

THE COMMERCIAL FACTOR

Newsletter for the Factoring Industry



Welcome to our New Board of Directors

Volume 2 Number 2
Summer 2000

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A Publication of:

The International Factoring Association

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The IFA has just completed its first full year and we would like to thank our outgoing Board of Directors for their time and efforts during the past year. The outgoing board members are: Jon Anselma from Paragon Financial, Dan Robbins from TranCentral, Inc., Sally Stark from Momentum Financial, and Sean Walden from Capital Partners USA.

We've grown tremendously in the past year. We are proud of the fact that we are able to offer our members so many services, while still keeping their membership free. Our main focus is the IFA web site. FactorSearch, our newest feature, has become a huge success. We've heard from several factors that the leads they are receiving are some of the best they have seen and there have been about ten fundings. We are now on our fourth issue of The Commercial Factor and circulation continues to grow with each publication.

Our Board of Directors for the year 2000 has been chosen. Included on this Board will be: Charles Dowden with Wells Fargo Business Credit in Texas, Bert Goldberg from Distinctive Solutions in California, Jim Lewis from Philadelphia Factors in Pennsylvania, Richard Kort with Accelerated Business Credit Corporation in California, Tobi Wilkins from Quantum Corporate Funding in New York, and Ron Winicour with Gibraltar Financial Corporation in Illinois.

Charles Dowden has worked for Wells Fargo since January 1999 in Business Credit. The Business Credit group provides Factoring, Asset Based Lending and Debtor in Possession financing. From April 1998 to January 1999, he was the Marketing Manager with Evergreen Funding Corp, a Dallas based factor, and from 1994 to 1998 he was Director of Marketing for Allied Capital Partners. Before that, he worked for subsidiaries of Pengo Industries, Tracor, Inc., and Baker Hughes in the position of Controller. All together, he has over 15 years of financial experience working in the trenches. He has a BS Degree in Accounting from Northwestern State University in Louisiana.

Bert Goldberg is President of Distinctive Solutions, the nation's leading software provider for Factors. Bert has been associated with Distinctive Solutions for over 15 years. He holds an MBA degree from California

Polytechnic University-San Luis Obispo and a B.S. degree in Accounting Information Systems.

Richard Kort is President and founder of Accelerated Business Credit Corporation, a niche factor that specializes in funding smaller, growing companies throughout the United States. Mr. Kort began his factoring career in 1993, at Advanced Capital Funding Corporation, a niche factor servicing the small business community. Mr. Kort has over 20 years of small business finance, operations and marketing experience, including 15 years in apparel finance and operations. Mr. Kort is also a successful entrepreneur with three business start-ups of his own. He is a graduate of the University of Southern California and holds an MBA from Pepperdine University's nationally recognized Presidential/Key Executive Program.

James E. Lewis is a Director and President of Philadelphia Factors, Inc. Mr. Lewis served as President and sole shareholder of Middle Atlantic Capital Incorporated from 1990 to 1994. From 1988-1990, he was a Vice-President of Washington Square Capital Markets, Inc., an investment and investment banking affiliate of Northwestern National Life Insurance Company. During 1987-1988, he managed the Corporate Finance Department of Ferris & Company, Inc. in Washington, D.C., and from 1984-1987 served as the Managing Director of PNC Merchant Banking Company. Previously, he held senior investment banking positions with First National Bancorporation, Inc. and Rauscher Pierce Refsnes, Inc. Mr. Lewis received a B.A. in economics from DePauw University and an M.B.A. in Finance from The University of Chicago.

Tobi Wilkins joined Quantum Corporate Funding, Ltd. in 1995 as Vice President, Sales & Marketing. She is responsible for new business development as well as training brokers (via seminars) and the creation of marketing materials. Since she has been at Quantum, their annual volume has increased threefold. Tobi is a member of the Commercial Financial Association, Commercial Finance League, Professional Women in Construction, Commercial Finance Management Association, Millennium Women's

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In Memory Of

The Factoring industry mourns the death of two of its own who passed away earlier this year. The International Factoring Association would like to send its condolences to the families and friends of **Allan Kutner** and **Vincent Galano, Sr.**

Allan Kutner, passed away on March 24, 2000, after a battle with cancer. Mr. Kutner was one of the pioneers in factoring in the south, having owned and operated FNB Factors in Houston, Texas since 1978. "Allan Kutner was a man of high ethics, principals, and dignity. He will be sorely missed by his family, friends, and business associates," said Ronald Spolane who acquired FNB Factors from Mr. Kutner earlier this year. Mr. Kutner is survived by his wife of 46 years, Daina, three married children and six grandchildren.

Vincent Galano, Sr. passed away on April 10, 2000 at the age of 64. Mr. Galano was instrumental in the success of Prime Financial Group in Redbank, NJ, which was founded by his son, Vincent Galano, Jr. in 1994. Mr. Galano, Sr. was a lifetime entrepreneur and owned several businesses. He was President and Chairman of the Board of Convergent Solutions, a public company specializing in computer software. Prior to that, he was President of T.H. Lehman and Company, a small business development corporation. He will be sorely missed by his family and friends.

The Commercial Factor

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Ron Winicour
Gibraltar Financial Corporation

The International Factoring Association's (IFA) goal is to assist the Factoring community by providing information, training, purchasing power and a resource for the Factors. The IFA provides a way for Commercial Factors to get together and discuss a variety of issues and concerns to the industry. Membership is open to all banks and finance companies that perform financing through the purchase of invoices of other types of accounts receivable.

The Commercial Factor invites the submission of articles of interest to the Factoring industry. For more information on submitting articles or advertisements, please e-mail info@factoring.org, or call 800-563-1895.

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LITIGATION TECHNIQUES INVOLVING THE USE OF INJUNCTIONS IN FACTORING DISPUTES

by Robert B. Buchan, Esq.

INTRODUCTION AND BACKGROUND STATEMENT

The use of injunctions and temporary restraining orders in litigation practice is a very unique area of the law which quite often is misunderstood by the general public, the practicing bar and even by factoring companies. Because the remedies involved in injunction litigation are so unique and intensive, quite often the attorney will opt to file a much simpler collection suit in order to seek a monetary judgment, but this is not always advisable. Of course, other means of collection through litigation are utilized by financial clients, i.e., compromise and settlement, referral to arbitration, or assignment to a licensed mediator. However, none of these “**alternative methods**” will have any real results when the factoring company encounters a truly problematic factoring client who will not yield to reason or obey the law, be it civil or criminal.

This article is intended to address problems concerning a factoring client who has signed a factoring contract or agreement wherein the factor has full recourse against his client for collection of the receivables along with a proper assignment of the receivables and compliance with the relevant notice and assignment provisions of **Article 9.318 of the Uniform Commercial Code**. This article is also intended to benefit and address those situations where the factor has secured a valid perfected security interest

with priority on his client's business assets. It is presumed in this article that the factoring reserve account is insufficient to cover the factoring company's exposure under the existing contract.

A. The “Real Problem Client”

The problem client will submit to the factoring company that he has not taken any receivable belonging to the factor. He will swear that the account debtors are mistaken when the account debtors inform the factor that the client deposited the receivable and ran it through his own bank account. Or more likely, your factoring client will tell you he received payment of the receivable by mistake. When you investigate you find not only that it was not an accident or mistake, you may also find that your factoring client has taken numerous checks from the account debtors that you did not know about as well as the existence of other miscellaneous problems. Some of the “**miscellaneous problems**” encountered by this author include the following: (1) the factor bought into an invoice schedule on invoices that were double billings or double invoicing (2) the factor bought into schedules on invoices that were fraudulent such as where the good or service was never provided or where the invoice is for future services which the client had no intention of providing (3) inappropriate letters sent by the factoring client directing the account debtors to pay him directly or informing the account debtors that “**the factoring contract has been terminated and rescinded**” thereby entitling the client to payment of all factored receivables (4) the client insists, after discovery of the foregoing that you buy into his new schedule so that he can make his payroll or continue his business. (5) the client offers to make restitution on the accounts or receivables that he took, only to issue “**hot checks**” to the factor (6) the client then terminates the factoring agreement for all practical purposes by having a new factoring company purchase or “buy into his receivables which you respectfully declined to purchase, thereby jeopardizing your collateral and security interest (7) the client demands that he be given his reserve account, which he insists is in a positive position or balance.

Of course, there are even more egregious situations which fit into the “**miscellaneous category.**” They vary with the boldness of the individual or company. And of course with smaller companies, the company is closely held and many times is an extension or alter ego of one

person or a majority shareholder who usually calls the shots. Therefore, it is important to know who you are dealing with in order to name the right person in the order. Other problems are encountered when the factoring client attempts to transfer assets, defray the blame to employees, sell or convert collateral, or leave behind a shell corporation after selling his business to a third party thereby jeopardizing your foreclosure or repossession of subsequently acquired property and accounts. In extreme situations, involving mail or wire fraud (**Title 18, United States Code**), the client may forge documents, contracts, and even court papers. He may even tell the account debtors that he is the official agent to receive payment for your company and “**to disregard the notice of assignment letters**” or notices under UCC Article 9.318(c) or forge letters to that effect.

The one thing a seasoned factor knows, is that a client who is destitute or insolvent due to poor business management or judgment, will also quite often become destitute in his actions, hoping that he can regain enough momentum to repay or delay the factor. When analyzed in a business analysis, the use of injunctions and restraining orders is of great importance in mitigating the damages of the factor at the outset. The factor must realize in situations involving a problem client who jeopardizes a significant portion of their portfolio, there may be no time to wait on a traditional lawsuit, or other collection methods, let alone the time to wait and see if the client will turn around his lost

wheel of fortune. Unless you are going to write off the entire debt, you must act now and you must act decisively.

I. General Purpose and Qualifications for Injunctive Relief

The following references are based upon Texas law. However the concepts employed are recognized generally in numerous states and to that extent are not unique.

(a) Jurisdiction and Venue-

The first consideration is where to file suit against the particular defendant. The United States Supreme Court along with various state courts have created general concepts of due process under the Fifth Amendment and the Fourteenth Amendment to the United States Constitution wherein defendants generally must have minimum contacts with a jurisdiction in order to gain personal jurisdiction, such as would be needed for a restraining order.

Caveat to the Factor: Make absolutely sure that you have comprehensive clauses in your factoring agreement such that the client is waiving his right to be sued in any place other than your local state court in which you reside or do business, and that he agrees to both venue and jurisdiction in the courts situated in your county of business or residence, as the case may be, and further that he agrees to be bound by the laws of your state and business domicile. Usually, these clauses will be enforced.

Injunction litigation will generally require immediate action by your attorney along with enforcement of your local or state laws. You do not want to be caught in some remote location trying to convince a local judge who is friends with the factoring client that he should be restrained or placed in contempt. Of course there are other reasons that you want your laws to be enforced which pertain to the factoring agreement itself.

Caveat to the Factor: Make absolutely sure that you also maintain a clause in the factoring agreement, that in the event of litigation the client agrees that any requirement for a bond, be it for any order or other action in court shall not exceed \$100.00. Because civil non-family injunctions require a bond in most states, you do not want to have a situation where a state district judge determines that the bond should

Unless you are going to write off the entire debt, you must act now ...

FACTORIZING NEWS

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According to **Factors Chain International (FCI)**, the volume of factoring increased from 213 million euros in 1998 to 470 million euros in 1999. The total volume of factoring deals was a record 573 billion euros last year, 27% higher than the year before, with Europe still accounting for the largest portion, 61% of the total volume. **FCI** believes the increase is due to flexibility of the service in the financing of trade and its good loan protection.

Baltic News Service, June 12, 2000

Capital Development Group (CDVG), an internet-based provider of billing, collection & consulting services to health care providers, has purchased **HealthSource Financial Advisors (HFA)**, providers of medical consulting and financing programs. The acquisition will help **HFA** to market its services, as well as provide marketing for the **IntraMed** software recently purchased by **CDVG**. **Capital Development Group** factors, bills and collects accounts receivable for financial institutions that either factor or finance Medical Healthcare Providers or directly for the providers themselves. They also factor directly managed care claims for hospitals.

Business Wire, June 2, 2000

Advantage Finance Corporation will have an unusual charge-off against **MetroBank's** loan loss reserve during the second quarter of 2000 due to a fraudulent scheme by a long-time customer. **Advantage** is the factoring subsidiary of **MetroBank N.A.** and receives loans from **MetroCorp** to finance its factoring business. The long-time customer recently informed **Advantage** and the FBI that it fraudulently documented and sold fabricated or inflated accounts receivable. The accounts receivable were apparently payable by a company with a long and consistent payment history and falsified corporate financial records and other documentation were submitted to **Advantage**. **Advantage** estimates that the maximum exposure from the loss will be approximately \$5.3 million, which has been charged off against **MetroCorp's** loan loss reserve.

Business Wire, June 1, 2000

FINOVA Group Inc. retained **Credit Suisse First Boston** to review strategic alternatives, including a possible sale, due to short-term financial woes. **FINOVA** is an independent commercial finance company that lends money to middle-market companies with funding requirements ranging from \$2 million to \$50 million. Lack of confidence in **FINOVA's** debt and commercial paper translates into higher credit spreads and makes it harder for the company to finance its operations. The company is looking for ways to increase its credit rating and it is believed that they are looking for buyers or strategic partners to that end. One analyst pointed to **Wells Fargo** as a possible buyer stating that the company has what **FINOVA** needs: A high level of capital and a strong credit rating. **Wells Fargo** has not commented.

Mergers and Acquisitions Report, May 22, 2000

Capital Development Group (CDVG), an internet-based provider of billing, collection and consulting services to health care providers has purchased **IntraMed**, developers of claims processing software. **IntraMed** will operate as a subsidiary of **CDVG**, and its President, Max Stanford Tomlinson, Jr., will remain with the company as a consultant and developer. **IntraMed** is an integrated program which is capable of scheduling, billing and on-line information faxing that can be operated by health care professionals locally or over the internet. A variety of management reports are easily generated and available to accounts receivable finance companies and payers through an Electronic Digital Interface.

Business Wire, May 12, 2000

St. George Bank has agreed to acquire the **Scottish Pacific Business Finance Group (SPBF)** for 42 million Australian dollars, subject to formal Board approvals. **SPBF** is the leading provider of cashflow finance solutions to the Small and Medium Enterprise markets in Australia and New Zealand. The cashflow financing market, consisting of factoring and invoice discounting, has a turnover of approximately A\$8 billion per year. **SPBF** has a 40% share of the factoring market and 21% of the overall cashflow finance market. The acquisition will give **St. George** a 29% share of the market. **St. George** will merge its existing cashflow finance business unit, **St. George Business Finance**, with the **SPBF** business.

AAP Newsfeed, May 9, 2000

A proposed acquisition of **Ashlar Capital Corp.**, by **Brier** provides an opportunity for both to increase their business operations. **Ashlar** factors credit-worthy trade receivable accounts for small to medium-size businesses. The access to additional capital provided by **Brier** will enhance **Ashlar's** operations by reducing the cost of financing and making **Ashlar** a more streamlined and efficient factor. **Ashlar** will provide the operational infrastructure, **Brier** will provide access to capital.

Canada NewsWire, May 8, 2000

Republic Security Bank will acquire the assets of **Spectrum Financial Corporation** in West Palm Beach, Florida. **Spectrum** provides receivable-based commercial financing and related fee-based credit, collections and management information services to small to medium-sized companies in various industries. Louis J. Dunham, Chief Credit Officer of **Republic Security Bank** said, "The acquisition of

Spectrum Financial Corporation broadens the factoring business engaged in by the Bank since 1997. **Spectrum** will now have the ability to focus on expansion using the Bank's state-wide commercial lending operations."

PR Newswire, April 27, 2000

CIT Commercial Services and **First Union National Bank** announced an agreement to provide factoring services and financing to **First Union** correspondent banks in Latin America and the Caribbean. This will provide **First Union** and its correspondent banks with the credit protection of **CIT** and help increase liquidity into the Latin American and Caribbean banking systems. **CIT** will provide its credit guarantee to **First Union's** correspondent bank, assuming the responsibility for the financial ability of its U.S. customers to pay. **Banco Financiera** is the first correspondent bank to sign on to this new program.

Business Wire, March 30, 2000

Accord Financial Corp. (ACD) announced that its subsidiary, **Montcap Financial Corp.** has entered into a service agreement with **Liquid Capital Corp.** to provide back-office processing infrastructure and credit guarantees. **Liquid Capital** offers its licensees a full back-office system, credit guarantee and the Liquid Exchange™-a clearinghouse where its licensees can purchase or sell approved invoices. **Montcap** factors transactions ranging from \$100,000 to \$5 million and offers inventory and equipment loans, and import financing. **Montcap** and **Liquid Capital** will be members of **FactorsCanada™**, a brand created by **Accord Financial Corp.** to tie together all its funding activities in Canada.

Canada NewsWire, March 23, 2000

If you have any news items you would like to include in the next issue of *The Commercial Factor*, please e-mail them to info@factoring.org.

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cover the full value of the collateral, or some amount in excess of the collateral. It is the experience of this author that most judges are willing to accept the amount of bond to which the parties have agreed.

(b) Fulfilling the requirements and definition of a restraining order-

For those of you who might be uninitiated to the concept of a restraining order used in commercial or business litigation, in its simplest form, it is an order prohibiting a business or its principal and agents from doing any act which is unlawful. It generally requires the applicant (or factor) to show a threat of immediate and irreparable harm to his collateral or property along with no adequate remedy at law. If the client is converting or appropriating the factor's money or property, the courts generally presume there is no adequate remedy at law, such as by recovery of money damages, and will issue the restraining order. But you or your counsel should be prepared to tell the Judge that the client has failed to restore the receivables that he wrongfully took or converted. In practice, however, the Judge usually doesn't inquire as to restitution once he or she finds out that your right to the receivables, has been converted or stolen.

In the state of Texas the initial order is called a "TRO" and may be obtained without notice to the other side based on a hearing with only the factor or his attorney present and it may be done without testimony on the basis of a sworn affidavit or verified pleading. **See, Rule 680, Tex. R. Civ. Proc.** This is based on a showing that "immediate and irreparable injury, loss, or damage will result to applicant before notice can be served and a hearing had thereon." **Id. at Rule 680.** In practice, rarely does the other side ever have the opportunity to appear at the hearing on the restraining order, and if properly worded, the restraining order can have severe consequences for the type of factoring client described in the introduction. Under local rules some courts inquire as to whether an attorney is representing the other side, but of course,

rarely is this the case because it is a brand new lawsuit and no attorneys have appeared except for the factor's attorney. As noted above, most jurisdictions, including Texas, are going to require a bond deposit which is designed to make the applicant (the factor) abide by any decision of the court should the TRO be wrongful. **Rule 684, Tex. R. Civ. Proc.** The bond amount is determined by the court, absent an agreement of the parties, such as by contract. The TRO itself will last until the hearing on the temporary injunction, which in Texas is a period of 14 days from the date of issuance of the TRO, with the right to one TRO extension of 14 days. **Rule 680, Tex. R. Civ. Proc.** One other thing to remember, the TRO generally has no legal effect until the bond is filed, so don't hesitate having the bond filed after the TRO is signed by the court. Furthermore, the TRO must meet some other requirements. It should contain the exact time of day it was signed by the Judge and notify the defendant when it expires along with notice of when the hearing will be conducted on the temporary injunction. **Id. at Rule 680, et seq.** This eliminates confusion over when the TRO is effective, and when it terminates, for the purpose of notice and due process requirements concerning the defendants and parties named in the lawsuit.

(c) Temporary Injunction distinguished from TRO-

The temporary injunction hearing will generally take place within the first 14 days, and involves live testimony from witnesses. It generally follows the same relief granted by the TRO and has one additional requirement. It usually requires that the factor show a likelihood of prevailing on the merits at final trial, or a probable right of recovery. **Miller v. Roberts Paper Co.**, 901 S.W.2d 593 (Amarillo.-Amarillo 1995). In practice, the courts are generally inclined to grant temporary injunctions where the client has committed the acts complained of in

The TRO can act to capture the money before it has been permanently removed ...

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the TRO. Unless modified by the court, the temporary injunction will last until final disposition of the case by trial or settlement. Thus it is highly advisable to obtain a temporary injunction (also known as a preliminary injunction) in those cases where the client, or his account debtors are not cooperating and the case has not otherwise been settled.

(d) What is the purpose of a TRO?

Virtually every legal practitioner will tell you that the primary purpose of a TRO or injunction is to preserve the status quo pending litigation. This means that your collateral be preserved and that the client be enjoined from taking receivables that you have factored. Numerous court decisions say the same thing concerning injunctions and the status quo. Actually, as applied to the factoring business this is misleading.

Caveat to the Factor: I would like to repeat something of great significance, which practitioners or, at least, factors may fail to realize. Not only may the status quo be preserved by injunction or TRO, it is also used to try to restore what should be the status quo. In other words, the factoring client cannot maintain the status quo, i.e., a converted receivable or converted collateral, if the status quo was arrived at by illegal means. For injunction purposes, the status quo cannot be a condition of affairs in violation of the law. **American Home Assurance Co. v Burnett**, 585 S.W.2d 793 (Tex. App-1972).

Therefore, if the factoring client has taken collateral such as cash or stolen receivables and placed them in a bank account, or cashed them for currency or for deposit, you can obtain a restraining order which prevents him from further transferring, spending, alienating, or disposing of his new found money, and restrain him from withdrawing money from the account to the extent of any receivable amount he so converted. His appropriation was unlawful therefore so is his possession. Since it is not a valid status quo the courts may fashion a restraining order which effectively prevents, rather than maintains the status quo. **Id.** The court can even order that the factoring client transfer those funds to its registry. Because it is an emergency hearing it

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can be obtained quickly, before all the money or property has vanished. A traditional lawsuit or collection method would virtually assure that the money or property is long gone, or even sold to a purchaser for value. The TRO can act to capture the money before it has been permanently removed, and before you have time to discover the amount, form and destiny of the collateral or cash.

Amazingly, in some situations the courts have even gone so far as to require the use of a TRO instead of a pre-judgment receivership because the TRO is less drastic and more appropriate. **American Home Assur. Co. v. Burnett**, 585 S.W.2d 793 (Tex. App.-1972)

(e) What remedies should the TRO grant to the factor?

(l) The general rule that this author uses is simple in theory and very expansive in use. The TRO should have sufficient wording or remedial language to cover every possible contingency in two respects: (l) it should prevent the factoring client from alienating, converting, transferring, spending, or otherwise destroying any current receivable or collateral which is subject to the factoring agreement or which has been factored and (2) it should prevent the factoring client from alienating, converting, transferring, spending, or otherwise destroying any future receivable or future collateral subject to the factoring agreement. The first part of the equation, i.e., preventing the client from taking any current or existing receivable is easy. Quite simply, you take an invoice aging or other report listing all the account debtors with balances and invoice numbers, and incorporate them in the order or attach them to the order as "Exhibit A.

Caveat to the Factor: Once you try to enforce the TRO you will be glad that you attached the invoice summary because your client may claim lack of proper notice of the invoices at any enforcement proceeding. Additionally, some Judges prefer that the accounts be spelled out to make the TRO effective, and enforceable in a contempt proceeding. The wording of the TRO is crucial and I have attached a sample of a TRO which covers many of the acts that a problem client might attempt with your property. Because it is five pages long, you would

probably be best to review it on your own, but suffice it to say that it is crucial that the restraining order reach the proceeds and offspring of your collateral and receivables, no matter what the form. You will also notice that where the account debtors identify their checks that were taken by your client, you should recite this information verbatim in the order.

(2) The second part of the equation is more difficult to enforce because it pertains to collateral or accounts which may not be in existence, or which have not been purchased by the factor.

It is hard to fashion a restraining order that is enforceable when it does not make reference to a specifically identifiable asset or invoice. In this regard, I would suggest the following language which I have started inserting in all restraining orders and temporary injunctions:

"This restraining order shall also apply to enjoin the transfer or disposal or sale of trade goods, equipment, general business, transfers of intangibles, inventory, and the like, which are subject to the first lien position of the factoring company under it's factoring agreement dated August 5, 1998 with Defendant and under it's financing statement filed with the Secretary of State of Texas, filed on January 10, 1998, filing no. 111, to the extent any such sale or transfer or other disposition is done with the intent, or would have the effect of prejudicing or adversely affecting Plaintiff's security interest and/or repossession."

The foregoing clause in all likelihood, would not create a wrongful injunction because it would still allow the factoring client to use his collateral in the ordinary course of business, as long as it was not done with the intent to injure or impair the factor's security interest. The UCC-I should be attached.

Caveat to the Factor: You may want to insert a clause, that in the event of the bulk sale of the business assets of your client or change in the controlling interest (i.e. greater than 50 of the voting power of the outstanding capital stock) of the company, that you be notified prior to the transfer of control or assets, along with the terms of the sale. In extreme situations, where you are concerned about the stability of the client, you may want to even have the right to consent to any bulk transfer of assets to which your security interest attaches. Regardless, this information can be a valuable tool when it comes to obtaining a temporary restraining order. For if the client has sold accounts, intangibles or assets subject to your security interest, the court has a basis for ordering that any future payments, or even past payments received by the client under the buyout agreement, be paid directly to the registry of the court, until further court order. Of course, once the proceeds are in the registry of the court, the factoring client who has taken your funds and not repaid them, will have extreme difficulty ever getting those funds out of the court. And if the client has signed a personal guaranty, the court has the basis to entrap payments to him as shareholder. Remember, under UCC **article 9-306**, a security interest continues in collateral notwithstanding sale, exchange, or other disposition thereof unless "**the disposition was authorized by the secured party**".

Of course, depending on the situation there are hundreds of other clauses that could be inserted in a TRO, such as restraining the factoring client from calling the account debtors and representing that the factoring agreement is terminated or that he owns the receivables. Your attorney will have to be careful to fully examine every possible wrongdoing by your factoring client Whatever you have drafted into the restraining order, you have to make absolutely sure it is broad enough to capture any potential violation of the TRO. If the TRO is

Do not ever attempt to rely on a TRO or injunction which simply names the corporate client.



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Current Factoring issues, Revised Article 9 of the UCC Code, Dealing with other Factors in take-overs, participations, sharing transactions and re-Factoring

Mike Ullman, Esq., Ullman & Ullman

Can you claim invoice payments your client deposited in their account? Update on usury and it's implications in Factoring

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Panel discussion on how to use new marketing techniques to grow your portfolio

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Lewis Faber – Yale Capital Group, Ltd.
Laurence Pino, Esq. – Pino Training Organization

Melinda Murphy, IRS

Working with the IRS in relation to your clients

Funding Panel

Panel discussion on different funding options.

Larry Meek – Capitol Resource Funding
Paul Cottone – Summit Rediscount Finance
Andrea Petro – Transamerica Financial Services Funding

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Investigation of fraud claims

Dr. Edmond Seifried, Lafayette College

Economic analysis and projections

Gary Miller, Esq., Boyar & Miller

Purchase and sale agreements, Participation agreements

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Stop The Bleeding



By Dr. Ron

"Many a tear has to fall, but it's all in the game". There is a lot of truth in that line from the popular song, especially as it relates to the factoring industry. Problems and losses may be a part of our daily lives, but discovering the problems early, and learning how to deal with them, will lead to less frequent and hopefully smaller losses.

This article is the first in a series of articles entitled, "STOP THE BLEEDING". We will try to avoid boring subjects like knowing your borrower, verifications, and credit checking. Instead, we will try and stick to fun stuff, like employee fraud, account debtor collusion and the like. So, here we go. I introduce you to the first, the one, the only, the dreaded, CONVERSION OF FUNDS!

We all know, including our clients, that conversion of funds is against the law. Nobody wants to spend time in jail, so how much risk can there be of a client swiping a check or two? It wasn't too long ago that I was in bankruptcy court in front of a Judge, pleading that the Judge lift the automatic stay which would then allow me to collect my receivables. In support of my argument I pointed out that the client had converted a \$9,000 check by picking the check up from the account debtor, endorsing my company's name to the back of the check, and then cashing it. I was certain that after committing such a heinous crime, that the client would soon have a six foot six inch roommate with a neck the size of a tree stump, and that the Judge would give me everything I needed to collect out. After listening to my story, the Judge looked at me, winked, and said, "I'll bet that's not the first time that's ever happened to you, son". The Judge then turned to the client and advised him not to ever do that again. So much for striking fear into the hearts of the bad guys.

We learned of the conversion the day after it happened. We found out through a routine collection call. Do not let your client make these calls for you. Doing the collection work yourself can alert you to all kinds of problems you might otherwise not learn about. Actually, the collection call we made was not so routine. During the past few weeks, the client had been asking for favors such as overadvances and early returns of reserves. We smelled trouble coming and we increased our collection activities.

The first step we took after learning of the conversion was to "re-notify", via facsimile and by certified mail, all the account debtors that the client had ever done business with, not just the account debtors presently on the books. This re-notification reinforced the notion that all checks were to be sent directly to the factor. We advised the account debtor that if the checks were sent or given to any other party, the account debtor would remain liable for the entire amount.

The next step we took was to do nothing but wait. Wait for the day

when the client gave us several new invoices to factor. It happened three days after the conversion.

Before the conversion, we were 80% advanced on eligible invoices. After the conversion we were over 95% advanced. But the combination of three days of collections, three days of not returning reserves, and receipt of the new invoices which we did not fund, actually brought our effective advance rate to about 70%. Now, we felt we could liquidate without incurring a loss, which is exactly what happened. We got lucky.

Factors are reasonably intelligent people. If we do everything correctly, follow all the prescribed procedures and rules, it should all but eliminate conversion problems. Right?

I am reminded of the time that we were factoring invoices for a Louisville, KY manufacturer of paint booths. Call the client the "ABC" Company. We had factored a \$17,000 invoice and were waiting to get paid. The invoice was verified. The paint booth was confirmed to be working properly. The account debtor was notified and acknowledged in writing to pay us directly. We spoke with the account debtor on several occasions and were told that the invoice was open in their system and that a check would soon be cut. We couldn't lose.

After six weeks our invoice remained unpaid but we expected payment any day. However, another company who was subsequently paid in full, submitted a new invoice for the same paint booth and for the same amount of money. Our client had formed a new corporation, the "XYZ" company, submitted an invoice in XYZ's name, and convinced the account debtor that the first invoice was sent in error. Again, we got lucky and collected our money. The point is, however, that no matter how good you are, a conversion of funds can happen to you. Here are some guidelines to follow to Stop the Bleeding if a conversion of funds does cross your doorstep.

- | | |
|--------------------|--|
| Rule number one. | Make your own collection calls. |
| Rule number two. | Do not tell the client what you know or suspect. |
| Rule number three. | Re-notify the account debtors, all of them. |
| Rule number four. | Do not panic. Do not act out of anger. Be patient. |
| Rule number five. | Hold reserves. |
| Rule number six. | Improve your position and then react accordingly. |

To share your experiences or to seek the advice of the author, Ron Winicour can be reached by e-mail to ron@gibraltarfinancial.com or by snail mail to Gibraltar's corporate address.

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A PRIMER ON HOW TO MAKE MONEY REFERRING HEALTHCARE RECEIVABLES TRANSACTIONS

by James R. Irwin, Jr. & Mitch Patridge

As a successful factor you have carved out a lucrative niche in the marketplace. But undoubtedly your marketing team comes across viable transactions that simply fail to meet your purchase parameters. By identifying these leads, you have already accomplished what is often one of the most difficult aspects of any transaction. And like all entrepreneurs, you would like to convert these opportunities into referral fees. But what is the best way to go about it? Moreover, once you have referred the transaction to a potential funder, how do you insure that you are fairly compensated for your efforts?

Arguably the greatest opportunity for you to leverage your resources and realize substantial referral fees is in the field of healthcare. Though healthcare is the largest industry in the United States, standing at \$1.3 trillion and growing, few factors have the expertise to provide funding effectively and profitably to this industry. However, most factors, in their normal course of business, come in contact with healthcare providers in need of funding. In this article we will describe the magnitude of opportunity within the field of healthcare, the two most common referral compensation structures, and the realistic fees that you can expect to realize from referring transactions to firms that specialize in factoring healthcare accounts receivable. But first, we would like to provide you with a brief background on the industry, which will help you to understand why healthcare providers need the services of factors and referral sources more than ever before.

Background

Once extremely well compensated, healthcare providers have been under increasing financial pressure since 1983 when the US Government implemented the Diagnostic Related Group ("DRG"). The evolution of managed care further squeezed profit margins and, to compound matters, the Balance Budget Act of 1997 implemented draconian cutbacks, often reducing provider reimbursements by 40% or more from already ravaged levels. At the same time, banks and finance companies, having experienced substantial losses on cash flow based loans made to these same entities, have tarred the entire industry with the same brush and pulled back from lending to healthcare providers en masse. The result is that the survivors, often good operators with bright business prospects, cannot successfully source the capital necessary to achieve their growth potential. Thus, medical factors are an attractive capital source.

To give you an appreciation of the enormity of the opportunity, we would like to highlight four submarkets that have a particular need for financing:

Hospitals. Hospitals currently have approximately \$424 billion of receivables outstanding. Though the largest hospital chains can access traditional financing, the majority cannot. This is particularly true of rural and specialty hospitals, the latter offering rehabilitation, psychiatric, or other similar services.

Nursing Homes. \$121 billion of accounts receivable and severely hamstrung by the BBA of 1997. This submarket is extremely fragmented with the largest 20 chains owning less than 18% of the market.

Home Healthcare. \$46 billion and likely the most decimated by the BBA of 1997, thus offering what we believe to be the greatest opportunity.

Physicians' Groups. There are over 600,000 physicians in the United States, which equates to \$310 billion in receivables. Experts estimate that in excess of 90% of physicians are in financial trouble.

Referral Fees

Healthcare factors generally use one of two methods to compensate referral sources and the method used commonly correlates to the size and yield on a particular transaction. The first method, which is more common on transactions larger than \$500,000 and which yield less than

25%, is to provide the referral source with 50% of the Origination Fee. In general, Origination Fees average 2% of the maximum funding commitment, which is sometimes referred to as the Purchase Limit. In our company's marketplace, for example, a typical purchase is approximately \$2,000,000 with an associated Purchase Limit of \$3,000,000. Assuming a standard 2% Origination Fee, the entity that referred a \$3,000,000 transaction would receive a referral fee of \$30,000 contemporaneous with the initial funding. It is not uncommon for a stand-alone broker to generate between ten and thirty million dollars of fundings per year, which would yield as much as \$300,000 in referral fees.

The second type of methodology, which is familiar to most non-healthcare factors and is more common on smaller higher yielding transactions quoted at a discount, is to provide residual or trailing income. The particular compensation structure varies by funder but in general the residual is 10% of the "gross revenue" on a transaction. Though prima facie this appears attractive, we have found it to have several drawbacks. First, the definition of gross revenue is somewhat arbitrary. Second, should the transaction encounter problems, the payment stream can be suspended before the referral source reaps the full benefit of the referral. Third, sometimes a funding source or purchaser will arbitrarily decide to cease payments to the referring source, leaving little recourse other than costly litigation. And fourth, from the factor's perspective, the calculations are difficult and prone to argument, a result of the complex nature of medical receivables.

As a guideline, there are two basic considerations that can greatly increase your probability of successfully referring a healthcare receivables transaction to a potential funding source.

Transaction Profile

First, you need to be familiar with the types of providers that are eligible for funding. Physician groups, hospitals, diagnostic centers, home health entities, rehabilitation centers, medical equipment providers, and nursing homes are often eligible candidates. However, many healthcare factors will not fund home healthcare entities or other providers who have a substantial Medicare exposure. Similarly, chiropractors, because of the nature of their receivables, are extremely difficult to fund.

It is of tantamount importance to know which receivables a healthcare factor considers to be eligible for purchase. In general, healthcare accounts receivable fall into three categories: (i) Governmental (e.g. Medicare, Medicaid); (ii) Commercial (e.g. Aetna, Blue Cross/Blue Shield); and (iii) other (e.g. personal injury, worker's compensation, self- or patient-pay). Commercial receivables are the most straightforward and therefore the most commonly purchased. Many factors, but not all, will also purchase governmental receivables. Most factors will purchase receivables aged up to 90 to 120 days from date of billing, or sometimes service date, though some healthcare factors will purchase receivables aged up to 180 days. Very few factors will purchase personal injury, workers compensation, and self-pay receivables.

In summary, many factors come across healthcare providers looking for a factoring relationship and do not refer them on, missing out on lucrative fees paid by specialty healthcare factors. This need not be the case for there are several firms that find that your castaways are their treasures!

James R. Irwin, Jr. is President & CEO of Meridian Capital, San Diego, California, a company that provides funding to the healthcare community. His toll free phone number is (877) 220-0033.

Factoring Conference Review

The 6th Annual Factoring Conference has come and gone, taking place on April 6th – 8th at the Hyatt Regency in Austin, Texas. According to the conference reviews, it was a huge success! The speakers were informative, and attendees enjoyed the Hyatt's and Austin's hospitality.

The conference started out Thursday morning with a presentation by Bert Goldberg and Karen Ross about the International Factoring Association. Conference attendees were very enthusiastic about the upcoming year and utilizing the association to it's fullest potential. FactorSearch seemed to be the biggest draw, and several new members signed up at the conference.

At 8:30am, Bob Zadek began speaking about revised Article 9 of the UCC code, dealing with other Factors in takeovers and participations, and as always, he answered Factoring FAQ's. Bob was one of the highlights of the two days.

After lunch, concurrent sessions began. Mike Ullman spoke about claiming invoice payments your client deposits in their account. He also gave an update on usury and it's implications in Factoring. Concurrent to Mr. Ullman was the Marketing Panel. Marketing is a tough topic to cover in Factoring, however, the panel did an outstanding job. This year's panel consisted of Dr. Bill Carner, a marketing professor from the University of Texas, Lewis Faber, president of Yale Capital Group, and Laurence Pino, Esq., of the Pino Training Organization. Many marketing techniques were discussed to help grow your portfolio.

The late afternoon sessions consisted of a choice between Melinda Murphy, a representative of the IRS, speaking about working with the IRS and Form 8821, and a Funding Panel. Included on the Funding Panel were Paul Cottone from Summit Rediscount Finance, Larry Meek from Capitol Resource Funding, and Andrea Petro with Transamerica Financial Services Funding. Funding options for every sized Factoring organization were discussed.

Thursday evening, Richard Worthy of Metro Factors in Dallas hosted a hospitality suite on the top floor of the Hyatt. With a view of the city all around, attendees were treated do hors d'oeuvres and drinks, and given time to network with other Factors.

Bert Goldberg from Distinctive Solutions spoke again to the very enthusiastic crowd on Friday morning about their latest software, Factor SQL and E-Factor. E-Factor is a product that enables clients to view data, run reports and input invoices via the internet. Distinctive Solutions has already received several requests for this software package.

Attendees were kept busy on Friday morning with two interesting presenters. First up was Matt Gravelle, a special agent from the FBI. He investigates White Collar Crimes and spoke about the investigation of fraud claims and referring them to the FBI. Next up was Dr. Edmond Seifried, an economist from Lafayette College. He spoke about economic analysis and his projections for the coming year. He also gave attendees a tool with which to analyze the economy. His presentation was one of the most popular of the conference.

During Friday's lunch break, attendees were "treated" to the comedy of Mr. Al Fike. Those who bothered to stay through the entire act will understand why there will be no comedian at lunch next year in Phoenix!

Concurrent sessions began again after lunch, with a choice between Gary Miller, an attorney from Houston, or Okorie Ezieme and David Lowenkopf from Deloitte & Touche. Mr. Miller gave a comprehensive review of purchase and sale agreements. Mr. Ezieme and Mr. Lowenkopf spoke about risk management and controls.

The final sessions of the conference offered a choice between Arnie Cavazos, an attorney from Dallas, and Richard Worthy, president of

Metro Factors. Mr. Cavazos spoke about bankruptcy and pre and post petition financing. Mr. Worthy talked about marketing ideas and making the transition from a small to a large Factoring operation.

During breaks on both days, guests visited with the many exhibitors located in the exhibit hall. Many industries of interest to Factors were represented including UCC search firms, funding firms, fraud insurance, imaging, debt management, medical factors and tele-marketing.

The banquet dinner at La Zona Rosa on Friday evening concluded the two days. Located in downtown Austin, guests listened to the sounds of the local band, Dime a Dozen, while eating, drinking, and visiting with a caricaturist and rice carver. Many attendees chose to stay downtown and visit some of the local bars and listen to more local music on 6th Street.

Saturday morning offered attendees the choice of attending the Operations Roundtable or golfing at Circle C Golf Club. The Operations Roundtable was very well attended and people walked away with many new ideas on how to run their Factoring operation.

Audio tapes of all sessions from this conference are available. Please use the order form on page ?? or visit the conference web site at www.factoringconference.com.

The 7th Annual Factoring Conference is already in the works! Planned for April 5th-7th, 2001 at the Radisson Resort in Scottsdale, Arizona. While not all speakers have been confirmed yet, we have booked return engagements from Bob Zadek and the economist, Dr. Edmond Seifried.

Activities will begin on Wednesday afternoon with a shotgun golf tournament at Stonecreek Golf Club in Phoenix. Early registration and a welcome reception will be held at the resort after the golf tournament. Speaking sessions will be held on Thursday and Friday from 8:00am – 5:00pm. Exhibit booths will also be open during those times. The Operations Roundtable will be held again on Saturday morning from 9:00am – 1:00pm.

Our banquet dinner for this conference will be held at Tonto Bar and Grill in Cave Creek, Arizona. Tonto offers beautiful views of the desert and wonderful cuisine. After dinner, guests will be offered the option of returning to the resort, or staying in Cave Creek to enjoy the local bars.

Look for more information about the 2001 conference on the Factoring Conference web site at www.factoringconference.com. Brochures and registration forms will be mailed out in the Fall. We hope to see you all there!

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overly broad, it can always be modified, for it is virtually impossible to draft a TRO that could be argued not to be overly restrictive. In those situations it can be modified, but it is the author's experience that you are better off to try to cover every contingency, rather than letting something slip through the cracks. Therefore, it is very important for the factor to know and study the tactics of the particular factoring client so this information can be fully communicated to the attorney. An attorney is only as effective as the information that he receives. So you need to tell him everything about the problem client.

(f) Who should you name in the TRO as defendants and what about notice to third parties?

This is the most important part of a TRO. It is the foundation to the entire injunctive relief, for if you don't notify and/or name the right parties, you are not going to get off the ground with your court orders.

Caveat to the Factor: Do not ever attempt to rely on a TRO or injunction which simply names the corporate client. This may be difficult to enforce. Find out who is giving the orders or taking the money and name them as well.

For a small corporation this almost always involves naming the president, who may also be a guarantor. But in some situations it may also

A defendant cannot avoid compliance or excuse a violation of an injunction even if they move to dissolve it ...

involve others who are actually taking the money belonging to the factor, particularly where they have been told to return the money to the factor, or have ignored your requests that they stop intercepting the payments from the account debtors. This could include general managers, vice-presidents, operations managers, and the like. Re-

member, under tort law it is no defense that a person acted to convert property or collateral of the factor. He is strictly liable for his torts and he cannot defend on the basis that he simply acted as an agent for the corporation as their employee.

Caveat to the Factor: The biggest single problem in enforcing a TRO is the issue of notice. If the client is interfering with the account debtors concerning your receivables, or your right to receive same, you would be well informed to do two things immediately after the TRO is issued and the bond deposited.

First, you or your attorney, as the case may be, should send the TRO as soon as possible to your client. Make sure to keep the fax confirmation sheet. Remember, many times the client is out-of state or difficult to reach or serve with the complaint and TRO.

Therefore make sure he has it immediately. The court is not going to pity a defendant who received actual notice of the TRO and then violates it.

The second thing you need to do is send it to every account debtor, (or have your attorney send it to every account debtor) on the invoice aging report. In the TRO which is contained in the appendix hereto you will note that you are obtaining an order which prohibits the factoring client from taking any further receivables that are factored, and further directs the client to forward all such payments from account debtors to the registry of the court.

Generally, at this point, the account debtors will cooperate because they realize that to allow the client to receive money is against the spirit of the order, if not Article 9 of the UCC.

Caveat to the Factor: In certain situations the account debtors may choose to ignore the court order and thus the problem continues. In those situations, it is highly advisable to talk to counsel and explore the possibility of expanding the original restraining order. Is it possible to sue and join all the account debtors? This is usually out of the question, so what is the next best thing to contemplate? I suggest in these

situations that the factor amend the restraining order whereby it directs each account debtor listed in the invoice report, on each factored invoice, to pay same to the registry of court in which the action is pending. This is a very bold move legally, but in practice, this author has found time and time again, that the attorneys for the account debtors have no desire to come to Dallas County and contest jurisdiction and venue, or confront the myriad of problems created by such an order. If there is a court of competent jurisdiction to which the factoring client has agreed to be sued, and the court will receive and determine how to distribute the funds, they generally will obey the order. Their option is to either file an interpleader action involving at least three parties in their state, and/or contest jurisdiction and venue in your home county. The account debtors and their counsel almost always choose not to do this, and instead comply with the court's order.

Some litigation counsel might be concerned that the account debtors would complain of a wrongful injunction. But if they choose to ignore the TRO or injunction it is very difficult to conceive how they would be damaged by the injunction. If no enforcement is sought by contempt of court, or other motion filed with the court, the account debtor has not been fined, penalized, let alone imprisoned. Nevertheless, your counsel will need to advise you in these matters because the factoring client might feel it is a basis of interference.

In the final analysis, it is very difficult for the factor's client to complain of interference with his customers because the factor has only done what he has an absolute legal right to do, i.e., recover his property or collateral. This is generally not a basis of tortious interference. The TRO does not and should not induce any customer (account debtor) to breach a contract with your client, nor should it prohibit your client from doing business with his customer. Furthermore, a claim of tortious interference asserted by your client is a compulsory counterclaim in the action involving the TRO and is waived unless it is asserted in that action. This is not to mention the legal effect of the defendant or account debtor's failure to set aside the injunction or TRO if they feel it is invalid. This brings us to our final point of discus-

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sion, i.e., enforcement of injunctions.

(g) **How does the factor enforce the TRO or injunction?**

The factor would be well advised to know that many times a restraining order will be violated, and you may have to go to the next step to gain your factoring client's attention.

Rule 692, Tex. R. Civ. Proc., provides in relevant part:

Disobedience of an injunction may be punished by the court or judge, in term time or in vacation, as a contempt. In case of such disobedience, the complainant, his agent or attorney, may file in the court in which such injunction is pending or with the Judge in vacation, his affidavit stating what person is guilty of such disobedience and describing the acts constituting same...On return of such attachment or show cause order, the judge shall proceed to hear proof; and if satisfied that such person has disobeyed the injunction, either directly or indirectly, may commit such person to jail without bail until he purges himself of such contempt, in such manner and form as the court or judge may direct.

After the defendants who are charged with contempt are served with a notice called a show cause order (sometimes called a citation for contempt) they are submitted to a contempt hearing. The court has numerous options. They can punish the defendant with civil contempt findings whereby the defendant will stay in jail until he complies with the TRO or injunction, or they can put him in jail, without any conditions, as a matter of criminal contempt.

In re Schariati! 998 S.W.2d 270 (Tex. App.-Amarillo 1988). In criminal contempt, the confinement must be satisfied, subject only to good time served. **In re Cantu**, 961 S.W.2d 482 (Tex. App.-Corpus Christi 1997). Under state and constitutional standards, generally if the defendant is to be sentenced to more than six months imprisonment, he is entitled to a jury trial. **Muniz v. Hoffman**, 422 U.S. 454 (1975). Therefore, it is not advisable to seek terms exceeding six months, because it is absolutely unadvisable to submit contempt issues to a jury. The court usually will not hesitate to enforce injunctions if they can find a belligerent or disobedient defendant

who has been properly served or notified.

(h) **What does the factor do if the TRO is ignored?**

If a factoring client, or his employees and officers choose to ignore a TRO or injunction, because they feel it is invalid or that it is otherwise improper, can they simply assert it is illegal and unenforceable? The answer is no. A defendant cannot avoid compliance or excuse a violation of an injunction even if they move to dissolve it, if it has not been dissolved at the time of their disobedience. **Ex Parte Jackson**, 663 S.W.2d 520 (Tex. App.-Dallas 1983). Furthermore, it has long been held the law in Texas that a person, who with knowledge of an injunction against another, aids and abets the latter in violating the injunction, is guilty of contempt. **Ex Parte Testard**, 102 T. 287, 115 S.W. 1155 (Tex. 1909). Therefore, if a factoring client's employee or even an account debtor, knowing of an injunction, aids your client in taking the receivables or other collateral, under certain circumstances they could be found guilty of contempt. Of course you would need to consult with counsel prior to proceeding against any third party who is not named in the restraining order or injunction.

Generally, the language of a restraining order, should purport to bind any agent, officer or employee of a corporate client who receives notice of the order.

(i) **What if the factoring client ignores the contempt hearing**

If a factoring client ignores a TRO or injunction, and he is out of state, the last thing he may want to do is show up in court before your Judge in your own county and submit himself to contempt fines and possible imprisonment. At this point, what can a factoring client do? In Texas, as well as in other states the trial court can certainly enter an order of attachment by a writ issued to the sheriff of that county directing him to attach the person and bring him to the county jail, and then to the court for a hearing. This is of no relief to the factor because the client is quite often beyond the jurisdiction of his home court for the purposes of arrest or imprisonment. In these cases, imprisonment might well be desirable from the standpoint of finding

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continued from page 1

Networking Group and several other like organizations. Previous to that, she was a successful financial adviser to small and mid-size businesses.

Ron Winicour is currently President and CEO of Gibraltar Financial Corporation, Northbrook, IL. Ron's career in the lending industry began in 1967 when he began working for a division of Indianapolis Morris Plan where he was introduced to the art of collecting over-the-road truck paper. Ron later spent two years with Union Investment Company in Phoenix, AZ, followed by five years with Heller Financial in Chicago, IL, factoring receivables and managing an asset based loan portfolio. In 1979 Ron started his own equipment leasing company, Nationwide Financial Corporation. In 1991, Ron and his partner, Jerry Pam, purchased the stock of Gibraltar Financial and have since grown the business at a 20% annualized growth rate while experiencing almost no bad debts.

We are all looking forward to another successful year of the IFA. Please remember, this association is here to serve you. Any suggestions and/or feedback would be greatly appreciated. E-mail info@factoring.org, or call 800-563-1895.

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out where all the assets and accounts are. For once a person is in prison, you can certainly take his deposition, or better yet, fashion a contempt order whereby he must direct the account debtors to forward money to the court, and/or disclose the whereabouts of same, or be held in jail indefinitely. The six month restriction concerning jury trials does not generally apply to contempt orders where the defendant literally holds the keys to the jailhouse doors in his back pocket.

The real problem is that you need to find a way to get the defendant/factoring client before your court so he can answer questions concerning his contempt. So you must find a way to effectuate arrest beyond the jurisdiction of your state. You must go to your trial judge who issued the TRO or injunction and convince him or her to issue a *capias* for arrest (a/k/a an order of arrest) and then have the clerk issue a writ of *capias* (or arrest) of the defendant with appropriate language alerting the national authorities to the order of arrest. This procedure has to be done with delicacy with both the trial court and with the governmental or law enforcement authorities. Interstate enforcement will be the subject of further articles by this author. For the time being, the factor would be well advised to seek the opinion of counsel in order to effectuate the process of alerting and enforcing arrest through interstate means. However, you should be advised that if done properly, interstate arrest can be derived through contempt.

CONCLUSION

The problem client of a factoring company can create many damaging situations with the factor and the account debtors. Criminal complaints often yield no action (and certainly no immediate freezing of assets) by either federal, and particularly by state authorities. If there is an improper threat of criminal retaliation it can create further problems. The immediate and most effective solution is injunctive relief in those situations where the reserve is insufficient to cover the numerous problems presented by the client, such as conversion of collateral. Because the types of problems are so varied, the TRO or injunction must be flexible. For instance, if a second factor actually buys into or takes possession of accounts in which you own a security interest, you would need to add him to the injunction or TRO because it constitutes an additional conversion of collateral.

This article is intended to cover many of the basic problems created by a dishonest or desperate factoring client. There are also other forms or relief which can effect rights of possession of collateral which can be used in combination with injunctive relief, which are not addressed herein.

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[Sample TRO on page 14](#)



We are pleased to announce that as of
May 22, 2000 ALTRES Financial
has changed its name to

SUMMIT FINANCIAL RESOURCES, LP

With the recent changes in our management team
and the renewed commitment to our customers,
the time seemed appropriate to rename the company.

We are excited about the name change because it brings with
it a greater focus on what our business is really all about:

*Serving as financial partners to our
customers in their growth and success.*

We specialize in providing working capital lines of credit
with accounts receivable from \$50,000 to \$2,000,000+.

We appreciate the association with you and your organization
and look forward to a continued prosperous relationship.

Call me if you have any questions.

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Sample TRO

_____) IN THE DISTRICT COURT
)
Plaintiff,)
VS)
) DALLAS COUNTY, TEXAS
)
and _____)
)
Defendants.) _____ JUDICIAL DISTRICT

ORDER GRANTING TEMPORARY RESTRAINING ORDER

This matter came on for hearing on the application for temporary restraining order of _____ Corporation in the above entitled and numbered cause, and the court having examined the evidence, and the pleadings on file, is of the opinion based on the circumstances that immediate harm to the security interest and property of _____ will occur unless Defendants _____ and _____ (hereafter jointly referred to as “Defendants”) are enjoined as provided herein, that such loss and damage will result to the applicant, and that plaintiff has demonstrated a likelihood of immediate and irreparable injury will occur such that a temporary restraining order is necessary in order to prevent further harm.

The court specifically finds that irreparable injury and harm will occur if defendants are allowed to dispose of or further alienate or convert Plaintiff’s account receivables and collateral or first lien interests and resulting checks, payments or proceeds relating to the invoices which were purchased by Plaintiff with the \$276,959.60 in funding provided to Defendants. As a basis for this restraining order, among other things, the court specifically refers to the checks from Worldwide and from _____ Chevrolet which are identified in Plaintiff’s petition as nos. 156810, 155901, 15520 and 11484 which total approximately \$10,500.00 which have been wrongfully taken by Defendants. The court further finds that defendants have wrongfully taken payments from the city of _____ Michigan and have acted to destroy and interfere with the contract and ownership rights of _____ Corporation arising from the factoring agreement, security interest and continuing lien provisions under the factoring agreement with _____ Corporation and _____ dated August 5, 1998.

The court finds that irreparable will continue to occur if defendants are allowed to continue to appropriate or convert and negotiate any other (or future) accounts receivable (s) subject to that the above described factoring agreement by and between Plaintiff and that Plaintiff is at immediate risk of losing over \$276,000.00 in funds.

IT IS THEREFORE IMMEDIATELY ORDERED that Defendants _____ and their officers, agents, servants, employees, and attorneys, and any person acting in active concert or participation with them who receive notice of this order by personal service or otherwise are hereby enjoined from transferring, converting, hypothecating, selling, disposing of, cashing, appropriating, negotiation or alienating or otherwise destroying the accounts receivable, and any check, payment or proceeds relating thereto, or the offspring thereof, or deposit relating thereto, or to the extent of the receivable, the account in which the receivable has been deposited or transacted over which defendants maintain the right of control or possession, which relate to the first lien and contract indebtedness of \$276,959.60 owed by _____ to _____ and specifically relating to those invoices and accounts listed on Exhibit “A” filed herewith and made a part hereof for all purposes.

This restraining order shall specifically apply to payments and the proceeds or offspring of those payments which have been received by Defendants in the form of check payments from _____ (NO. 11484), _____ (156810, 155901, 15520) and the \$8,000.00 in payments received from the City of _____ which were taken by Defendants.

This restraining order shall also apply to enjoin the transfer or disposal or sell of trade goods, equipment, general business, transfers of intangibles, inventory, and the like, which are subject to the first lien interest of Plaintiff under it's August 5, 1998 factoring agreement with _____ and under it's financing statement filed on January 10, 2000 no. _____ with the Secretary of State of Michigan, to the extent any such sale or transfer is done with the intent, or would have the effect of prejudicing or adversely affecting Plaintiffs security interest and repossession.

IT IS FURTHER ORDERED THAT defendants, and each of them, including any employee, servant, agent, or other person acting at their control, or acting in concert with them, who receive notice of this order by personal service or otherwise, are hereby directed to immediately forward any of the payments received by defendants or their agents concerning the accounts receivable and invoices shown on Exhibit "A" filed herewith to the clerk of this court to be deposited in the registry of this court, until further order. Said defendants are further ordered to cease and desist from directing the accounts/debtors listed on Exhibit "A" to make payment to them, including specifically, the City of _____ Michigan.

IT IS FURTHER ORDERED THAT both defendants and their officers, agents, servants, employees, and attorneys, and any other person acting in active concert or participation with them who receive notice of this order by personal service or otherwise, are hereby enjoined from transferring, converting, hypothecating, selling, disposing of, cashing, appropriating, or otherwise destroying or impairing any other existing or future account receivable which is subject, or potentially subject, to the factoring agreement with _____, or which is subject to the first lien position of _____ Corporation on _____ assets, to the extent of \$276,959.60 indebtedness,

This temporary restraining order shall extend to and include any depository, checking or other accounts, in which defendants have deposited the accounts receivable or the proceeds thereof relating to the above referenced factoring agreement with _____. It shall specifically include the payments or checks noted herein.

Plaintiff is hereby ordered to maintain a bond or deposit as a condition to the issuance of this extended restraining order in the amount of \$100.00, conditioned that Plaintiff will abide by the decision which may be made in this cause, and that he pay all sums of money and costs that may be adjudged against him if the temporary injunction is dissolved,

This order shall be effective, for a period of 14 days from the date hereof,

This matter is set before this court for hearing on the temporary injunction on the 17th day of April, 2000 at 9:00 o'clock a.m. **ENTERED THIS 6th DAY OF APRIL, 2000 AT 11:30 O'CLOCK A.M.**

JUDGE PRESIDING

In order to keep the newsletter & IFA membership free, our primary method of distribution for the newsletter will be via e-mail.

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