy, especially on the margins.

This Article focuses on one recent innovation—earned wage access—to offer tools that policymakers and courts can use to answer the question of whether a product is credit. Earned wage access is a fintech product that allows employees to get access to wages they have already earned but have not been paid.[14] In most of these transactions, third parties give employees the money ahead of the employee's scheduled payday, and then the third parties recover the amount advanced directly from the employer or from the employee's bank account, often with some fees involved.[15]

The determination of whether earned wage access is credit has significant practical implications. Some are easy to see, such as the requirements that creditors comply with the Truth in Lending Act (TILA), register as lenders in most states, and obey state usury laws.[16] But others are less obvious. For instance, comments to the Consumer Financial Protection Bureau's (CFPB) proposed interpretive rule (Proposed Interpretive Rule) on earned wage access[17]

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12. *See, e.g.*, Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates vs. the Rent-to-Own Industry: Reaching a Reasonable Accommodation*, 34 AM. BUS. L.J. 385, 423 (1997) ("Theoretical disputes about the distinctions between leases and sales and the meaningfulness of those distinctions have been ongoing for centuries.... [T]he law should take into consideration the unique aspects of the [rent-to-own] transaction rather than try to squeeze it into existing definitions that do not accurately describe it.").

13. DAVID GRAEBER, DEBT: THE FIRST 5,000 YEARS 4-5 (2011).

14. For a sample of the legal literature on earned wage access, see generally Jim Hawkins, *Earned Wage Access and the End of Payday Lending*, 101 B.U. L. REV. 705 (2021); Nakita Q. Cuttino, *The Rise of "FringeTech": Regulatory Risks in Earned-Wage Access*, 115 NW. U. L. REV. 1505 (2021); Jonathan Macey, *Fair Credit Markets: Using Household Balance Sheets to Promote Consumer Welfare*, 100 TEX. L. REV. 683, 697-98 (2022); Raúl Carrillo, *Platform Money*, 41 YALE J. ON REGUL. 894, 908-09, 908 n.69 (2024).

15. *See* Hawkins, *supra* note 14, at 714-19.

16. *See id.* at 742-43, 747.

17. *See* Truth in Lending (Regulation Z); Consumer Credit Offered to Borrowers in

predicted that determining that earned wage access is credit would push certain companies out of the market entirely.[18] Some companies have already responded to the regulatory threat by shifting their products to avoid the credit designation, and the products resulting from these shifts are arguably less consumer friendly than the originals.[19] Dave and Money Lion, two popular earned wage access companies, are allegedly piloting a product in which employees set up bank accounts exclusively to obtain advances on wages by overdrafting the account—all to avoid coming under the moniker of credit.[20] The substance of the transaction is the same as that of the products these companies currently offer, but the form is much more complicated and confusing.[21]

Advance of Expected Receipt of Compensation for Work, 89 Fed. Reg. 61358, 61359-63 (proposed July 31, 2024) [hereinafter CFPB's Proposed Interpretive Rule].

18. *See, e.g.*, FlexWage, Comment Letter on CFPB's Proposed Interpretive Rule 5 (Aug. 30, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0059 [https://perma.cc/CM3R-59PP] ("Many employer-partnered [earned wage access (EWA)] providers, such as FlexWage, are not traditional lenders and therefore lack the infrastructure required to comply with Regulation Z, including the necessary personnel and internal systems needed to provide the required disclosures or, in the case of open-ended products, ongoing periodic statements. Consequently, imposing Regulation Z's requirements upon these providers could force many out of the market.").

19. For instance, comments asserted that some companies do multiple advances to stay below TILA's minimum-cost threshold while also increasing the overall cost the employee pays. *See, e.g.*, Nat'l Consumer L. Ctr., Ctr. for Responsible Lending & Consumer Fed'n of Am., Comment Letter on CFPB's Proposed Interpretive Rule 23 (Sep. 16, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0076 [https://perma.cc/VZ48-98A9] ("Lenders may seek to evade the [annual percentage rate] disclosure requirement by splitting a larger loan into several pieces.... Some lenders already require borrowers to take out multiple loans .... They likely do that in order to increase the number of expedite fees and to make the 'tips' look smaller.").

20. *See* Tex. Appleseed, Comment Letter on CFPB's Proposed Interpretive Rule 2 (Aug. 30, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0081 [https://perma.cc/DE7T-T75A] (Dave); Nat'l Consumer L. Ctr., *supra* note 19, at 18 (Dave and MoneyLion).

21. *See* Tex. Appleseed, *supra* note 20, at 2 ("[Dave's] model includes confusing features, including authorizing Dave to deny withdrawals of the approved 'Advance' or 'overdraft' amount from the account; requesting 'tips' paid to Dave as part of the overdraft request, and express transfer fees ... depending on whether the transfer is to an account held through Dave or an external bank account. The product also allows multiple transfers per day, with new fees accompanying each transfer."); Nat'l Consumer L. Ctr., *supra* note 19, at 10-11 ("Many providers charge fees that increase as the amount borrowed increased, just like interest does. For example, Money Lion charges a 'Turbo Fee' of $.49 to $8.99, depending on the advance amount, to expedite disbursement of an advance .... For transfers to an external debit card or checking account, Money Lion charges a $1.99 Turbo Fee if the advance is $5 or less, and $8.99 if it is $90-100." (footnote omitted)).

Despite the importance of the question, earned wage access, similar to its many predecessors, is difficult to categorize.[22] The CFPB's confused history with earned wage access highlights the problem in classifying it. In November 2017, the CFPB excluded earned wage access from its payday lending rule, essentially concluding that earned wage access is not credit.[23] In 2020, the CFPB backtracked and claimed only some versions of earned wage access are not credit.[24] In July 2024, the CFPB boldly proclaimed in the Proposed Interpretive Rule that earned wage access was credit and always had been credit.[25] Now, as control of the CFPB shifts under President Trump, the question will presumably be addressed again: Is earned wage access credit?

Even outside of the CFPB, earned wage access is at a tipping point. In February 2022, the influential California consumer financial regulator, the Department of Financial Protection and Innovation, followed a path similar to the CFPB's in determining that some earned wage access was not credit under state law,[26] only to reverse course in October 2024.[27] States have begun passing laws—with wildly different prescriptions—on earned wage access.[28]

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22. *See* Hawkins, *supra* note 14, at 742-45.

23. *See* Payday Lending Rule, 12 C.F.R. § 1041.3(d)(7)(i) (2024).

24. *See* CONSUMER FIN. PROT. BUREAU, APPROVAL ORDER (2020), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_approval-order_2020-12.pdf [https://perma.cc/2LDL-GLXE]; *see also* CONSUMER FIN. PROT. BUREAU, ORDER TO TERMINATE SANDBOX APPROVAL ORDER (2022), https://files.consumerfinance.gov/f/documents/cfpb_payactiv_termination-order_2022-06.pdf [https://perma.cc/3XF7-YLZT].

25. *See* CFPB's Proposed Interpretive Rule, *supra* note 17, at 61359-61.

26. *See* FlexWage, OP 8206, at *4-5 (Cal. Dep't of Fin. Prot. & Innovation 2022) (interpretive opinion), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/02/FINAL-OP-8206-FlexWage-Specific-Ruling.pdf [https://perma.cc/YXT4-UPEP].

27. *See* Press Release, Cal. Dep't of Fin. Prot. & Innovation, DFPI Announces New Rules to Expand Protections for California Consumers (Oct. 22, 2024), https://dfpi.ca.gov/press_release/dfpi-announces-new-rules-to-expand-protections-for-california-consumers/ [https://perma.cc/7TM3-2Z4Q].

28. *See* LA. STAT. ANN. §§ 9:3591.1-.7 (2025); KAN. STAT. ANN. §§ 9-2401 to -2416 (2024); MO. REV. STAT. § 361.749 (2023); NEV. REV. STAT. § 604D.190(1) (2023); WIS. STAT. §§ 203.01-.08 (2025); IND. CODE §§ 28-8-6-101 to -1003 (2026); UTAH CODE ANN. §§ 13-78-101 to -106 (LexisNexis 2025). Many states have introduced bills in their legislatures to regulate earned wage access providers. *See* H.B. 25-1020, 75th Gen. Assemb., 1st Reg. Sess. (Colo. 2025); H.B. 1307, 2025 Leg., Reg. Sess. (Miss. 2025); H.B. 59, 57th Leg., 1st Sess. (N.M. 2025); Assemb. B. 258—A, 2025-2026 Leg., Reg. Sess. (N.Y. 2025); S.B. 3332—A, 2025-2026 Leg. Reg. Sess. (N.Y. 2025); H.B. 2043, 89th Leg., Reg. Sess. (Tex. 2025). Arizona, Georgia, and Montana have yet to successfully pass legislation, but these states have claimed that earned wage access

A federal bill has also been introduced.[29] Lawsuits have been filed against earned wage access companies, alleging failures to comply with state and federal lending laws.[30] The vast majority of this legislative and judicial attention revolves around whether earned wage access is credit, but the attempts to classify it have floundered because of an impoverished understanding of what counts as credit.

Drawing on existing laws, history, contemporary credit practices, and the policies behind various consumer credit laws, this Article argues that credit usually involves personal liability, mandatory costs, and individual creditworthiness. On the other hand, a product is not credit merely because it generates consumer-protection concerns or involves some form of owing. Given these factors, most earned wage access is likely not a credit product. This market does pose risks for consumers that regulations should address, but those regulations should be tailored to the policy concerns in this market and should not try just to force earned wage access into existing lending laws.

Part I introduces earned wage access, focusing on the attributes of the product that make it unique in a sea of consumer products. I describe how earned wage access is almost exclusively nonrecourse—if the company is not repaid by the employee's paycheck,

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products do not constitute traditional loans. *See* Earned Wage Access Products, No. I22-005 (R22-011), at *1 (Ariz. Off. of the Att'y Gen. 2022), https://www.azag.gov/sites/files/2025-06/122-005.pdf [https://perma.cc/797C-AETA]; Earned Wage Access Transactions, No. U2024-1, at *3-4 (Ga. Off. of the Att'y Gen. 2024) (unofficial opinion), https://law.georgia.gov/opinions/u2024-1 [https://perma.cc/V9BC-MDUH]; Earned Wage Access Providers Do Not Need to Be Licensed by the Montana Division of Banking and Financial Institutions Under the Montana Consumer Loan Act and Montana Deferred Deposit Loan Act to Provide Earned Wage Access Products, 24 Mont. Admin. Reg. 1897, 1897 (Mont. Dep't of Just. 2023) [hereinafter Mont. Dep't of Just.].

29. *See* Earned Wage Access Consumer Protection Act, H.R. 7428, 118th Cong. (2024). The Act was referred to the House Financial Services Committee and was placed on the Calendar in December 2024. *See H.R. 7428 - Earned Wage Access Consumer Protection Act*, CONGRESS.GOV (Dec. 3, 2024), https://www.congress.gov/bill/118th-congress/house-bill/7428/all-actions [https://perma.cc/3V84-N77Y].

30. *See* First Amended Class Action Complaint ¶ 5, Orubo v. Activehours, Inc., 780 F. Supp. 3d 927 (N.D. Cal. 2025) (No. 24-cv-04702); Second Amended Class Action Complaint ¶ 4, Johnson v. Activehours, Inc., No. 24-cv-02283 (D. Md. Oct. 31, 2025); *see also* Taylor Gess, Carlin McCrory, Caleb Rosenberg & Jeremy Rosenblum, *Class Action Alleging Usurious Fees and Tips Filed Against FinTech Provider of Earned Wage Access Services*, TROUTMAN PEPPER LOCKE: CONSUMER FIN. SERVS. L. MONITOR (Aug. 22, 2024), https://www.consumerfinancialserviceslawmonitor.com/2024/08/class-action-alleging-usurious-fees-and-tips-filed-against-fintech-provider-of-earned-wage-access-services/ [https://perma.cc/99D4-BV89].

the employee has no personal liability. I also highlight the unique pricing mechanisms in the market.

Part II draws on law, history, contemporary practice, and policy to create a list of the attributes of credit. Starting with the earliest written records, credit and debt have been depicted as personal. The primordial debt hypothesis—the idea that our conceptions of debt are based on religious principles—suggests debt involves personal liability. An unsurprising corollary is that credit products over time have primarily relied on the individual creditworthiness of the recipient. Finally, I show how credit law and policy almost always are concerned with credit that involves a cost.

Part III applies these attributes to earned wage access. I argue that earned wage access is nonrecourse (and thus not personal) and not based on the creditworthiness of the employee. Though some versions of the product involve small costs, many do not. Also, earned wage access does not engender most of the policy concerns behind other consumer credit laws. Of course, some aspects of the product do resemble credit, and I assess whether these are sufficient to push earned wage access into the credit category.

The Article makes two primary contributions to the literature on consumer credit regulation. First, it offers a broad historical and legal assessment of the role of recourse and personal liability in defining debt. Second, it offers the most complete evaluation in the academic literature of whether earned wage access is credit under the TILA and other consumer protection laws—the issue behind current legislation being proposed for earned wage access and litigation occurring in the space.

I. INTRODUCING EARNED WAGE ACCESS

Most employees in the United States are paid every two weeks or less frequently. In 2023, the U.S. Bureau of Labor Statistics found that over 73 percent of employees were paid biweekly, semimonthly, or monthly,[31] yet employees often need cash before their scheduled

31. *See Current Employment Statistics-CES (National): Length of Pay Periods in the Current Employment Statistics Survey*, U.S. BUREAU OF LAB. STATS., tbl. 1 (Aug. 4, 2023), https://www.bls.gov/ces/publications/length-pay-period.htm [https://perma.cc/HV47-48K5].

payday.[32] Short-term, high-cost lenders serve this market segment, but the costs are, well, high,[33] and consumer advocates have identified a wide range of abusive practices in payday,[34] auto-title,[35] and pawn lending.[36]

Seeing room for innovation in markets serving lower-income Americans as well as the abuses of payday lenders,[37] earned wage access companies emerged in strength in the 2010s, and in 2020, workers used the product fifty-six million times to access more than $9 billion.[38] By 2022, four out of five employers were offering earned wage access to employees.[39]

Although the market is dynamic and some earned wage access companies use different models, two models are most common.[40] First, some earned wage access companies partner with employers, getting access to the employer's information about wages and hours worked and, most importantly, access to payroll before money is sent to employees.[41] Second, some companies work directly with

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32. *See* Yonathan A. Arbel, *Payday*, 98 WASH. U. L. REV. 1, 4 (2020) ("We seem to take the payday's existence for granted, but it exacts a heavy price. Workers who wait for payment need to support themselves; the vicissitudes of everyday life—a sudden toothache, a flat tire, a stain on their only clean work shirt—demand money, now." (footnote omitted)).

33. *See* Jim Hawkins, *Are Bigger Companies Better for Low-Income Borrowers?: Evidence from Payday and Title Loan Advertisements*, 11 J.L., ECON. & POL'Y 303, 314-17 (2015).

34. *See* Mann & Hawkins, *supra* note 3, at 881-84.

35. *See* Kathryn Fritzdixon, Jim Hawkins & Paige Marta Skiba, *Dude, Where's My Car Title?: The Law, Behavior, and Economics of Title Lending Markets*, 2014 U. ILL. L. REV. 1013, 1027-28.

36. *See* Susan Payne Carter & Paige Marta Skiba, *Pawnshops, Behavioral Economics, and Self-Regulation*, 32 REV. BANKING & FIN. L. 193, 197 & n.12 (2012).

37. *See* Cuttino, *supra* note 14, at 1510.

38. Jose Murillo, Boris Vallee & Dolly Yu, Fintech to the (Worker) Rescue: Earned Wage Access and Employee Retention 2 (Mar. 27, 2022) (unpublished manuscript) (on file with Harvard Business School), https://www.hbs.edu/ris/Publication%20Files/FinTech%20to%20the%20Worker%20Rescue%20-%20Earned%20Wage%20Access%20and%20Employee%20Retention_2d9994e9-705d-499c-8d27-6ffb98d5ee14.pdf [https://perma.cc/QDZ5-YQZ5].

39. Suman Bhattacharyya, *Earned Wage Access: A CFO Primer*, CFO DIVE (Nov. 12, 2024), https://www.cfodive.com/news/earned-wage-access-a-cfo-primer/732617/ [https://perma.cc/6PCE-PWVU].

40. *See* Nat'l Consumer L. Ctr., *supra* note 19, at 12. For a description of one variation not represented here, see FlexWage, *supra* note 18, at 4 ("FlexWage maintains the position that its model is inherently different from the aforementioned programs, as within the FlexWage model: (i) the employer maintains control over payroll and direct deposit at all times; and (ii) there are no deviations between wage statements and net deposits.").

41. *See* Wagestream, Comment Letter on CFPB's Proposed Interpretative Rule 1 (Aug. 30, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0042 [https://perma.cc/

individuals, gaining information about wages from bank account records and information about hours worked from geolocation tools tied to employees' phones.[42] These direct-to-consumer companies recoup the money by withdrawing it from the employee's bank account.[43]

Employees use earned wage access for a variety of reasons, including as "liquidity insurance" and a means to "consume earlier within the pay cycle."[44] Most companies allow employees to access only 50 percent of their earned wages[45] and often offer other financial health benefits with the access product.[46]

Commentary on earned wage access has identified a variety of consumer-protection concerns with the product. Some people posit that earned wage access is just payday lending in disguise,[47] that it creates "repayment risks, information asymmetry, and intertemporal decision-making,"[48] or that earned wage access companies' contracts have abusive terms.[49]

To assess whether it is credit, three features of earned wage access are particularly important: It is nonrecourse, it is not based on the creditworthiness of the employee, and it is often free. This Part examines these three features.

6KRT-E6Z4] ("Many of these programs, such as Wagestream's EWA service, are integrated into their employers' time and attendance and payroll systems.").

42. *See* DEVINA KHANNA & ARJUN KAUSHAL, FIN. HEALTH NETWORK, EARNED WAGE ACCESS AND DIRECT-TO-CONSUMER ADVANCE USAGE TRENDS 4 (2021), https://cfsi-innovation-files-2018.s3.amazonaws.com/wp-content/uploads/2021/04/26190749/EWA_D2C_Advance-_sage_Trends_FINAL.pdf [https://perma.cc/A75M-58X7] ("[Direct-to-consumer] providers typically observe inflow and outflow patterns in a consumer's bank account and provide a certain advance amount based on those patterns, upon the consumer's request."); Ryan Peterson, *What Is Earned Wage Access? The Complete Guide*, MONEYLION (Jan. 29, 2025), https://www.moneylion.com/learn/earned-wage-access/ [https://perma.cc/YYR4-GHUM].

43. KHANNA & KAUSHAL, *supra* note 42, at 4.

44. Murillo et al., *supra* note 38, at 3.

45. *See id.* at 5.

46. *See* KHANNA & KAUSHAL, *supra* note 42, at 15-21.

47. *See* Greg Iacurci, *Workers Are Paying to Get Part of Their Paychecks Early. It's 'Payday Lending on Steroids,' One Expert Says*, CNBC (Jan. 29, 2024, at 10:08 ET), https://www.cnbc.com/2024/01/28/why-one-expert-called-earned-wage-access-payday-lending-on-steroids.html [https://perma.cc/K6AW-YWUN].

48. Cuttino, *supra* note 14, at 1539.

49. *See* Hawkins, *supra* note 14, at 732-39.

A. Nonrecourse

Starting on the first day of 1L Civil Procedure, law students learn that remedies can be in rem or in personam.[50] Some lawsuits seek to collect money from a person, while others seek to recover property itself.[51] Credit products, even ones secured by collateral, are personal liabilities. Someone who cannot pay a car loan might lose the car (the property) and be forced to pay the creditor any difference between the debt owed and the amount received from the sale of the car.[52] In that example, the lender has recourse to the debtor's personal assets in addition to the collateral for the loan.

Earned wage access companies characterize the product as nonrecourse and without personal liability.[53] The Attorney General of Montana described the attributes of a nonrecourse transaction:

> [A] product is fully non-recourse where the provider obtains no legal or contractual right to repayment against the consumer, does not engage in any debt collection activities with regard to any unpaid balance, does not sell or assign any unpaid balance to a third party, and does not report non-payment to any consumer credit reporting agency.[54]

Many earned wage access products meet this description.

MoneyLion describes its product, Instacash, as "affirmatively disclos[ing] to customers that they have no obligation to repay the advance they receive. Customers who receive advances have no legal obligation to repay them, and MoneyLion does not and cannot take

50. *See* Pennoyer v. Neff, 95 U.S. 714, 724 (1877).
51. *See id.*
52. *See* U.C.C. § 9-607 (A.L.I. & UNIF. L. COMM'N 2023).
53. *See, e.g.*, FlexWage, *supra* note 18, at 4.
54. Mont. Dept of Just., *supra* note 28, at 1898 n.2.

legal action to collect payments."[55] Companies that partner with employers have the same approach.[56]

One exception that many earned wage access providers make to the nonrecourse nature of the product is that they will seek to hold employees personally liable for fraud.[57] Some nonrecourse products have so many exceptions that they are essentially recourse products.[58] But that is not the case here. Fraud is a tort that is not tied to a contractual obligation (except for promissory fraud or the like),[59] so saying that fraud makes a contractual obligation a recourse obligation is a category mistake. Fraud sounds in tort; recourse for credit sounds in contract. Earned wage access companies would presumably sue if an employee blew up the company's offices, but that would not make the product a recourse loan with personal liability.

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55. MoneyLion, Comment Letter on CFPB's Proposed Interpretive Rule 1 (Aug. 30, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0070 [https://perma.cc/3W73-T5SN]; *see also* EARNIN, A BRIEF ON EARNED WAGE ACCESS (2022), https://www.earnin.com/assets/pdf/earnin_white_paper.pdf [https://perma.cc/TC7U-FG73] ("Moreover, workers do not face any adverse consequences for not repaying a Cashout, except that Earnin may choose not to provide future Cashouts to such worker as long as a prior Cashout remains unpaid. Earnin does not retain a legal right to repayment; Cashouts are provided on a 'non-recourse' basis and Earnin has no right to charge late fees, sue for repayment, or send accounts to collection agencies. Earnin also does not report nonpayment of Cashouts to employers or credit reporting agencies.").

56. *See, e.g.*, *Compliance First: Why Payactiv Is the EWA Leader*, PAYACTIV (Apr. 24, 2025), https://www.payactiv.com/trust-center/compliance-handbook [https://perma.cc/3UMU-2NXG] ("Payactiv unambiguously waives and disclaims any right to pursue collection or legal remedies against the user in the event of a failure to recoup EWA amounts except in the unlikely event of fraud. Payactiv has never engaged in collection activity or litigation against a user in the event of non-settlement."); *Program Terms*, DAILYPAY: LEGAL (Sep. 24, 2025), https://www.dailypay.com/en-us/legal/program-terms/ [https://perma.cc/5U2S-ZGUQ] ("Our right to receive your Daily Earnings is non-recourse and is not intended to create any debt obligation owed by you to us. This means that if the Hiring Entity pays us an amount that is less than the amount of the Daily Earnings—for example, if the Hiring Entity is unable to make payment because its business has slowed down or closed in the ordinary course of business—then you will owe us nothing. Under such circumstances, we will have no legal or contractual claim or remedy against you based on our inability to collect the full amount of the Daily Earnings, and we will not engage in debt collection activities against you, place the Daily Earnings as a debt or sell them to a third party, or report you to a consumer reporting agency.").

57. *See* PAYACTIV, *supra* note 56; *Brigit Terms of Service*, BRIGIT § 7.6.2 (July 16, 2025), https://www.hellobrigit.com/terms [https://perma.cc/43AQ-E55U] ("Brigit does not waive any rights regarding fraudulent activity, and Brigit will pursue instances of fraud.").

58. *See infra* notes 148-55 and accompanying text.

59. *See* Eric A. Zacks, *Contract and Fraud*, 26 U. PA. J. BUS. L. 570, 575-76 (2024).

Given that the earned wage access provider will not sue the worker or send the account to collections, why do people ever repay the advance? The question has not been empirically studied, but the main threat companies can make is to refuse to do future earned wage advances to the worker.[60] People likely repay the advance to make sure the product is available to them in the future.

B. Information Sources

One hallmark of all earned wage access companies is that they do not perform credit checks or do general underwriting on potential users.[61] Depending on how we conceptualize the transaction, this business practice is shocking. Credit reports are now used to evaluate people for many purposes—employment, housing, insurance, and credit.[62] Credit reports contain thousands of datapoints that predict repayment of debt by using millions of datapoints from other individuals.[63] Credit card companies, it is no stretch to say, are much better than a borrower at predicting the borrower's probability of repaying.[64]

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60. *See, e.g.*, EARNIN, *supra* note 55.

61. *See, e.g.*, *Make Any Day Payday*, EARNIN, https://app2.earnin.com/ [https://perma.cc/YA7W-GS4X] ("Your credit stays untouched. Get paid without worrying about hard or soft inquiries impacting your score."); *Does Instant Cash Affect My Credit?*, BRIGIT, https://help.hellobrigit.com/hc/en-us/articles/360023706531-Does-Instant-Cash-affect-my-credit [https://perma.cc/8V2K-K943] ("Brigit does NOT look at your credit score to determine if you qualify for Instant Cash and it will NOT have any impact on your credit score."); MoneyLion, *supra* note 55, at 1 ("Instacash ... involves no credit check."); Am. Fintech Council, Comment Letter on CFPB's Proposed Interpretive Rule 10 (Aug. 29, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0040 [https://perma.cc/SKM5-28VZ] ("No credit check is conducted because credit is not being issued and the only issue is the right to payment of earned wages."); Chamber of Progress, Comment Letter on CFPB's Proposed Interpretive Rule 3-4 (Aug. 30, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0069 [https://perma.cc/M9Y9-J5BR] ("Unlike traditional credit products that may affect a user's credit score through payment history and credit utilization, earned wage access services do not involve lending-related activities such as pulling credit reports, underwriting, assessing fees based on creditworthiness, charging interest, or imposing origination fees.").

62. Richard Hynes, *The Social Costs of Credit Reporting Errors*, 11 J.L. ECON. & POL'Y 329, 332 (2015).

63. *See* Andrea Freeman, *Payback: A Structural Analysis of the Credit Card Problem*, 55 ARIZ. L. REV. 151, 161 (2013) ("Underwriting technology, introduced in the 1990s, allows lenders to develop complex statistical models to predict spending and repayment behavior for increasingly smaller sections of the population.").

64. *See id.*

Yet despite not using credit underwriting, earned wage access companies have excellent information on the transactions in which they engage. They either gain information about hours worked, wages earned, and employment status from the employer directly, or they monitor wages coming into the employee's bank account and the employee's time at work.[65] These information sources will not tell the earned wage access company whether the employee has good self-control or can manage finances.[66] They tell the company only whether the next paycheck is likely to materialize.

C. Cost Structures

One of the most interesting developments in this space has been the way in which companies impose costs for earned wage access. Even at a single company, employees can often choose between multiple ways to pay (or not pay) the earned wage access company.[67] Because price is a key factor that earned wage access companies use to distinguish themselves from payday loans, understanding the pricing models is essential.[68]

1. No Mandatory Fees

Payactiv is an example of a company that works directly with employers and offers ways for employees to access earned wages without any direct costs. Employees can elect to have money put on their "Payactiv Visa Card if they receive their direct deposit on the card" or have the money delivered to any bank account in one to

65. Hawkins, *supra* note 14, at 723.

66. *Cf.* DONNCHA MARRON, CONSUMER CREDIT IN THE UNITED STATES 86 (2009) (discussing how self-control and financial management play key roles in the context of credit card repayment).

67. *See, e.g.*, *Earned Wage Access*, PAYACTIV, https://www.payactiv.com/earned-wage-access/ [https://perma.cc/9TDK-J36P].

68. *See* Hawkins, *supra* note 14, at 721.

three business days.[69] Some companies that work directly with employees solicit tips but also have no mandatory fees.[70]

It is hard to see how earned wage access companies make money if they do not charge anything for their services. Part of the explanation is that they seek voluntary tips and charge for services related to the transaction, as will be discussed in the following two Sections.

Another less obvious source of revenue is the interchange income that companies' credit cards generate every time an employee spends money using the cards.[71] Many of the free options for consumers involve putting funds onto a payment card.[72] Interchange fees create significant revenue for companies that issue the cards or that partner with issuers that give part of the fee to the earned wage access company.[73] While interchange fees impose costs throughout the payment system,[74] they do not impose direct costs on earned wage access users.[75]

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69. Payactiv, Inc., Comment Letter on CFPB's Interpretive Rule 1 (Aug. 31, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0080 [https://perma.cc/P7DB-RXZS]. Payactiv also allows employees to access money for free by paying "bill[s] through an integrated bill-pay service," or getting instant transfers to an Amazon account or to "pay for an Uber ride." *Id.*; *see also* PAYACTIV, *supra* note 67 ("Users can access their earned wages and transfer to their bank account, Payactiv card, or pick up cash at Walmart. We front the money.... Pay a bill, call an Uber and get daily necessities from Amazon with EWA funds directly from the Payactiv app." (footnote omitted)).

70. *See, e.g.*, MoneyLion, *supra* note 55, at 1, 4 ("Instacash has no interest or mandatory fees .... Customers can opt to pay a modest fee for expedited transfer of their earned income or leave a tip for the service, both entirely optional, with no impact on eligibility or advance limits if they elect not to pay.").

71. *See* Robert Adams, Vitaly M. Bord & Bradley Katcher, *Credit Card Profitability*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Sep. 9, 2022), https://www.federalreserve.gov/econres/notes/feds-notes/credit-card-profitability-20220909.html [https://perma.cc/7QAE-693Y]; Instant Fin. USA Inc., Comment Letter on CFPB's Proposed Interpretive Rule 1 (Aug. 29, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0045 [https://perma.cc/KEN8-WFH3] (describing Instant's product as offering a free deposit onto "the employee's payroll card").

72. *See* Peterson, *supra* note 42 ("[T]he requested amount is transferred directly to your bank account or a connected card.").

73. *See* Adams et al., *supra* note 71.

74. Natasha Sarin, *What's in Your Wallet (and What Should the Law Do About It?)*, 87 U. CHI. L. REV. 553, 580-81 (2020) (discussing the regressive effects of interchange fees).

75. *See* Adams et al., *supra* note 71 (explaining that the merchant pays interchange fees).

2. Voluntary Tips

A lot of the "free" services that are direct to consumer generate part of their revenue from voluntary tips. EarnIn, a large player in the market, advertises optional tips and no mandatory fees.[76]

The tips have been the subject of much controversy and legal attention.[77] Critics allege that the tips are deceptive, that employees are, or feel, compelled to give tips, and that the average tip is too high.[78] Some earned wage access companies have sought to clarify. Consider this footnote from EarnIn's webpage: "Tips go to EarnIn. Whether you tip, how much and how often you tip do not impact the quality and availability of services."[79] In a recent lawsuit, the Attorney General for the District of Columbia noted that EarnIn highlighted that tips are voluntary, although the Attorney General stated that the reason EarnIn did this was to hide the fees it imposes for expedited delivery of funds.[80] Consumer advocates have argued that voluntary tips are not in reality voluntary.[81] This important point is discussed in Part III.A.3.

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76. EARNIN, *supra* note 61.

77. *See e.g.*, Class Action Complaint ¶¶ 25-51, Orubo v. ActiveHours, Inc., 780 F. Supp. 3d 927 (N.D. Cal. 2025) (No. 24-cv-04702) ("[Tips are] solely intended to compensate EarnIn for lending money.").

78. *See* Evan Weinberger, *Earned-Wage Access Firms Rile Regulators with Customer Tips*, BLOOMBERG L.: BANKING (June 4, 2024, at 11:27 ET), https://news.bloomberglaw.com/banking-law/earned-wage-access-firms-rile-regulators-with-tip-compensation [https://perma.cc/5VYC-R572].

79. EARNIN, *supra* note 61, at n.4.

80. *See* Complaint for Violations of the Consumer Protection Procedures Act ¶ 38, District of Columbia v. ActiveHours Inc., No. 2024-CAB-007303 (D.C. Super. Ct. Nov. 19, 2024) ("On top of being charged fees for fast access, when a consumer requests a Cash Out, they are also asked to leave a 'tip' that is paid to Earnin. Unlike the Lightning Speed fees, Earnin prominently advertises the tipping option, creating the reasonable impression that the only fees associated with Earnin's services are purely voluntary—stating, for example: 'no mandatory fees—just tip what you think is fair.' Moreover, Earnin heavily encourages tipping through its messaging—which suggests that the Borrower is helping other Borrowers—and through a prominent tip button, which ranges from $1-$14 as a default.").

81. *See infra* notes 247-48 and accompanying text.

3. Expedited-Access Fees

Many earned wage access companies take several days to deposit money for employees' use.[82] These same companies offer users the option to pay a fee to get the money more quickly.[83] As Payactiv describes its program: "Users can also choose to pay an optional, one-time flat fee (ranging between $2.49 to $3.49) to instantly transfer their wages to any debit card or to pick up their wages in cash at Walmart."[84]

Controversy surrounds these additional charges. The lawsuit by the Attorney General of the District of Columbia alleges that EarnIn hides these charges and then imposes usurious interest rates on customers.[85] The status of these fees is assessed in Part III.

4. Subscription Fees

Other lenders charge customers a set amount regardless of how they use the product. Brigit is a popular earned wage access provider that charges a monthly fee for some of its products.[86] For a "Plus" membership, employees pay $8.99 per month, and for a "Premium" membership, they pay $15.99 per month.[87] One of the services users get is access to Brigit's Instant Cash product, which

82. *See* Peterson, *supra* note 42.

83. *See id.*

84. Payactiv, Inc., *supra* note 69, at 1.

85. *See Attorney General Schwalb Sues "Pay Advance" Company EarnIn for Deceiving More than 20,000 DC Borrowers*, OFF. OF THE ATT'Y GEN. FOR THE D.C.: NEWSROOM (Nov. 19, 2024), https://oag.dc.gov/release/attorney-general-schwalb-sues-pay-advance-company [https://perma.cc/4R7U-A4EW] ("As a result of the 'Lightning Speed' fee alone, the average interest rate on an EarnIn instant 'cash out' is over 300%—more than 12 times the District's 24% interest rate cap. Moreover, although it acts as a lender, EarnIn has been operating in the District without the required lending license.... EarnIn requires users to pay 'Lightning Speed' fees (currently $3.99 or $5.99 per transaction) for the 'instant' access to funds that it promises. The existence of these fees is buried in the fine print, and EarnIn does not inform users about the amount of the fees until after they sign up, provide a substantial amount of personal and financial information, and attempt to get the promised instant cash. Demonstrating their need for immediate cash, about 90% of EarnIn's DC users have paid 'Lightning Speed' fees.").

86. *See How Much Does Brigit Cost?*, BRIGIT: BRIGIT HELP CENTER, https://help.hellobrigit.com/hc/en-us/articles/360034832191-How-much-does-Brigit-cost [https://perma.cc/U4KK-E7D8].

87. *See id.*

will deposit money within either twenty minutes or one to three days after requested, depending on whether the consumer is enrolled in the Plus or Premium membership[88] or pays an additional fee.[89]

5. Per-Use Fees

Finally, some firms charge a set fee per transaction. DailyPay offers a free card-based product,[90] but it will also transmit money to a bank account for a set fee per transaction.[91] For instant transfers, DailyPay charges somewhere between $0 and $3.99, and next-day Automated Clearing House transfers cost $0.[92]

Earned wage access offers a unique product to deal with short-term liquidity crises. It is nonrecourse,[93] is unconcerned with the creditworthiness of its users,[94] and is often free.[95] But is it credit? The next Part outlines how we can know.

II. CHARACTERISTICS OF CREDIT

The most important federal law governing credit is the TILA.[96] It defines credit as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."[97] In a curious legislative decision, the Act does not define debt.[98] In making its determination that earned wage access is credit, the CFPB turned to dictionaries to define debt.[99] Merriam Webster, the CFPB tells us, defines debt as "something owed,"[100] and Black's

88. *See id.*

89. *See Instant Cash*, BRIGIT: PRODS., https://www.hellobrigit.com/instant-cash [https://perma.cc/LDC4-VU7Z].

90. *See Expand On-Demand Pay Options for Your Employees with the DailyPay Card*, DAILYPAY, https://www.dailypay.com/dailypay-card/ [https://perma.cc/2EM2-8L8X].

91. *See* DAILYPAY, *supra* note 56.

92. *Id.*

93. *See supra* Part I.A.

94. *See supra* Part I.B.

95. *See supra* Part I.C.1.

96. 15 U.S.C. §§ 1601-1608, 1610-1613, 1615-1635, 1637-1667f.

97. § 1602(f).

98. CFPB's Proposed Interpretive Rule, *supra* note 17, at 61360.

99. *See id.*

100. *See id.* at 61360 & n.14.

Law Dictionary defines it as a "sum of money due by certain and express agreement" or "a financial liability or obligation owed by one person, the debtor, to another, the creditor."[101]

A dictionary does not give a fulsome enough picture of debt to parse complicated consumer financial products. A dictionary distills hundreds of years of cultural and intellectual history and context into a sentence-long definition.[102] When making difficult decisions about what falls within the margins of a word, it is essential to unearth that background.

In this Part, I argue that credit and debt generally involve personal liability, cost, and an assessment of creditworthiness. The argument is based on a broad view of the history of the concept of debt as well as an examination of existing caselaw discussing debt. In an earlier article, I made a lengthy argument about why a court might consider earned wage access credit.[103] The point of that argument was to say policymakers need to clarify the transaction's status,[104] and they do. Since that article was published, many states have made definitive statements.[105] But I went further than saying merely that the status was unclear, and asserted that some of the arguments earned wage access companies made, and one that I make here, had "serious problems."[106] While I would like to paint the earlier work as focused exclusively on uncertainty, in reality, the argument I advance here involves eating a little crow. I changed my perspective primarily because I have now considered the issue in light of the larger social and historical context in which these terms developed and in light of additional caselaw.

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101. *See id.* at 61360 & n.16.

102. *See* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 502-03 (2013).

103. *See* Hawkins, *supra* note 14, at 752 ("[I]t is possible that courts or regulators will find earned wage access products to be credit products, depending on how the companies structure their business models and fees. It is not that all of these products are necessarily loans; it is enough that they *might* be loans.").

104. *Id.* at 742-44.

105. *See supra* note 28 and accompanying text.

106. *See* Hawkins, *supra* note 14, at 747-52.

A. Things That Are Not Credit

Before exploring what is credit, it is worth mentioning a few things that are not.

1. "Something Owed"

Defining credit as "something owed"[107] makes the concept unimaginably capacious. Granted, in common speech, we do use debt language in unexpected ways, usually as a nicety. Consider the etymology of "thank you":

> In English, "thank you" derives from "think," it originally meant, "I will remember what you did for me"—which is usually not true either—but in other languages (the Portuguese *obrigado* is a good example) the standard term follows the form of the English "much obliged"—it actually does mean "I am in your debt." The French *merci* is even more graphic: it derives from "mercy," as in begging for mercy; by saying it you are symbolically placing yourself in your benefactor's power—since a debtor is, after all, a criminal.... Decoding the tacit calculus of debt ("I owe you one," "No, you don't owe me anything," "Actually, if anything, it's me who owes you," as if inscribing and then scratching off so many infinitesimal entries in an endless ledger) makes it easy to understand why this sort of thing is often viewed not as the quintessence of morality, but as the quintessence of *middle-class* morality.[108]

The sort of debt people owe when a stranger opens the door for them cannot be considered debt under American law, despite the fact that "something" is owed to the stranger. The CFPB does not regulate door opening, recipients of door openings are not debtors, and the door openers are not creditors. On the other hand, any illiquid asset held by someone else would be debt under the CFPB's definition, as a bowling alley is creditor when someone borrows shoes.[109]

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107. *See supra* note 100 and accompanying text.
108. GRAEBER, *supra* note 13, at 123.
109. *See* CFPB's Proposed Interpretive Rule, *supra* note 17, at 61360.

One important difference between the debt we owe a stranger for opening the door and the debt we owe a creditor for a loan is the creditor's ability to enforce the debt using the coercive power of the state. Contract law gives creditors the ability to use the power of the police to seize a debtor's assets to repay a debt.[110] No coercion is brought to bear to force repayment for a kind gesture, so as a society, we have made the decision to not get involved in those sorts of affairs.

2. Things for Which Consumers Require Protection

Consumers can be harmed in a wide variety of ways by things that are not credit,[111] so the mere fact that consumers need protection from something does not make that something credit. While this point may seem so obvious that it should not be said, many of the comments in support of the CFPB's Proposed Interpretative Rule on earned wage access alleged a need to regulate the product as credit to protect consumers.[112] This topic will be explored in Part III.

B. Credit History

To understand the modern use of the word "debt," it is worth looking at some credit history. Anthropologist David Graeber tells us that the first written evidence of debt is from around 3500 BC, when the Sumerians recorded debts in their temples.[113] Debt plays an important role in many major world religions. Not only has religion heavily regulated debt between people,[114] but the concept

110. *See* U.C.C. § 9-601(a)(1) (A.L.I. & UNIF. L. COMM'N 2023) ("After default, a secured party ... may reduce a claim to judgment, foreclose, or otherwise enforce the claim ... by any available judicial procedure.").

111. *See, e.g.*, *Fraud and Scams*, CONSUMER FIN. PROT. BUREAU (Nov. 24, 2025, at 14:16 ET), https://www.consumerfinance.gov/consumer-tools/fraud/ [https://perma.cc/FC4X-YCWL].

112. *See infra* notes 290-91 and accompanying text.

113. *See* GRAEBER, *supra* note 13, at 38-39 ("But the most shocking blow to the conventional version of economic history came with the translation, first of Egyptian hieroglyphics, and then of Mesopotamian cuneiform .... What these texts revealed was that credit systems of exactly this sort actually *preceded* the invention of coinage by thousands of years.... [Sumerian t]emple bureaucrats used [an accounting] system to calculate debts.").

114. For instance, Christopher Hampson explains the important Hebrew concept of Jubilee, in which debtors were released from their debts every seven years, and its effect on the

of individuals owing the divine, ancestors, or the universe pervades religion. Graeber goes through several world religions to make this argument. To illustrate debt's centrality to Hinduism, he quotes the *Satapatha Brahmana*:

> In being born every being is born as debt owed to the gods, the saints, the Fathers and to men. If one makes a sacrifice, it is because of a debt owing to the gods from birth ... If one recites a sacred text, it is because of a debt owing to the saints ... If one wishes for offspring, it is because of a debt due to the fathers from birth ... And if one gives hospitality, it is because it is a debt owing to men.[115]

Just being born puts us in the red in early Hindu thought.

Christianity's centerpoint, the crucifixion of Jesus Christ, is often described in terms of a debt. Each person individually incurred a debt by sinning: "[T]he wages of sin *is* death," the apostle Paul wrote in his letter to the Romans.[116] But Christ's death paid that debt for all who trust in him.[117] Jesus is called the redeemer[118]—a word whose verb form often means "to buy something back, or to recover something that had been given up in security for a loan; to acquire something by paying off a debt."[119]

Geoffrey Ingram points out the connection between modern language and religious origins of debt:

> In all Indo-European languages, words for "debt" are synonymous with those for "sin" or "guilt", illustrating the links between religion, payment and the mediation of the sacred and profane realms by "money." For example, there is a connection

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Jewish and Christian, and indirectly the Muslim and Bahá'í faiths. *See* Christopher D. Hampson, *The Spirit of Jubilee*, 51 BYU L. Rev. (forthcoming 2026) (manuscript at 3 & n.2), https://papers.ssrn.com/sol3/Delivery.cfm/5100907.pdf?abstractid=5100907&mirid=1 [https://perma.cc/EZ92-CP2V]; *see also* GEISST, *supra* note 7, at 275 ("Of all the prohibitions against undesirable activities in the Koran, usury is mentioned the most. Interest, or *riba*, is considered usury and no distinction is made between them. The terms are interchangeable and the prohibition is immutable.").

115. GRAEBER, *supra* note 13, at 43 (omissions in original) (quoting *Satapatha Brahmana* 1.7.2.1-.5).

116. *Romans* 6:23.

117. *See Colossians* 2:13-14.

118. *See, e.g.*, *Hebrews* 9:15.

119. GRAEBER, *supra* note 13, at 80.

> between money (German *Geld*), indemnity or sacrifice (Old English *Geild*), tax (Gothic *Gild*) and, of course, guilt.[120]

We could dwell on this topic at length, as many works on credit do, but my focus is limited to pointing out how this primordial-debt theory argues that deep in human conceptions of religion and social policy is the idea that each person owes a debt to others and the divine.[121] Primordial-debt theorists draw a wide variety of implications from this historical evidence that are not important for this Article and that I do not share. But the core observation that humans for millennia have conceptualized religious and social reality in terms of debt does help us understand the meaning of the term debt.[122] One of the most important attributes of debt uncovered by the primordial-debt theory is discussed in the next Section: personal liability.

C. Personal Liability

We can observe from the connection between religion and debt that debt is personal. In Hinduism, people are reincarnated as they pay off karmic debt.[123] They cannot pay it off by merely forfeiting

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120. *Id.* at 59 (quoting GEOFFREY K. INGHAM, THE NATURE OF MONEY 90 (2004)).

121. *See id.* at 59-60.

122. In the end, Graeber rejects the primordial-debt theory:

> Set out this way, though, the argument begins to undermine its very premise. These are nothing like commercial debts. After all, one might repay one's parents by having children, but one is not generally thought to have repaid one's creditors if one lends the cash to someone else.... If you cannot bargain with the gods because they already have everything, then you certainly cannot bargain with the universe, because the universe *is* everything—and that everything necessarily includes yourself.... Or let us look at the other side of the equation. Even if it is possible to imagine ourselves as standing in a position of absolute debt to the cosmos, or to humanity, the next question becomes: Who exactly has a right to speak for the cosmos, or humanity, to tell us how that debt must be repaid?

Id. at 68. There is a lot to unpack in these objections as applied to all religious thinking, so I will make only one personal observation: Graeber's critiques here are not effective against Christianity. God, as creator and law giver, has the right to speak for the cosmos, and though the debt to God is unpayable, Jesus's incarnation made the debt payable because God paid the infinite debt with a sacrifice of infinite value. *See* ATHANASIUS, ON THE INCARNATION 31-35 (Archibald Robertson trans., London, D. Nutt 2d ed. rev. & enlarged 1891).

123. *See* JEANEANE FOWLER, HINDUISM: BELIEFS AND PRACTICES 10-12 (reprt. 2010).

their possessions or even their lives.[124] Similarly, in Christianity, people face judgment as individuals.[125]

Even the colloquial use of debt terms reflects the fact that debt expresses personal liability. Saying "much obliged" in response to the help of a stranger does not mean "my mother owes you" or "you have a claim on my coat." It means that the recipient of the kind act personally owes a "debt."[126]

1. The Rule

The law in the United States largely tracks with this idea that credit involves a personal liability for an obligation, although there are some exceptions explored below. When I previously considered this issue in a narrower context, I underappreciated the extent of caselaw holding that nonrecourse obligations are not credit.[127]

Before looking at caselaw, however, it is important to recognize that almost all credit in the United States is recourse debt.[128] All credit card debt, almost all collateralized debt obligations, and almost all mortgages involve personal liability.[129]

But some products on the fringe of credit are nonrecourse, and generally, the law does not treat those products as credit. First, one of the major reasons courts held and continue to hold that rent-to-own transactions are not credit is because they can be cancelled without personal liability.[130]

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124. *See id.*

125. *See Romans* 14:10-12.

126. Even historical descriptions of debt that do not discuss religion assume personal liability. *See, e.g.*, Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 808 (2003).

127. *See* Hawkins, *supra* note 14, at 750-51 (acknowledging only that "[a]t least one court has concluded that nonrecourse loans are excluded from TILA," and concluding that "[e]ven if all earned wage access products were nonrecourse, many loans are nonrecourse but are still considered loans").

128. *See* James Chen, *Recourse Loan: What It Is, How It Works, Example*, INVESTOPEDIA (Sep. 10, 2024), https://www.investopedia.com/terms/r/recourse-loan.asp [https://perma.cc/F37M-5D5W].

129. *See Recourse vs. Nonrecourse Debt*, INTERNAL REVENUE SERV., https://apps.irs.gov/app/vita/content/36/36_02_020.jsp [https://perma.cc/STN8-PEUG].

130. *See* Consumer Fin. Prot. Bureau v. Snap Fin. LLC, No. 23-cv-00462, 2024 WL 3625007, at *13 (D. Utah Aug. 1, 2024) ("Under the legacy lease agreement, after the initial lease term is underway, no further renewal (or payment) is necessary for use to have taken place, and compensation for use is therefore decoupled from the total value of the property.

Second, one comment on the CFPB's Proposed Interpretive Rule points out four comments in Regulation Z (TILA's implementing regulation) that indicate obligations without personal liability are not credit under TILA:

> Layaway plans are exempt *unless* the consumer *is contractually obligated* to continue making payments;
> Home improvement transactions involving progress payments [are exempt] if the consumer pays as work progresses, *only* [pays] *for work completed* and has *no contractual obligation* to continue making payments;
> Insurance premium plans involving installment payments for future coverage [are exempt], *unless* the consumer *is contractually obligated* to continue making payments; and Borrowing against the accrued cash value of an insurance policy or pension account [is exempt], *if there is no independent obligation to repay*.[131]

Thus, in addition to caselaw, the regulation implementing TILA also treats nonrecourse debt as not credit.[132]

Thus, Snap's legacy lease-to-own agreement does not constitute a 'credit sale' under the plain language of Regulation Z's definition."); Silva v. Rent-A-Center, Inc., 912 N.E.2d 945, 952 (Mass. 2009) ("Because Costa's rent-to-own agreement permitted him to terminate it at any time without penalty, it was not a 'credit sale' within the meaning of the Federal Truth-in-Lending Act, and it similarly does not involve an 'extension of credit' under [Massachusetts's Retail Installment Sales Act]."); Stewart v. Remco Enters., 487 F. Supp. 361, 362-63 (D. Neb. 1980) ("The termination clause contained in the agreement provides that the renter is *required* to rent the property *for only one week*. The renter has the right to terminate the agreement at the end of any rental period by return of the property to the owner. Thus, the sole obligation of the plaintiff under this agreement is to pay $21.00—hardly the aggregate value of the television set involved. Accordingly, it is clear that the rental agreement in question does not fall within the meaning of the term 'credit sale' as defined in [15 U.S.C.] § 1602(g).").

131. Andrew Grant, Comment Letter on CFPB's Proposed Interpretive Rule 3 (Aug. 28, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0047 [https://perma.cc/C59V-CDGT] (summarizing the interpretation of credit found in Truth in Lending; Revised Regulation Z, 46 Fed. Reg. 20848, 20851 (Apr. 7, 1981)).

132. Cases interpreting "claim" under the Bankruptcy Code are not relevant to deciding the definition of credit because the meaning of "claim" is very broad. *Compare* 11 U.S.C. § 101(5)(A) ("The term 'claim' means—right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."), *with* § 101(12) ("The term 'debt' means liability on a claim."). Thus, when the Supreme Court held that a mortgage claim under which the party had no personal liability was a claim, it was not the same as determining that such a claim was a debt under other law. *See* Johnson v. Home State Bank, 501 U.S. 78, 83 (1991)

Other similar products are treated the same way. In *Reed v. Val-Chris Investments, Inc.*, the court considered a transaction in which one party's sole source of repayment was an estate.[133] Because there was no personal liability, the court concluded there was no loan: "[T]he transaction between Plaintiff and AI was not a loan because Plaintiff had no obligation to pay AI anything if the Estate did not satisfy the amount Plaintiff assigned to AI."[134]

Some courts consider litigation finance not to be a loan because it is nonrecourse and the funder's only source of repayment is the proceeds of the litigation: "These transactions are often referred to as 'litigation loans,' but the law does not regard them as loans because the corporation that gives money to the plaintiff has no right to recover from the plaintiff in the event that the lawsuit is unsuccessful."[135]

In one interesting case, the Southern District of West Virginia had to determine whether a party who owned collateral but was not on a loan owed a debt.[136] Applying the definition of debt in the federal Fair Debt Collection Practices Act[137] and West Virginia's counterpart,[138] the court concluded that the party did not owe a debt because "the option to pay money to retain collateral is not equivalent to a personal obligation to repay a discharged debt."[139]

As one final example, consider *Capela v. J.G. Wentworth, LLC*.[140] In *Capela*, the plaintiff sold his rights to a structured settlement to the defendant.[141] The plaintiff alleged that the defendant disguised

("We have previously explained that Congress intended by this language to adopt the broadest available definition of 'claim.'").

133. *See* No. 11cv00371, 2011 WL 6028001, at *2 (S.D. Cal. Dec. 5, 2011).

134. *Id.*

135. Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 627 (Fla. Dist. Ct. App. 2005); *see also* Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc., No. 04283-2011, 950 N.Y.S.2d 723, slip op. at 5 (Sup. Ct. Mar. 29, 2012) ("In fact, the Defendants were always at risk of no recourse whenever one of the underlying cases went to trial and resulted in no recovery. Such circumstances simply cannot be stated to constitute a 'loan.'").

136. Ballard v. Bank of Am., No. 12-2496, 2013 WL 5963068, at *11 (S.D. W. Va. Nov. 7, 2013), *aff'd per curiam*, 578 F. App'x 226 (4th Cir. 2014).

137. 15 U.S.C. § 1692a(5).

138. W. VA. CODE § 46A-2-122(b) (2025).

139. *Ballard*, 2013 WL 5963068, at *11 (citing Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 23 (1st Cir. 2002).

140. CV09-882, 2009 WL 3128003 (E.D.N.Y. Sep. 24, 2009).

141. *See id.* at *1.

a loan as a sale and failed to make TILA disclosures.[142] The court disagreed because the transaction involved no personal liability:

> In its simplest terms, a loan is a transaction in which something, often money, is transferred to someone who is obligated to pay it back. By these definitions, the transaction between Capela and Henderson was not a loan. As the defendants explain, the transaction between Capela and Henderson cannot be considered a loan because Capela has no obligation at all to pay the settlement installments if Allstate fails to do so.... The defendants term this difference the "existence of recourse" and argue that such recourse against the borrower is "a classic element of a loan transaction." ... Capela did not incur any debt or potential debt as a result of the transaction and it was not a loan or credit transaction governed by TILA, but a transfer of structured settlement rights governed by New York's [Structured Settlement Protection Act].[143]

Many other examples follow the same basic formulation—debt requires a personal obligation to pay.[144]

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142. *Id.* at *1.

143. *Id.* at *9-10.

144. *See, e.g.*, Joint Apprenticeship Comm. of United Ass'n Loc. Union No. 307 v. Rezendes (*In re* Rezendes), 324 B.R. 689, 693-94 (N.D. Ind. 2004) ("The first group is made up of those who train in the [Joint Apprenticeship Committee of United Association Local Union No. 307 (JATC)] program and go on to work as plumbers and pipefitters. Those who work for signatories pay for their education by working based upon a particular equation such that after five years the payments are complete. Those who work for nonsignatory employers are considered to have breached the agreement and thus have incurred a requirement to pay the costs of their education by JATC. The second class is made up of those who receive some or all of their training from JATC but do not find work in the plumbing and pipefitting industry. These individuals are not required to pay for any of their education. Because there is no obligation to repay, this cannot be a loan." (citing *In re* Chambers, 348 F.3d 650, 657 (7th Cir. 2003))); Kuhfeldt v. Liberty Mut. Ins. Co., 833 F. Supp. 632, 636 (E.D. Mich. 1993) (holding in the context of insurance premium payments: "Those courts which have addressed the issue raised by this case have also held that where there is no obligation to continue making payments, there is no credit and TILA is inapplicable. Thus, under the facts as plaintiff has alleged them, there was no credit relationship which would subject defendants to compliance with TILA or Regulation Z." (citations omitted)).

2. Exceptions and Explanations

There are potential exceptions to the general rule above. Some products are commonly called nonrecourse but considered credit. Yet each of the products actually do involve personal liability or are truly exceptional and not determinative of the definition of credit.

a. Nonrecourse Mortgages

One common example is a type of mortgage loan that sometimes goes by the name "nonrecourse loan." That term by itself could derail my entire argument here. A recent Texas Supreme Court opinion's definition of a nonrecourse mortgage leaves the definite impression that (1) the collateral provided the creditor's only source of repayment, and (2) the product was still a loan: "No one disputes that 'without personal liability against each owner' limits the sources of funds from which Wells Fargo may seek payment of the loan. Courts have traditionally described nonrecourse loans with such language."[145] The only examples the CFPB gave of treating nonrecourse products as consumer credit in the context of PACE financing were reverse mortgages[146] and mortgages in states with antideficiency statutes, which it called "effectively nonrecourse."[147]

Nonrecourse mortgages do not stand as a significant barrier to concluding that debt involves personal liability. Most states have recourse mortgages, so from the outset, nonrecourse mortgages are an exceptional product, not the norm.[148] And even nonrecourse mortgage loans are not really nonrecourse because the borrower is often personally liable for the debt.[149] Most consumer mortgages instead benefit from antideficiency statutes that procedurally prevent the lender from pursuing a deficiency or make it more difficult

145. Wells Fargo Bank v. Murphy, 458 S.W.3d 912, 917 (Tex. 2015).

146. *See* Residential Property Assessed Clean Energy Financing (Regulation Z), 90 Fed. Reg. 2434, 2448 & n.107 (Jan. 10, 2025) (to be codified at 12 C.F.R. pt. 1026) (citing 12 C.F.R. § 1026.33 (2025).

147. *See id.* at 2448.

148. *See* Ron Harris & Asher Meir, *Non-Recourse Mortgages—A Fresh Start*, 21 AM. BANKR. INST. L. REV. 119, 120 (2013) ("Ten to fifteen American states, including two of the four leading foreclosure states, California and Arizona, are considered non-recourse states.").

149. *See id.* at 123; Gregory M. Stein, *The Scope of the Borrower's Liability in a Nonrecourse Real Estate Loan*, 55 WASH. & LEE L. REV. 1207, 1229-30 (1998).

to do so.[150] These antideficiency statutes are consumer protection mechanisms, not redefinitions of the concept of debt. More importantly, supposedly nonrecourse mortgages contain provisions that make borrowers personally liable for certain carve outs[151] or for breaching covenants,[152] and state law makes borrowers personally liable for waste[153] or fraud in obtaining the mortgage.[154] Similarly, reverse mortgages are not truly nonrecourse because if the homeowner defaults on the agreement, then the lender gets both any value from the proceeds of a sale of the property and the proceeds of mortgage insurance to pay any outstanding amounts owed under the agreement.[155]

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150. *See* Harris & Meir, *supra* note 148, at 124 ("Most of the states that allow only nonrecourse loans do so through procedural rules." (citing Andra C. Ghent & Marianna Kudlyak, *Recourse and Residential Mortgage Default: Evidence from U.S. States*, 24 REV. FIN. STUD. 3139, 3177-83 (2011))).

151. *See* Aozora Bank, Ltd. v. 1333 N. Cal. Boulevard, 15 Cal. Rptr. 3d 340, 342 (Ct. App. 2004) ("Certain exceptions to the nonrecourse limitation are listed in the note and deed of trust. If those 'carve-outs' of personal liability do not encompass the fees at issue, the fees are only recoverable from the collateral and the Partnership is not liable for them under the contracts.").

152. *See* 172 Madison (N.Y.) LLC v. NMP-Grp., LLC, No. 650087/2010, 2013 WL 5509241, at *3 (N.Y. Sup. Ct. Oct. 3, 2013) (unpublished decision) ("[W]here, as here, a lender has conditionally agreed to limit its remedies to foreclosure, subject to the borrowing parties' compliance with certain loan covenants, and the borrowing parties breach those covenants only after the commencement of foreclosure proceedings, [New York's Real Property Actions and Proceedings Law section] 1301 does not preclude the lender from seeking alternative relief at that point, since such relief was unavailable at the time the foreclosure action was commenced." (citing Gameways, Inc. v. Dep't of Consumer Affairs, 101 A.D.2d 888, 888 (N.Y. App. Div. 1984))).

153. *See* Harris & Meir, *supra* note 148, at 123 ("Of course, a non-recourse regime does not extinguish every kind of liability for reduction in home value. It is true that with non-recourse loans, borrowers are not meant to be liable because of the default as such. But, they are meant to be personally liable when they intentionally damage the secured asset—their residence.").

154. *See* Stein, *supra* note 149, at 1210-11.

155. *See What Happens If I Have a Reverse Mortgage and I Want to Sell My Home?*, CONSUMER FIN. PROT. BUREAU (Sep. 11, 2024), https://www.consumerfinance.gov/ask-cfpb/what-happens-if-i-have-reverse-mortgage-and-i-want-sell-my-home-en-2095/ [https://perma.cc/YAZ7-E3ZN] ("If your reverse mortgage loan is in default and you've received a notice that the loan is 'due and payable,' you may sell your home for 95 percent of its appraised value. The money from the sale will then go towards the outstanding loan balance *and any remaining balance of the loan is paid for by mortgage insurance*." (emphasis added)).

b. Nonrecourse Sales of Receivables

A second potential exception is the sale of receivables. When a company is owed money, that debt is called an accounts receivable.[156] To generate immediate cash, companies will sell their accounts receivable, and sometimes companies will buy the accounts receivable and agree to not hold the seller personally liable if the people who owe on the accounts do not pay.[157] In other words, the sale is nonrecourse.

The Uniform Commercial Code (UCC), the commercial law governing secured loans, enacted in all states, explicitly governs all sales of accounts, even nonrecourse transactions.[158] Buyers have to perfect their interests in the accounts, even when buyers cannot go after the seller personally.[159] Thus, it appears that these nonrecourse transactions create debt.

Merely being governed by the UCC, however, does not mean that nonrecourse sales of accounts are credit transactions. The reason that the UCC includes sales under its purview is because its drafters wanted to avoid any disputes over whether the UCC covers a specific transaction involving accounts—sales of accounts and loans using accounts as collateral are often blurred in commercial transactions.[160]

For other purposes, such as determining whether a sale of receivables is a true sale or a loan for usury purposes, the key factor is whether the seller or borrower retains risk of nonpayment—said another way, whether the seller or borrower will be personally liable. As one recent Southern District of New York opinion explains:

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156. *Account*, BLACK'S LAW DICTIONARY (12th ed. 2024).

157. *See* LARGE & MID-SIZE BUS. DIV., INTERNAL REVENUE SERV., LMSB-04-0606-004, FACTORING OF RECEIVABLES AUDIT TECHNIQUES GUIDE 1 (2006), https://www.irs.gov/pub/irs-utl/factoring_of_receivables_atg_final.pdf [https://perma.cc/QEU9-VG52].

158. *See* U.C.C. § 9-109(a)(3) (A.L.I. & UNIF. L. COMM'N 2023).

159. *See id.* § 9-109 cmt. 5 ("[I]f the buyer's interest in accounts or chattel paper is unperfected, a subsequent lien creditor, perfected secured party, or qualified buyer can reach the sold receivable and achieve priority over (or take free of) the buyer's unperfected security interest.").

160. *See id.* § 9-109 cmt. 4.

> Where the lender has purchased the accounts receivable, the borrower's debt is extinguished and the lender's risk with regard to the performance of the accounts is direct, that is, the lender and not the borrower bears the risk of non-performance by the account debtor. However, where economic analysis reveals that "the lender's risk is derivative or secondary, that is, the borrower remains liable for the debt and bears the risk of non-payment by the account debtor, while the lender only bears the risk that the account debtor's non-payment will leave the borrower unable to [pay]," then there has not been a bona fide purchase of receivables and the transaction is, in substance, a loan.[161]

Instead of being an example of an exception to the requirement of personal liability, the sale of accounts serves as another example of courts requiring personal liability for a transaction to create debt.

c. "Debtors" Under Article 9

Critics of this nonrecourse argument might also appeal to Article 9 of the UCC, the uniform state law governing secured transactions. "Debtor" under Article 9 includes someone who owns collateral but has no personal liability for the underlying debt.[162] The UCC distinguishes a debtor—someone who owns the collateral—from an obligor—someone who owes payment for a transaction related to the collateral.[163] Thus, under Article 9, arguably the most important commercial law in the country, a party without any personal liability can be a debtor.

While facially appealing, the argument makes little sense in the context determining a cultural understanding of debt. The UCC is aimed at defining terms in the context of secured transactions, not of lending in general or cultural understandings of these terms.[164] The comments to the UCC's definitions specifically say the goal of having a different term for debtor and obligor is to show the

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161. Haymount Urgent Care PC v. GoFund Advance, LLC, 609 F. Supp. 3d 237, 247 (S.D.N.Y. 2022) (alteration in original) (citation omitted) (quoting Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc., 67 F.3d 1063, 1069 (2d Cir. 1995)) (citing Adar Bays, LLC v. GeneSYS ID, Inc., 179 N.E.2d 612, 622 (N.Y. 2021)).

162. *See* U.C.C. § 9-102(a)(28)(A) (A.L.I. & UNIF. L. COMM'N 2023).

163. *Contrast id.* (debtor), *with id.* § 9-102(a)(59)(i) (obligor).

164. *See id.* § 9-109(a), (d).

relationship to the security interest, not to reflect the cultural meaning of the terms.[165]

As almost every Secured Transactions student can testify, the artificial definitions run contrary to normal understandings of these terms. Consider the third example in the comments to Article 9's definitions: "Behnfeldt borrows money on an unsecured basis. Bruno cosigns the note and grants a security interest in her Honda to secure her obligation. Inasmuch as Behnfeldt does not have a property interest in the Honda, Behnfeldt is not a debtor."[166] In this example, a party who owes money on a debt is not a debtor because the party does not own the collateral. This example shows that the UCC's definition of debtor fails to capture even the capacious definition of debt as something owed. Appealing to Article 9's definition of debt is misguided.

d. Nonrecourse Pawn Loans

One truly nonrecourse product that is consistently treated as debt is a pawn loan. States have specific laws aimed at pawn loans, and these loans limit the borrower's liability to losing the pawned item but also treat the transaction as creating debt.[167] Pawn loans create no personal liability, but law currently and has for many years treated the transaction as a loan.

Pawn loans cut against the argument I have made in this Part, but they stand out as a truly exceptional transaction and not typical of other credit and debt.[168] First, pawnbroking has existed since ancient times and has operated the same way the entire time.[169] It

165. *See id.* § 9-102 cmt. 2.a ("[T]hese definitions distinguish among three classes of persons: (i) those persons who may have a stake in the proper enforcement of a security interest by virtue of their non-lien property interest (typically, an ownership interest) in the collateral, (ii) those persons who may have a stake in the proper enforcement of the security interest because of their obligation to pay the secured debt, and (iii) those persons who have an obligation to pay the secured debt but have no stake in the proper enforcement of the security interest.").

166. *Id.* § 9-102 cmt. 2.a, ex. 3.

167. *See* Jim Hawkins, *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*, 86 IND. L.J. 1361, 1388-93 (2011) (discussing pawn laws across various states).

168. *See* LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK 18, 297 n.41 (2011) (declining to discuss pawnbroking because it never led to mainstream credit products).

169. GEISST, *supra* note 7, at 27. For a discussion of pawnbroking in early American life,

has always been viewed as unique, often relegated to disreputable parts of town.[170] Historically, when momentous changes occurred in lending law, such as in 1854 when Britain repealed usury laws, the changes did not affect pawn loans because they were governed by their own laws.[171] In modern America, states continue to govern pawn loans with special laws that apply only to pawnshops.[172] Thus, pawn loans do not undermine the conclusion that debt requires personal liability.

D. Creditworthiness

Whether a company checks someone's credit is not determinative of whether the product is a credit product, but it is a clue. Creditors care about creditworthiness when the loan is a recourse loan.[173] If the debt depends on the borrower being personally liable for the debt, then creditors will check borrowers' credit to see how good they are at paying their debts.[174]

Credit that relies on personal liability of the debtor fundamentally reflects trust. "A debt is, by definition, a record, as well as a relation of trust."[175] Lenders extend credit to credible people.[176]

For hundreds of years, lenders have extended credit to individuals based on their creditworthiness. Charles Geisst points back five hundred years: "By the end of the Napoleonic era, the concept of creditworthiness still remained much as it had for the previous three hundred years. Reputation and social standing still were the main factors determining whether someone got a loan."[177] Louis Hyman explains that in the 1920s in America, banks lent to consumers based on their "character," in contrast to lending to firms, which was based on the firm's assets.[178] By 1930, numerous

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see HYMAN, *supra* note 168, at 297 n.41 (noting that "pawnbroking ... [was] very widespread in industrial America").

170. *See* GEISST, *supra* note 7, at 27.

171. *See, e.g.*, *id.* at 147.

172. *See, e.g.*, VA. CODE ANN. §§ 54.1-4000 to -4005, -4008 to -4014 (2026).

173. *See* Hawkins, *supra* note 167, at 1399-400.

174. *See id.* at 1400 (exploring how creditors that depend on the collateral for repayment can avoid relying on credit reports).

175. GRAEBER, *supra* note 13, at 213.

176. *See id.* at 328.

177. GEISST, *supra* note 7, at 139.

178. HYMAN, *supra* note 168, at 89.

credit bureaus emerged to keep track of individuals' conduct on their credit accounts.[179] By the mid-1950s, around 1,600 credit bureaus existed, and then in the 1960s, the process began to use computers, setting in motion the modern credit reporting services.[180]

When companies assess creditworthiness, it is an indicator that they are extending credit. While not outcome determinative, it is a factor that policymakers should consider as they assess new products.

E. Credit's Cost

The vast majority of loans throughout human history have cost money, but of course that does not mean that if a product is free, then it is not a loan. This Section briefly looks at free products in history and the ways people have characterized those products. Here, however, Regulation Z, implementing TILA, itself gives us guidance that free products are not credit under the Act.[181]

In their massive tome on interest rates throughout history, Sidney Homer and Richard Sylla note that the "earliest historical records show that interest was already a usual and accepted concomitant of credit."[182] Some early loans could not have interest because they involved repayment in kind (for example, returning a borrowed tool or ox), but as the type of loans evolved, interest quickly followed.[183]

Thus, it would be inaccurate to say credit was never free historically. But on the other hand, the concerns about credit throughout history have been closely tied to interest rates. In the West, Plato and Aristotle both argued for bans on interest.[184] Early Roman laws such as the *Twelve Tables* set maximum rates of interest.[185] In Europe, through the Reformation, religious concerns focused on lending at any interest rate. A 1521 pamphlet described a creditor and priest's attempt to defend charging interest in a dialogue with

179. *See* MARRON, *supra* note 66, at 101.

180. *See id.*

181. *See* 12 C.F.R. §§ 226.2(a)(17)(1), .18(e) n.42 (2025).

182. SIDNEY HOMER & RICHARD SYLLA, A HISTORY OF INTEREST RATES 18 (4th ed. 2005). They note that the first records of lending in Mesopotamia involved interest. *Id.* at 25-31.

183. *See id.* at 33.

184. Peterson, *supra* note 126, at 833-34.

185. GEISST, *supra* note 7, at 5.

a peasant.[186] The peasant's response shows the opprobrium for any interest at all: "Interest indeed. You baptize two children ... Now you ask me what are the two, I answer: they are children. It is the same with lending money at a profit. Baptize it as interest or anything else, it is still usury."[187]

In the Islamic world, charging interest was the key rationale for the prohibition on lending.[188] In fourteenth-century Italy, the church developed interest-free pawnshops, *montes pietatis*, to aid the poor with the authorization of the church and to avoid usurious lenders.[189] Despite the existence of interest-free loans, the concern with lending has historically centered on interest rates.

The historical context is less important here because Regulation Z explicitly exempts credit transactions that are free from TILA. The regulation states, "For any transaction involving a finance charge of $5 or less on an amount financed of $75 or less, or a finance charge of $7.50 or less on an amount financed of more than $75, the creditor need not disclose the annual percentage rate."[190] Even more importantly, Regulation Z defines creditors as parties that charge finance charges,[191] so if a party does not charge a finance charge, then it is not a creditor under TILA.

While the argument from history—that credit always costs something—is weak, the argument that free products do not fall within TILA is strong. Also, other relevant lending laws, such as usury laws, cannot apply to products that lack interest rates.[192] While being free does not mean something is not credit for all purposes, it does mean that the most important lending laws do not apply to that thing.

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186. *See id.* at 74.

187. *Id.*

188. *See generally*, Rehman, *supra* note 7 (describing the textual and historical rationales for prohibiting interest in Islam).

189. MARRON, *supra* note 66, at 2.

190. 12 C.F.R. § 226.18(e) n.42 (2025).

191. *See id.* § 226.2(a)(17)(i) ("Creditor means: (i) A person who regularly extends consumer credit that is subject to a finance charge.").

192. *See, e.g.*, 12 U.S.C. § 86 (prohibiting as usurious "[t]he taking, receiving, reserving, or charging [of] *a rate of interest* greater than is allowed" by federal law (emphasis added)).

F. Policies Behind Consumer Credit Laws

This Section quickly surveys the policies behind four consumer credit laws as well as one general policy concern frequently involved in consumer credit. Understanding the "why" behind common credit laws gives us a clue as to whether a new product is credit because if a product is credit, it should evoke similar concerns.

1. Truth in Lending Act

TILA is focused on uniform disclosure of price terms to inform shopping for credit. Companies, the Act supposes, should disclose costs on similar products in the same way so that consumers can easily price shop. The Congressional Findings and Declaration of Purpose states:

> The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of [15 U.S.C. §§ 1601-1667f] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.[193]

By requiring all creditors to state the cost of credit as an annual percentage rate, TILA seeks to help consumers make better choices in selecting credit.[194]

2. Usury

Usury laws set price caps on how much lenders can charge for credit.[195] By using a blunt regulatory instrument that applies price limits in all situations to all borrowers and lenders, "[u]sury laws aim to protect both borrowers and society from the effects of overindebtedness."[196] If borrowers have to pay too much for credit,

193. 15 U.S.C. § 1601(a).

194. *See* Peterson, *supra* note 126, at 876-77.

195. *See, e.g.*, VA. CODE ANN. § 6.2-2216.A.1 (2025) (limiting allowable interest on auto-title loans to "a simple annual rate not to exceed 36 percent").

196. Levitin, *supra* note 1, at 435; *see also* Adam J. Levitin, *Rent-a-Bank: Bank*

it is likely that they will have too heavy a debt load and will be unable to pay off their obligations. Being in financial distress has negative consequences for the borrower and generates negative externalities.[197]

3. Equitable Right of Redemption

Another important right in commercial law generally is the right of debtors to the equity in collateral being used for a loan. The common law developed the idea of an equitable right of redemption to prevent mortgage lenders from seizing a debtor's property after a simple default on the mortgage.[198] Foreclosing that equitable right of redemption through a foreclosure sale ensures that the debtor gets any surplus the sale generates—that is, the debtor gets the equity in the collateral.[199] The UCC similarly gives debtors any surplus after collateral is sold.[200]

These laws are concerned with making sure borrowers do not forfeit rights on their equity in collateral.[201] The equity represents wealth or savings that the borrower has, and laws affording the debtor the chance to either keep the collateral or at least keep the debtor's value in the collateral are animated by a desire for the debtor to retain that wealth.[202] Law and scholarship on asset-backed lending condemn the practice because it ignores the borrower's

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Partnerships and the Evasion of Usury Laws, 71 DUKE L.J. 329, 347-48 (2021) (stating that usury law "protects borrowers from lender market power and informational asymmetries, and it helps prevent negative externalities from overindebtedness").

197. *See* Hawkins, *supra* note 167, at 1366.

198. *See* Debra Pogrund Stark, *Foreclosing on the American Dream: An Evaluation of State and Federal Foreclosure Laws*, 51 OKLA. L. REV. 229, 231 (1998).

199. *See* Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser*, 62 N.Y.U. L. REV. 293, 306 (1987).

200. *See* U.C.C. § 9-615(d)(1) (A.L.I. & UNIF. L. COMM'N 2022).

201. *See* Peter Linzer & Donna L. Huffman, *Unjust Impoverishment: Using Restitution Reasoning in Today's Mortgage Crisis*, 68 WASH. & LEE L. REV. 949, 965-66 (2011) ("Society struggles with the concept because it is hard to believe or see at first glance that the bank is enriched. However, it is easy to see how a homeowner is impoverished. If the process was deficient or tainted, and in some cases, if it could have been avoided by a slight change in term such as moving a few payments to the end and allowing the lender to continue to amortize interest after a period of illness or layoff, then certainly the failure to modify and the consequence of forfeiture is unjust. Equity abhors forfeiture.").

202. *See* Hawkins, *supra* note 6, at 2081-82.

ability to repay the debt and because it magnifies the risk that the borrower will lose the collateral.[203]

4. Ability to Repay

A more recent innovation in consumer credit regulation is the requirement that lenders perform due diligence to ensure that the borrower has the ability to repay the loan.[204] "Ability-to-repay ... looks at the borrower's financial condition and the terms of the loan but not at the borrower's broader situation, the bargaining power between lender and borrower, or the course of dealing between the parties."[205] The policy rationale behind these laws is easy to discern from the name. These types of laws hope to prevent people from taking on debt they cannot repay.[206]

5. Behavioral Economics

Many consumer-law scholars argue that consumers accessing credit make systematically bad decisions.[207] The literature here is expansive, but scholars have argued that consumer borrowers are overly optimistic,[208] have limited attention,[209] are present-biased,[210] succumb to the halo effect,[211] and so on. Thus, when evaluating

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203. *See, e.g.*, Levitin, *supra* note 1, at 459-60.

204. *See, e.g.*, 15 U.S.C. § 1639c(a)(3) ("A determination under this subsection of a consumer's ability to repay a residential mortgage loan shall include consideration of the consumer's credit history, current income, expected income the consumer is reasonably assured of receiving, current obligations, debt-to-income ratio or the residual income the consumer will have after paying non-mortgage debt and mortgage-related obligations, employment status, and other financial resources other than the consumer's equity in the dwelling or real property that secures repayment of the loan.")

205. Levitin, *supra* note 1, at 431.

206. *See id.*

207. For a discussion of behavioral economics, see generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

208. *See, e.g.*, Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1375-76, 1400 (2004).

209. *See, e.g.*, Fritzdixon et al., *supra* note 35, at 1047-49.

210. *See, e.g.*, Stephan Meier & Charles Sprenger, *Present-Biased Preferences and Credit Card Borrowing*, 2 AM. ECON. J.: APPLIED ECON. 193, 195 (2010).

211. *See, e.g.*, Jim Hawkins, *Exploiting Advertising*, 80 LAW & CONTEMP. PROBS., 43, 68 (2017).

products, it is important to see if the same biases and mistakes people using credit exhibit are present in the market for that product.

III. EARNED WAGE ACCESS IS NOT CREDIT

The principles outlined in Part II give a rubric to grade earned wage access. This Part applies that rubric to the earned wage access products currently on the market. Although earned wage access does resemble credit products in some ways, each of these similarities is based on a misunderstanding of the nature of credit and debt. Given the historical and legal precedents as well as the public policies animating consumer credit law, earned wage access is likely not credit.

A. Factors Indicating That Earned Wage Access Is Not Credit

The earned wage access market is not static and contains a wide variety of types of products. Despite the variety, it is unlikely that most versions of the products currently in the market qualify as credit because they are nonrecourse and involve no personal liability, do not consider creditworthiness, do not involve finance charges, and do not implicate most of the policy concerns behind consumer credit law.

1. Most Earned Wage Access Is Nonrecourse and Involves No Personal Liability

a. Employer-Partnered Products

For earned wage access products in which the company partners with an employer, that the transaction is nonrecourse is easy to see. First, the employee does not ever promise to pay the earned wage access company any money—only the employer does[212]—so even the

212. *See* ZayZoon US Inc., Comment Letter on CFPB's Proposed Interpretive Rule 12 (Aug. 30, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0077 [https://perma.cc/TV4N-YG45] (explaining that the employer, not the employee, owes the earned wage access company money because the earned wage access company "can ... satisfy the existing financial obligations of the employer to the employee").

expansive definition of "something owed"[213] is not satisfied. Rain Technologies explains its product "does not give rise to an obligation of indebtedness by the employee-consumer to 'repay' any amount .... The only party that is liable to pay Rain is the *employer*: upon demand by Rain and in accordance with the contract between Rain and the employer."[214]

Second, the earned wage access company has a claim only on the unpaid wages, and if those unpaid wages do not generate enough to pay off the earned wage access company, the employee owes nothing personally.[215] Thus, there is no personal liability beyond the "collateral" of the wages, if we conceptualize the transaction using traditional secured financing categories.

Third, the earned wage access company bears the entire risk of nonpayment. The product is similar to factoring transactions, in which the buyer of accounts receivable bears the risk of nonpayment,[216] so courts should conclude that earned wage access products are not credit.[217]

b. Direct-to-Consumer Products

Whether direct-to-consumer earned wage access products are recourse loans is harder to see because money from a source other than the employee's paycheck could be used to repay the loan. The employee could, for instance, not get paid because the employer goes bankrupt, but the employee could receive an inheritance that repays

213. *See supra* note 100 and accompanying text.

214. Rain Tech. Inc., Comment Letter on CFPB's Proposed Interpretive Rule 4 (Aug. 30, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0085 [https://perma.cc/HUZ3-LVZ4].

215. *See supra* notes 55-56 and accompanying text.

216. *Compare* LARGE & MID-SIZE BUS. DIV., INTERNAL REVENUE SERV., *supra* note 157, at 1 ("Many companies who extend credit to their customers sell their accounts receivable to a factor.... A factor may ... [assume] the credit risk of customers."), *with* Am. Fintech Council, *supra* note 61, at 11 ("With [EWA] products, the risk of non-payment is transferred to the EWA provider, meaning that the provider may incur a loss without recourse to the consumer.").

217. *Cf.* Haymount Urgent Care PC v. GoFund Advance, LLC, 609 F. Supp. 3d 237, 247 (S.D.N.Y. 2022) (holding that transactions involving accounts receivable are loans, not sales, when "the borrower remains liable for the debt and bears the risk of non-payment by the account debtor" (quoting Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc., 67 F.3d 1063, 1069 (2d Cir. 1995)) (citing Adar Bays, LLC v. GeneSYS ID, Inc., 179 N.E.3d 612, 622 (N.Y. 2021))).

the advance. Still, looking carefully at the agreement between the employee and the earned wage access company reveals that the transactions are nonrecourse.[218]

Most importantly, the employee is not required to ever pay back the advance.[219] This is hard to let sink in because we are accustomed to agreements requiring repayment. But direct-to-consumer earned wage access products are more like gifts with requested repayment than loans with obligated repayment. So why do agreements mention repayment through an automatic debit at all?[220] The reason is that the automatic debit is the way the user elects to repay if the user wants to do so.[221]

The concept is so strange that it is worth saying again: The repayment is entirely voluntary, and the agreement between the user and the company merely provides a mechanism for the user to repay the obligation if they want. EarnIn's agreement states:

> As stated in Section 2.a., to obtain Cash Outs and utilize the other Cash Out Services, you must have a checking account at a bank located within the United States and you must link that bank account to your EarnIn profile. To repay Cash Out Services, you must authorize debits from your Bank Account or another eligible bank account. Your bank account(s) are subject to the terms of the applicable deposit account agreement(s) you enter into with each bank.
>
> You do not have an obligation to repay any of the Cash Out Services, and EarnIn will have no legal or contractual claim or remedy against you based on your failure to repay any of the Cash Out Services. However, if you do not repay a Cash Out Service or EarnIn is unable to complete a repayment to EarnIn that you authorized, you will be prevented from using the Cash Out Services until you pay any outstanding authorized payment to EarnIn. EarnIn warrants that it will not (i) engage in any debt collection activities if Cash Out Services are not repaid on the scheduled date, (ii) place the amount of the outstanding

218. *See, e.g.*, BRIGIT, *supra* note 57, § 7.6.2.

219. *See supra* note 55 and accompanying text.

220. *See, e.g.*, BRIGIT, *supra* note 57, § 7.6.1 ("If you receive an Advance, Brigit will initiate an electronic debit using your Payment Method in the amount of the Advance plus any optional fee.").

221. *See id.* §§ 7.6.1-.2.

> Cash Out Services as a debt with, or sell it to, a third party, or (iii) provide any reporting to a consumer reporting agency concerning the amount of the Cash Out Services."[222]

Brigit's agreement is the same.[223] Because there is no obligation to repay, there is no personal liability on the advance—no "something owed"—even though there is a way to make voluntary repayments.

Second, even if a court or regulator thought giving a means of repayment created an obligation to repay, these products are not recourse because the employee can cancel the automatic debit with the earned wage access company or can close the bank account and never face any personal liability.[224] Because there is no personal liability, earned wage access companies will not seek reimbursement if the automatic debit is cancelled.[225]

c. Arguments That Earned Wage Access Is Recourse

One reason that people argue earned wage access credit is a recourse loan is that the earned wage access companies have the right to debit users' accounts multiple times or seek deductions from their payroll multiple times. The National Consumer Law Center and the Center for Responsible Lending argued to California's financial regulator that Payactiv's and EarnIn's agreements both afford the companies these rights; the advocacy groups concluded

222. *Cash Out User Agreement* § 8, EARNIN (Sep. 24, 2025), https://www.earnin.com/privacyandterms/cash-out/terms-of-service [https://perma.cc/3MZK-J5UM].

223. *See* BRIGIT, *supra* note 57, § 7.6.2.

224. *See* Iowa Dep't of Just. & Kan. Off. of the Att'y Gen., Comment Letter on CFPB's Proposed Interpretive Rule 4 (Aug. 30, 2024), https://regulations.gov/comment/CFPB-2024-0032-0049 [https://perma.cc/CQM8-HW3Q] ("[I]f a consumer revokes permission for a fully non-recourse EWA product before payday, the consumer owes *nothing*."); *see also* MoneyLion, *supra* note 55, at 5 ("Customers can decide not to repay their Instacash advance by simply revoking their payment authorization. Thus, the choice of whether to continue using Instacash stays fully within the customer's control."); Fin. Tech. Ass'n, Comment Letter on CFPB's Proposed Interpretative Rule 3 (Aug. 30, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0043 [https://perma.cc/P6VZ-CF4G] ("Because a consumer is not legally bound to make a repayment and can cancel the automatic mechanism, this does not create a legal obligation—another key distinction from traditional credit.").

225. *See* Iowa Dep't of Just. & Kan. Off. of the Att'y Gen., *supra* note 224, at 5 ("Given that definition, a fully non-recourse EWA product never leads to violative types of 'debt collection,' because if the consumer declines to reimburse the EWA provider, the EWA provider has no recourse and simply declines to provide future EWA products to that consumer.").

that this "right to repayment from future wages or income further reveals that these are loans, not payment of wages."[226] They continued, "[g]arnishments may also expose consumers to legal claims by the payday advance provider, despite their assertion that their products are 'nonrecourse.'"[227]

This analysis, however, confuses the mechanism for the user voluntarily repaying the debt with a legal obligation to pay the debt.[228] The agreements say that the earned wage access companies have no legal right to repayment from the employee, so it is impossible for these companies to assert "legal claims."[229]

2. Earned Wage Access Products Do Not Rely on Creditworthiness

Earned wage access providers do not obtain information about the worker's credit history, personal-responsibility level, or other debts—the hallmarks of creditworthiness.[230] While not dispositive, the fact that providers do not care about creditworthiness suggests that earned wage access is not credit. Earned wage access companies do not care about creditworthiness because there is no personal obligation to repay.[231]

Consumer advocates disagree, asserting that learning about the unpaid wages is underwriting. "Verification of coming earnings—whether directly through a connection to the employer's time and attendance system or indirectly by monitoring the employee's work

226. Nat'l Consumer L. Ctr. & Ctr. for Responsible Lending, Comment Letter on Proposed Earned-Wage-Access Rulemaking Under the California Consumer Financial Protection Law 5 (Mar. 15, 2021), https://www.nclc.org/wp-content/uploads/2022/08/CRL_CA_DFPI_EWA_Comments.pdf [https://perma.cc/Y3ZH-L5J2].

227. *Id.* at 8.

228. *See* EarnIn, Comment Letter on CFPB's Proposed Interpretative Rule 8 (Aug. 30, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0082 [https://perma.cc/PM7C-JP4B] ("Similarly, many employees authorize a voluntary payroll deduction from their wages for deposit into their retirement account, but such authorization does not create an *obligation* for the employee to fund the retirement plan. Likewise, a monthly recurring donation to a charity via preauthorized [automatic clearing house] debit does not generally constitute an obligation to donate money (absent an underlying pledge or other form of reliance constituting an obligation under state law).").

229. *See, e.g.*, EARNIN, *supra* note 222, § 7; BRIGIT, *supra* note 57, § 7.6.2.

230. *See* MARRON, *supra* note 66, at 86, 101.

231. *See* MoneyLion, *supra* note 55, at 1 ("Instacash ... involves no credit check.... [C]ustomers ... have no obligation to repay the advance they receive.").

habits—is merely a form of underwriting."[232] They further argue that the only reason earned wage access companies do not care about creditworthiness is that the providers are confident that they will obtain repayment through other means.[233]

It is hard to understand, however, how verifying that a payment will be voluntarily returned is the same as verifying that a borrower will not breach a legal obligation to repay under a contract. Investors routinely infuse capital in businesses by purchasing interests in the businesses.[234] The investors sometimes perform extensive searches to maximize the likelihood of recouping their investment and not losing it.[235] This is underwriting, but the focus is on factors distinct from traditional creditworthiness. The same thing is true in the context of earned wage access. The providers do not assess whether they trust a worker to repay a debt based on that worker's character; they underwrite the earned wages themselves.

Professor Cuttino has argued that earned wage access is similar to payday loans because both include (1) high costs, (2) limited underwriting, and (3) credit invisibility.[236] As discussed below, I agree with her concerns about the costs. But, while she rightly points out problems associated with (2) and (3), both of these "bugs" are actually "features" when considering whether earned wage access is credit because their opposites—underwriting and reporting outcomes to credit bureaus—are associated with lending.[237]

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232. Nat'l Consumer L. Ctr. & Ctr. for Responsible Lending, *supra* note 226, at 4.

233. *See id.* at 5 ("The fact that the providers are confident enough of their ability to recoup the payment through debiting the account to give up on other collection methods does not mean they are not offering credit.").

234. *See, e.g.*, Jesse M. Fried & Mira Ganor, *Agency Costs of Venture Capitalist Control in Startups*, 81 N.Y.U. L. REV. 967, 981-82 (2006) (describing venture capitalists investing in startups in exchange for preferred stock).

235. *See, e.g.*, Yifat Aran & Nizan Gesievich Packin, *Due Diligence Dilemma*, 2025 U. ILL. L. REV. 1795, 1802 (describing venture-capitalist firms as "risk reduction engineers" that "approach potential investments with an almost scientific rigor, using investment memoranda to 'pressure-test ideas' and bring hidden risks to light instead of hiding them").

236. Cuttino, *supra* note 14, at 1544-51.

237. *See id.* at 1547-50.

3. Voluntary Tips Likely Are Not Finance Charges

Many earned wage access companies generate revenue through voluntary tips.[238] The CFPB's Proposed Interpretive Rule evoked a serious debate about whether earned wage access providers' tips are finance charges.[239] As Regulation Z, TILA's implementing regulation, defines finance charges:

> The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.[240]

Do tips fall under that definition?[241]

Existing case law does not treat optional fees as finance charges,[242] and at least one court has held that voluntary tips in the earned wage access context are not finance charges.[243] Cases

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238. As described in Part I.C, some earned wage access companies have subscription fees or per use fees. *See supra* Parts I.C.4 and I.C.5. The analysis here obviously does not apply to those business models. Some comments to the CFPB's Proposed Interpretive Rule were concerned about whether subscription fees were finance charges. *See, e.g.*, Tex. Appleseed, *supra* note 20, at 2 (citing "[m]embership or subscription fees" as an additional charge companies impose); Nat'l Consumer L. Ctr., *supra* note 19 ("The CFPB should investigate whether subscription fees required to be eligible for cash advances are disguised finance charges. To the extent that these fees are imposed as an incident to or a condition of the extension of credit, they are finance charges under TILA." (footnote omitted)).

239. *See infra* notes 247-48, 253-55 and accompanying text.

240. 12 C.F.R. § 226.4(a) (2025). TILA also defines the term. *See* 15 U.S.C. § 1605(a) ("Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. The finance charge does not include charges of a type payable in a comparable cash transaction.").

241. One argument earned wage access companies make is that there are no finance charges because there are no obligations. *See, e.g.*, EarnIn, *supra* note 228, at 3. Because Part III.A.1. considers that argument at length, I will not repeat the analysis here.

242. *See, e.g.*, S. Fin. L.L.C. v. Rogers (*In re* Rogers), 796 F. App'x 236, 237 (5th Cir. 2020) (per curiam) (rejecting a claim that a motor club membership was a finance charge because the "membership was optional, and Rogers was advised that he could decline it without affecting his ability to obtain the loan").

243. *See* Golubiewski v. Activehours, Inc., No. 22-CV-02078, 2024 WL 4204272, at *6 (M.D. Pa. Sep. 16, 2024) ("Here, the tips and fees are not a condition to credit. In fact, by alleging

contemplating tips as finance charges emphasize that the tips were not voluntary.[244]

Voluntariness also matters for Regulation Z. For instance, voluntary credit-insurance premiums are not finance charges if they are disclosed to be voluntary,[245] nor are fees for voluntary debt-cancellation or debt-suspension agreements.[246]

In response to the argument that voluntary tips are not finance charges, opponents of earned wage access make several important arguments. Most importantly, they argue that earned wage access companies compel workers through deception to pay tips involuntarily.[247] Similarly, some argue that tips as a concept are inherently

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that Plaintiffs sometimes accidentally paid tips or fees and that Plaintiffs obtained advances without paying tips and fees, Plaintiffs acknowledge that the tips and fees were not a necessary condition to credit. This Court agrees with EarnIn that the optional tips and fees are not finance charges under TILA, which requires that the fees be a *necessary* condition for credit." (citations omitted) (citing Household Credit Servs. v. Pfennig, 541 U.S. 232, 239-41 (2004))).

244. *See, e.g.*, Consumer Fin. Prot. Bureau v. SoLo Funds, Inc., No. 24-cv-04108, 2024 WL 4553110, at *3, 5 (C.D. Cal. Oct. 17, 2024) ("These allegations include that only 0.5% of loans on the SoLo platform were funded without a lender tip and that most SoLo borrowers were required to select a percentage of the loan principal as a donation to SoLo as a condition of completing the loan application.... The Court disagrees [with SoLo]. As previously discussed, the Bureau alleges ample facts to support its underlying allegation that tips and donations are not voluntary, and therefore, may be defined as finance charges."); *see also* Checchia v. SoLo Funds, Inc., No. 23-2193, 2024 WL 3717491, at *1 n.2 (3d Cir. Aug. 8, 2024) (nonprecedential opinion) ("According to Mr. Checchia, SoLo misleadingly claimed in both its promissory notes and its required *Truth in Lending Act* disclosures that the advances had a zero-dollar Finance Charge and a zero percent annual percentage rate ('APR'), while in actual fact, users were unable to obtain advances on the platform without paying a 'donation' to SoLo and a 'tip' to the user that funds the advance.").

245. 12 C.F.R. § 226.4(d)(1) (2025).

246. *See id.* § 226.4(d)(3).

247. See Nat'l Consumer L. Ctr. & Ctr. for Responsible Lending, *supra* note 226, at 9 ("While the tips are purportedly voluntary, companies can employ strategies to make it difficult not to tip or to make the consumer feel compelled to tip. These range from adding a default tip that must be removed each time, to different user interfaces sending psychological signals, to disingenuous statements about how the tips support a 'community' rather than a large company or wealthy hedge fund, to the outright denial or reduction of future credit if the consumer does not tip enough." (footnote omitted)); *see also* Att'ys Gen. of Mass., D.C., Del., Me., Md., Mich., Minn., N.J., N.M., N.Y., N.C., Or., Pa. & R.I., Comment Letter on CFPB's Proposed Interpretive Rule 3 (Aug. 30, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0065 [https://perma.cc/HT9Z-746N] ("Some EWA sellers have designed their apps such that a 'tip' amount must be selected to complete the transaction, with the default set to a non-zero number or a suggested tip pre-selected. EWA sellers have also attempted to misleadingly suggest that tips are in some way earmarked to help other consumers, with 38% of respondents of one survey who tipped reporting that they did so to

deceptive because financial services are not a service industry.[248] These arguments reflect claims that have been made for years about optional credit life insurance.[249]

While this consumer protection problem is serious, if true, it does not make the charge mandatory; it makes the companies deceptive. Existing law addresses deceptive conduct,[250] and future regulation could be aimed at prohibiting this sort of behavior. But deception does not make tips finance charges.

Alternatively, if the argument is that provider deception makes the tips mandatory, then courts would have to decide such an argument on a case-by-case basis. There is an extensive body of law regarding whether fees are voluntary, and courts must routinely decide whether fees are truly voluntary.[251] Earned wage access

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'pay it forward to another user.'" (footnote omitted)).

248. *See* Consumer Reps., Comment Letter on CFPB's Proposed Interpretative Rule 5 (Aug. 29, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0037 [https://perma.cc/RLM3-DKT5] ("Such practices are clearly manipulative, deceptive, and unfair. Soliciting tips should ideally be prohibited, in EWA as well as for any fintech loans or other financial products or services. Tipping is inappropriate for the financial sector as it is not a service industry and there is a fundamental imbalance of power and information between companies and consumers that places consumers in an inherently vulnerable position.").

249. *See* Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMP. L. REV. 1, 57 (2005) ("For instance, because TILA does not usually require disclosure of credit insurance as a finance charge, consumers do not have the benefit of an annual percentage rate disclosure reflective of the cost of the insurance premium. TILA treats credit insurance premiums as a finance charge only where the lender requires the insurance. For this reason, the great majority of lenders treat credit insurance as optional. But predatory lenders tend to lead consumers to believe the insurance is necessary, or to omit any mention of the insurance at all, then slipping a form for the consumer to initial into a stack of documents at closing." (footnote omitted)).

250. *See* Nev. Off. of the Att'y Gen., Comment Letter on CFPB's Proposed Interpretative Rule 4 (Aug. 31, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0079 [https://perma.cc/VDD4-43U3] ("As the CFPB notes, if providers engage in deceptive practices regarding how they solicit or explain these gratuities to consumers, the CFPB and the States can apply existing deceptive practices statutes to those providers.").

251. *See* Elizabeth Renuart & Diane E. Thompson, *The Truth, the Whole Truth, and Nothing but the Truth: Fulfilling the Promise of Truth in Lending*, 25 YALE J. ON REG. 181, 224 & n.242 (2008) (collecting cases and secondary sources analyzing whether fees were voluntary). As one example, see *Sparano v. JLO Auto., Inc.*, No. 19-cv-00681, 2021 WL 4503078, at *9 (D. Conn. Sep. 30, 2021) ("Regardless of whether this claim was raised in the Complaint, there is no evidence in the record before the Court that could lead a reasonable jury to find that Mr. Sparano's election of the service contract and Guaranteed Auto Protection was involuntary. The Agreement states, in bold, that the service contract is 'OPTIONAL', and that the customer '[is] not required to purchase ... [the] service contract as a condition of purchasing this Vehicle on credit.'" (alterations in original)).

companies that coerce tips or expedite fees may see courts decide that those fees are finance charges, assuming the underlying transaction is governed by TILA. But it is not an argument that every tip from every provider is involuntary. Research indicates that many people do not leave tips, suggesting that the fear of coercion is overstated.[252]

Second, critics of the concept of tips argue that the mere fact that tips are voluntary does not mean they are not usurious charges. A recent class action complaint against Klover Holdings alleged that the company's tips and fees were usury despite being voluntary.[253] The complaint cited two cases, both of which say that the mere fact a usury interest rate is paid voluntarily by the borrower does not prevent it from being a usurious rate.[254] The National Consumer Law Center (NCLC) and Center for Responsible Lending (CRL) made the exact same argument to the California Department of Financial Protection.[255]

The difference between a worker paying voluntary tips and a borrower paying a fee is the legal obligation to pay. Take *Stock v. Meek*, a case cited by both the *Klover* class action plaintiffs and the NCLC and CRL.[256] In *Stock*, the borrower promised to pay $20,000

252. Survey research has reached varying conclusions. *Contrast* Marshall Lux & Cherie Chung, *Earned Wage Access: An Innovation in Financial Inclusion?* 29 (Harvard Kennedy Sch. Mossavar-Rahmani Ctr. for Business & Gov't, M-RCBG Associate Working Paper Series No. 214, 2023), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/214_AWP_final_2.pdf [https://perma.cc/Z9JG-2PCU] ("In our survey, we found that 37% of respondents left tips when they used the apps and of those respondents, 59% left an amount of $5 or more."), *with* Econ. Action Md. et al., Comment Letter on CFPB's Proposed Interpretive Rule 4 (Aug. 28, 2024), https://www.regulations.gov/comment/ CFPB-2024-0032-0023 [https://perma.cc/W4P5-XBJZ] ("When asked about tipping, 57% of our survey respondents said they 'always or usually' tip, while another 16% percent [sic] tip about half of the time, meaning that 73% of respondents tip providers.").

253. *See* Notice of Removal of Civil Action, Exhibit A, Class Action Complaint ¶ 69, Pierce v. Klover Holdings, Inc., No. 24-cv-00665 (W.D. Pa. May 3, 2024), Dkt. No. 1-1, *dismissed per stipulation*, Stipulation of Dismissal with Prejudice 1, *Pierce*, No. 24-cv-00665 (W.D. Pa. July 1, 2024), Dkt. No. 16.

254. *See id.* ("[T]he payment of usurious interest is usually voluntary.... The theory of [a usury] law is that society benefits by the prohibition of loans at excessive interest rates, even though both parties are willing to negotiate them. Accordingly, 'voluntary' payments of interest do not waive the rights of the payors." (second alteration in original) (first quoting Marr v. Marr, 20 A. 592, 593 (Pa. 1885); and then quoting Stock v. Meek, 221 P.2d 15, 20 (Cal. 1950))).

255. *See* Nat'l Consumer L. Ctr. & Ctr. for Responsible Lending, *supra* note 226, at 20.

256. *See id.* at 20 n.46; Notice of Removal of Civil Action, Exhibit A, Class Action

in one year in exchange for a $10,000 business loan.[257] The lender argued that because the borrower had voluntarily complied with the contractual obligation to pay, the borrower waived the protection of the usury law.[258] The court rejected the defense and awarded the borrower the $10,000 it had paid.[259] Part of the reasoning for the *Stock* court's decision was that the payment was not actually voluntary: "Payments of usury are not considered voluntary, but are deemed to be made under restraint."[260] The contractual requirement to pay is the restraint that makes cases like *Stock* fundamentally different than paying a tip that everyone acknowledges can be cancelled without any consequences at any time.

Finally, others contend that the high cost of tips when expressed as an annual percentage rate (APR) makes the product credit. Marshall Lux and Cherie Chung appear to suggest that if the cost is high, the product is credit: "[I]t seems evident that [earned wage access] services, when accompanied by extensive charges, constitute credit and should be treated as such."[261] Their concern appears to relate primarily to the need to disclose APRs so that vulnerable consumers can price shop.[262]

High costs are a serious concern in the earned wage access market, even if they are voluntary. I have previously argued for caps on costs associated with earned wage access.[263] Yet, high costs alone do not convert a product into credit. Some shoes cost a lot, but we do not consider them credit even when purchased by vulnerable groups. We should be concerned about the cost of earned wage access, but calling it credit is an inappropriate and circuitous route to solving the problem. Also, it is important to keep the extent of the actual costs in mind. Devina Khanna and Arjun Kaushal projected the annual cost of frequently using earned wage access under a tip model.[264] They projected that people who use the product twice per

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Complaint, *supra* note 253, ¶ 69.

257. *See* Stock v. Meek, 221 P.2d 15, 17 (Cal. 1950).

258. *Id.* at 20.

259. *See id.* at 20-21.

260. *Id.* at 20 (quoting Taylor v. Budd, 18 P.2d 333, 334 (Cal. 1933)).

261. Lux & Chung, *supra* note 252, at 34.

262. *See id.* at 37.

263. *See* Hawkins, *supra* note 14, at 758-59.

264. *See* KHANNA & KAUSHAL, *supra* note 42, at 12 & n.20 (assuming for the model "that the voluntary amount paid is $4.07," which is the "mean cost per advance" for the studied

month could pay $97.68 per year and users who use it six times per month could pay $293.04 per year.[265]

4. Expedited-Service Fees Are Not Finance Charges

Determining whether expedited-service fees are finance charges involves the same legal precedent and many of the same arguments addressed above. Expedited-service fees, however, have an additional powerful argument in favor of considering them to be mandatory and not voluntary, namely that workers want and need money immediately. Economic Action Maryland explains,

> The majority of Earned Wage Access products charge fees to expedite the payment. Since workers who use these products are facing a shortfall in funds, the speed with which an individual will receive the funds is a critical factor in accessing the credit. Yet, it adds to the cost of the credit and the cumulative costs of these fees add up for low-income workers. In our survey, 89% of respondents [(n=430)] used the expedited fee option.[266]

Instead of characterizing them as mandatory, earned wage access companies liken expedited-service fees to ATM fees, which involve neither credit nor finance charges but merely convenience.[267]

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companies, and assuming "that companies do not restrict the number of advances users can take").

265. *See id.* at 12.

266. Econ. Action Md. et al., *supra* note 252, at 3; *see also* Att'y Gen. of Mass. et al., *supra* note 247, at 2 ("EWA providers' reliance on the argument that their products are necessary to meet consumers' short-term liquidity needs underscores the propriety of including expedited funds delivery fees in any finance charge calculation."); Nat'l Consumer L. Ctr., *supra* note 19, at 10 ("Like tips, expedite fees are payable directly by the consumer and imposed directly by the creditor as a condition of the extension of credit. Expedite fees are a condition of the extension of credit, if a consumer wants to access the frequently advertised speed and ease of obtaining funds. Lenders advertise instant access to cash and obscure the fees necessary for immediate access in fine print and footnotes.... Consumers who cannot wait for payday will almost always pay expedite fees rather than wait one to three business days.").

267. *See, e.g.*, JOSH BERSIN, ON-DEMAND PAY: REAL-TIME PAY TO MAKE WORKERS HAPPY 5 (2021) https://joshbersin.com/wp-content/uploads/2021/06/2021_07_On_Demand_Pay_1.1.pdf [https://perma.cc/V2M3-JSJL] ("Functioning like an ATM for the employee's wages, they can access their earned wages at any time."); Wagestream, *supra* note 41, at 6 ("For example: ATMs provide immediate access to consumer-owned funds on deposit with their bank, but ATM fees are not considered finance charges and ATM advances are not considered extensions of credit — even where such advances represent provisional credit based on

In assessing whether expedited-service fees were finance charges in other contexts, courts have often examined if there were alternatives to the proposed service. In *Veale v. Citibank*, the court had to decide if a fee to send a document by Federal Express was a finance charge.[268] The court relied on the fact that an alternative delivery method existed: "[W]e are not convinced that the Federal Express fee was required by Citibank. If the borrower can choose to avoid the Federal Express fee by having the documents sent via regular mail, then the fee is not imposed as an incident to the extension of credit."[269] Because of advertising or necessity, expedited-service fees might be critical to a specific provider's product, but as in the case of tips, the determination of a fee's voluntariness cannot be made systematically but relies on a case-by-case judgment.

Because both expedited-service fees and tips are voluntary and not conditions to the earned wage access transaction, they likely do not constitute finance charges. So TILA and usury laws, as well as other lending laws, likely do not apply to earned wage access transactions that involve only tips and expedited-service fees.

5. Earned Wage Access Does Not Implicate Traditional Consumer Credit Policy Concerns

Users of earned wage access seem to have few complaints about the product, at least when judged by the complaints the CFPB has published. At the start of 2025, the CFPB had published eighty-nine complaints about earned wage access.[270] To put that in perspective, during that same period, the CFPB had received 7,361,299

unsettled deposits.").

268. *See* 85 F.3d 577, 579 (11th Cir. 1996).

269. *Id.* (citing Berryhill v. Rich Plan of Pensacola, 578 F.2d 1092, 1099 (5th Cir. 1978)).

270. *See Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/data-research/consumer-complaints/search/ [https://perma.cc/N8FH-VAMY] (quantifying published earned-wage-access-related complaints received from December 1, 2011—the first date for which data are sortable—through January 10, 2025). *But see About the Database*, CONSUMER FIN. PROT. BUREAU: CONSUMER COMPLAINT DATABASE, https://www.consumerfinance.gov/data-research/consumer-complaints/ [https://perma.cc/644K-BM9M] (noting that published consumer complaints are not necessarily a representative sample of consumer experiences); Lauren Hirota, Comment, *Tomayto, Tomahto: The Cunning New Face of Payday Lending*, 52 U. PAC. L. REV. 185, 194 (2020) ("[T]he Better Business Bureau's website contains hundreds of complaints from customers who use direct-to-consumer applications, such as Earnin.").

total complaints, meaning complaints about earned wage access accounted for around 0.0012 percent of the complaints the CFPB received.[271] Complaints about other common products vastly outnumbered these eighty-nine.[272] In contrast to actual users, commentors, however, have many concerns. In just one comment, 165 advocacy groups and academics signed a letter in support of the CFPB's Proposed Interpretive Rule.[273]

The lack of consumer complaints about earned wage access is probative as to the inapplicability of credit-oriented policy to earned wage access.[274] More importantly, the policy concerns animating credit regulation are largely inapplicable in this market.

a. Truth in Lending Act

The policy goals of TILA are largely inapplicable or impossible to implement for earned wage access. TILA's ideal of having similar products priced similarly is hard to put into practice in this space. First, the small amounts of money and time involved would often render APR misleading. A two-dollar fee for a two-day advance of twenty dollars would yield an astronomically high APR of 1,825

271. *See* All Complaint Data, CONSUMER FIN. PROT. BUREAU: CONSUMER COMPLAINT DATABASE, https://www.consumerfinance.gov/data-research/consumer-complaints/search/ [https://perma.cc/22JP-WTA2] (quantifying all published complaints received from December 1, 2011, through January 10, 2025).

272. The CFPB published 1,819 complaints about payday loans. *See* Payday Loan Complaint Data, CONSUMER FIN. PROT. BUREAU: CONSUMER COMPLAINT DATABASE, https://www.consumerfinance.gov/data-research/consumer-complaints/search/ [https://perma.cc/L88H-R78Q] (quantifying published payday-loan-related complaints received from December 1, 2011, through January 10, 2025). And there were 220,449 published complaints about checking and savings accounts. *See* Checking and Savings Account Complaint Data, CONSUMER FIN. PROT. BUREAU: CONSUMER COMPLAINT DATABASE, https://www.consumerfinance.gov/data-research/consumer-complaints/search/?date_received_max=2025-01-10&date_received_min=2011-12-01&page=1&product=Checking%20or%20savings%20account%E2%80%A2Checking%20account&product=Checking%20or%20savings%20account%E2%80%A2Savings%20account&searchField=all&size=25&sort=created_date_desc&tab=List [https://perma.cc/97WN-Y5AM] (quantifying published checking and savings account-related complaints received from December 1, 2011 through January 10, 2025).

273. *See* Ams. for Fin. Reform Educ. Fund et al., Comment Letter on CFPB's Proposed Interpretive Rule 1 (Aug. 29, 2024), https://www.regulations.gov/comment/CFPB-2024-0032-0034 [https://perma.cc/F92P-QSSZ].

274. *See supra* Part II.F.

percent.[275] Yet it does not follow that borrowing twenty dollars on a credit card would be safer or cheaper for the employee in the long term because of other risks inherent in credit card lending.[276] APR is not appropriate as a measurement of cost for the product—the product requires people to use it for a short period of time because they have to earn the money before using it. So workers most commonly use earned wage access close to payday.[277]

Also, the timing of TILA disclosures do not match the way many earned wage access products work. The Nevada Attorney General notes,

> If a consumer decides to obtain an advance on his earned wages, the consumer cannot receive a disclosure of a gratuity amount until after the consumer provides that amount to the provider. By then, however, the transaction has been consummated and it is too late to provide the required disclosure.[278]

Moreover, requiring APRs could cause confusion in comparing different products. ZayZoon offers a compelling example:

> [APR] will not help the consumer understand and compare the costs of two different transactions within the same pay period, let alone in comparison to high-cost alternatives. In Nevada, a state which has recently regulated EWA in a responsible and informed way, the average cost to consumers to borrow $500 for 4 months using a payday loan is $924, at an APR of 602%. With most EWA providers, the cost to access $500 is less than $20. With the required APR disclosures, a consumer may conclude that 580% is close enough to 602%, and simply settle for the payday loan, yet if the consumer is comparing the dollar cost

275. *See How to Calculate APR on Money You Borrow*, CAPITAL ONE (Jan. 9, 2025), https://www.capitalone.com/learn-grow/money-management/how-to-calculate-apr-on-credit-card/ [https://perma.cc/E6AB-ZS4Z] ("APR = (((Interest + Fees ÷ Loan amount) ÷ Number of days in loan term) x 365) x 100.").

276. *See* Ronald J. Mann, *Patterns of Credit Card Use Among Low- and Moderate-Income Household*s, *in* INSUFFICIENT FUNDS: SAVINGS, ASSETS, CREDIT, AND BANKING AMONG LOW-INCOME HOUSEHOLDS 257, 257 (Rebecca M. Blank & Michael S. Barr eds., 2009) ("[T]he credit card is singled out as one of the most perilous consumer financial products.").

277. *See* Murillo et al., *supra* note 38, at 7 ("[T]he majority of users use the service in the second week of the pay cycle, which corresponds to the period where the worker has accumulated wages that have been earned but not paid yet.").

278. Nev. Off. of the Att'y Gen., *supra* note 250, at 4.

> between the two, it is clear which product the consumer will choose.[279]

Thus, the policy goals of TILA are unlikely to apply to earned wage access.

b. Usury

Usury law's concern that costs will be so high that people will become overindebted does not directly apply in the context of earned wage access because the product does not ever involve a worker becoming overindebted. If an employee experienced financial distress and could not repay the advance, the employee can walk away.[280]

Indirectly, the costs associated with using earned wage access could lead to financial distress because paying those costs may prevent the payment of other debts or expenses.[281] Paige Marta Skiba and Jeremy Tobacman theorized that this mechanism caused their finding that bankruptcies increase after the first time a borrower was approved for a payday loan.[282] While this indirect causation in the earned wage context is a theoretical possibility, there is no empirical evidence of it at this time, so it is difficult to make the case that this policy concern exists for earned wage access.

c. Equitable Right of Redemption

The concern behind the equitable right of redemption—that the borrower not lose equity interest in the collateral—is not applicable in the context of earned wage access. Unlike collateralized debt, which creates concerns about the borrower losing the collateral or any surplus value in the collateral, here, "losing the collateral" is the whole point of the transaction. The employee has already obtained the benefit of the wages by getting early access to those

279. ZayZoon US Inc., *supra* note 212, at 8 (footnotes omitted).

280. *See supra* Part III.A.1.

281. *Cf.* Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?*, 62 J.L. & ECON. 485, 516-17 (2019) (finding that the "additional high-interest-rate borrowing" inherent in payday loans "may worsen household cash flow sufficiently to induce bankruptcy").

282. *See id.*

wages, so there is no risk the employee will lose their interest in the wages.

d. Ability to Repay

Ability-to-repay rules concerned with borrowers' capacity to repay the debt are not a concern here because (1) empirically, most earned wage access advances are in fact repaid,[283] and (2) companies have extremely reliable data on whether the advance will be repaid.[284]

e. Behavioral Economics

Behavioral economics concerns have more traction in this market than the other policy concerns identified above. First, drawing on behavioral economics, scholars have suggested that workers might make suboptimal decisions when using credit because of present bias, or the tendency to prefer consumption in the short term over long-term well-being.[285] This behavioral tendency is not unique to credit: People eating too many donuts are not using credit but likely exhibit present bias. But more importantly, empirical evidence on earned wage access indicates that users are not present biased. Jose Murillo, Boris Vallee, and Dolly Yu studied employees' behaviors concerning earned wage access provided by Minu, a company operating in Mexico.[286] They found that most workers did not "withdraw all available earned wages on any day, to shift their consumption as early as possible within the pay cycle," indicating that workers were not present biased.[287] They write, "Because only a small fraction of users withdraw the maximal amount of earned wage they are allowed to, it is unlikely that present-bias, at least in

283. *See* KHANNA & KAUSHAL, *supra* note 42, at 2 ("Advances were recouped successfully at least 97% of the time.").

284. *See supra* Part I.B.

285. *See* Meier & Sprenger, *supra* note 210, at 208 ("We find that present-biased individuals are more likely to borrow and, conditionally, borrow more than dynamically consistent individuals.... The finding ... gives critical support to behavioral economics models of present-biased preferences in consumer choice."); *see also* Bar-Gill, *supra* note 208, at 1395 (explaining that self-control problems lead "[m]any consumers [to] overestimate their ability to resist the temptation of finance consumption by borrowing, and consequently underestimate future borrowing").

286. *See* Murillo et al., *supra* note 38, at 5.

287. *See id.* at 13-14.

its most extreme version ... is the main driver for the demand for [earned wage access]."[288] Thus, this credit-related concern is not, to date, established by the existing empirical evidence.

Other behavioral biases, such as overoptimism, are unlikely to occur in this market because the time between getting the earned wage access and repaying it is so short. While people tend to exhibit overoptimism about events in the distant future, they are less likely to be overly optimistic about the immediate future,[289] and the immediate future is the focus of earned wage access.

Most importantly, no empirical evidence currently indicates that consumers are systematically making suboptimal decisions in the earned wage access market. Of course, this information may become available, but at present, the case for credit-like behavioral market failure is weak.

B. Assessing the Argument That Earned Wage Access Is Credit

Proponents of the view that earned wage access is credit commonly make two other arguments for why earned wage access looks like credit.

1. General Consumer Protection Concerns Do Not Make Earned Wage Access Credit

Scholarship on earned wage access raises a variety of ways in which we need to protect employees from earned wage access products. Some of the reasoning is circular, such as an argument that we must treat earned wage access as credit so that providers do not deceive the public by saying it is not credit.[290] Other concerns relate to the cost, terms, or long-term effects of earned wage access.[291] These general concerns, however, do not mean that the product is credit because a lot of consumer-focused products present

288. *Id.* at 14.

289. *See* Fritzdixon et al., *supra* note 35, at 1042.

290. *See* Nat'l Consumer L. Ctr., *supra* note 19, at 5.

291. *See* Cuttino, *supra* note 14, at 1545 (high cost); Hawkins, *supra* note 14, at 732-39 (onerous contract terms); Lux & Chung, *supra* note 252, at 25-26 (long-term effects of frequent use).

consumer-protection concerns but are not credit.[292] There are good reasons for policymakers to govern this product, but the regulation should be focused on fixing the unique issues involved in this specific financial service.

2. Deferred Payment Alone Does Not Make Earned Wage Access Credit

Professor Nakita Cuttino points out that one feature of earned wage access that makes it similar to credit products is "deferred repayment."[293] Comments to the CFPB's Proposed Interpretive Rule concur: "[W]orkers clearly incur obligations to repay money at a future date.... It does not matter that the obligation to repay is sometimes satisfied via payroll deduction. It is still an act of repayment."[294]

Earned wage access products, however, do not neatly resemble rights to defer payment merely because the employer owes the employee money.[295] Many companies use payroll processors to actually pay their employees, but that does not make the payroll processor a creditor of the employee if the processor pays the employees before the employer funds the payroll.[296]

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292. *See, e.g.*, Mitja Kovač & Ann-Sophie Vandenberghe, *Regulation of Automatic Renewal Clauses: A Behavioural Law and Economics Approach*, 38 J. CONSUMER POL'Y 287, 287-88 (2015) (explaining that many fixed-term contracts for consumer subscription services contain automatic-renewal clauses, which "might increase switching costs and average price and therefore also reduce consumer welfare").

293. *See* Cuttino, *supra* note 14, at 1538.

294. Wis. Credit Union League, Comment Letter on CFPB's Proposed Interpretative Rule 2 (Aug. 28, 2024) (quoting CFPB's Proposed Interpretive Rule, *supra* note 17), https://www.regulations.gov/comment/CFPB-2024-0032-0033 [https://perma.cc/7YZ8-TADP].

295. *See* Truth in Lending; Revised Regulation Z, 46 Fed. Reg. 20848, 20851 (Apr. 7, 1981) (codified at 12 C.F.R. pt. 226) ("Certain types of loans are not viewed as extensions of credit. For example, where the consumer borrows money against the accrued cash value of an insurance policy, credit has not been extended because the consumer is, in effect, only using the consumer's own money.").

296. Some payroll processors will in certain circumstances pay employees even though the employer has not prefunded the payroll. *See, e.g.*, TriNet Grp., Inc., Annual Report (Form 10-K) (Feb. 14, 2019) ("Our accounts receivable represents outstanding gross billings to clients, net of an allowance for doubtful accounts. We require our clients to prefund payroll and related liabilities before payroll is processed or due for payment. If a client fails to fund payroll or misses the funding cut-off, at our sole discretion, we may pay the payroll and the resulting unfunded payroll is recognized as accounts receivable. When client payment is received in advance of our performance under the contract, such amount is recorded as client

The Montana Attorney General explained how the employer's role in the transaction matters: "An [earned wage access] product that limits income-based advance amounts to income already earned, does not extend credit, or loan money, because it allows a consumer to access the consumer's own income.... [T]hey grant a consumer access to income to which the consumer is already entitled."[297] The fact that employees are using money owed to them suggests that this transaction is not like those deferring the right to repay.[298] Thinking otherwise leads to absurd results: One comment went so far as to suggest that an employer paying its employees before a scheduled payday could be considered credit,[299] but we would universally reject the idea that someone paying a credit card bill early is making a loan to the credit card issuer because the payment pays off a loan, not makes one. As with general consumer protection concerns, deferred payment does not by itself make earned wage access credit.

CONCLUSION

The earned wage access market needs regulation to protect consumers from high costs, confusing and abusive terms, and overuse. For very small advances, some companies charge high fees or set defaults to try to pressure workers to pay more than they otherwise would.[300] Earned wage access companies have the right to unilaterally amend their agreements with almost no notice to users.[301]

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deposits. We establish an allowance for doubtful accounts based on historical experience, the age of the accounts receivable balances, credit quality of clients, current economic conditions and other factors that may affect clients' ability to pay, and charge-off amounts when they are deemed uncollectible.").

297. Mont. Dep't of Just., *supra* note 28, at 1903.

298. Payactiv, Inc., *supra* note 69, at 7; *see also* ZayZoon US Inc., *supra* note 212 ("If all parties agree that the [earned wage access] advance is satisfying an existing obligation from the employer to the employee, the advance is not for temporary use, the subsequent funds payment to the [earned wage access] provider is not an obligation (i.e. a debt under the definition set forth in the Proposed Interpretive Rule) of the consumer, and therefore the transaction should not be deemed credit.").

299. *See* Nat'l Consumer L. Ctr., *supra* note 19, at 6-7.

300. *See supra* notes 247-48 and accompanying text.

301. *See, e.g.*, EARNIN, *supra* note 222 ("EarnIn may amend this Agreement at any time and will post the revised Agreement, with the applicable effective date, on EarnIn's website.

But distorting the definition of credit to force a square product into a round definition is misguided. It ignores the historical background of the concepts of credit and debt, and it disregards caselaw and regulatory guidance about the meaning of credit and debt as well as the policy concerns behind those laws. The desire to protect consumers cannot transform a nonrecourse advance that entails no personal liability into a credit product. The earned wage access market needs regulation, but that regulation must be targeted at actual harms, not creative fictions.

You should check EarnIn's website periodically for the current version of this Agreement. If you continue to use the Cash Out Services after any change to this Agreement, you will be subject to the terms and conditions of the updated Agreement."); *see also* BRIGIT, *supra* note 57, § 3 ("Brigit reserves the right to modify the Terms at any time and will notify you of any changes by posting the revised Terms on the website located at [www.hellobrigit.com] and in the mobile application and, where required by law, by providing you notice by email, in-app notification, text message, or other reasonable means. You should check the Terms periodically for changes. All changes shall be effective upon posting. The Terms will indicate ... the effective date of your Terms. YOUR CONTINUED USE OF OR PAYMENT FOR THE SERVICES AFTER THE EFFECTIVE DATE OF ANY MODIFICATION TO THE TERMS CONFIRMS YOUR AGREEMENT TO BE BOUND BY ANY MODIFICATIONS.").