



International
Factoring
Association

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A Publication of:

THE INTERNATIONAL
FACTORIZING ASSOCIATION

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2004 FACTORING CONFERENCE

MIAMI BEACH - THE AMERICAN RIVIERA

Taking a 180 degree turn from 2003's conference in conservative Salt Lake City, the 2004 Factoring Conference will be held in flamboyant Miami Beach, Florida. Attendees at the IFA's 10th annual conference are in for an unforgettable convention. From the top notch line up of speakers to the world class resort, this conference promises to be a memorable one.

Miami Beach

Located directly across the Biscayne Bay from Miami is Miami Beach, with its famed Art Deco District, sparkling aquamarine sea and white sand. South Beach, also known as SoBe, is the number one area in the country to view this unique architecture. With the corner curves, soaring finials and glass brick expanses, a visit to South Beach is like entering a time warp. Even the lifeguard towers are of an art deco design.

Rated as one of the best overall beaches in America and the "Best Beautiful People Beach" by The Travel Channel, South Beach's broad strand makes it an excellent destination. The Surfrider Foundation also voted Miami Beach as the best urban beach in the U.S. Whether you are looking for the early morning run, or some people watching, Miami Beach is as good as it gets.

South Beach, known as the American Riviera and Art Deco playground, has become the chic, happening 24/7 street party. SoBe is the embodiment of excess offering an international playground with non-stop nightlife. Wild street parties here are the norm, with neon-lit buildings and raucous nightclubs. This is not an early evening town. Nightclubs open late and stay open till the wee hours of the morning. Whatever type of entertainment you are looking for, you will find it here in South Beach.

If you are looking for great food and shopping, SoBe is the place. Here you will find an amazing variety of restaurants, shopping and art galleries. The two main restaurant areas of Collins Avenue and Lincoln Road, offer an unbelievable variety of top notch restaurants offering a wide variety of cuisines.

Eden Roc Resort & Spa

This year's host hotel will be the Eden Roc Resort & Spa. This is a world class resort unlike any other.

Designed by the famed architect Morris Lapidus, the Eden Roc became an immediate landmark and set new standards for luxury oceanfront resorts. From its opening in 1955, the Eden Roc has and continues to attract top entertainers and celebrities.



The Eden Roc has recently undergone a spectacular restoration, transforming the hotel to a modern interpretation of Lapidus' original design. From its Grand Lobby, to the unique meeting rooms and luxurious guest rooms, this hotel is sure to be a hit with the attendees.

The hotel has its own 600 foot white sand beach. Guests can relax in the covered beach lounges, enjoy a variety of watersports or be pampered by beach attendants. You can also choose from either of the hotel's two extraordinary swimming pools.

The Spa of Eden at the Eden Roc is ranked as one of the top spas in the country. The spa offers a full gym complex overlooking the ocean, a full array of massages, therapies and body treatments, a full size basketball court, racquetball courts and even a climbing gym.

[CONTINUED ON PAGE 2](#)

Conference Speakers

This year we have assembled an impressive line up of speakers and activities.

Returning this year will be Bob Zadek, Esq. This year Bob will be joined by Barkley Clark, Esq. Barkley is the author of the acclaimed book, "The Law of Secured Transactions Under the Uniform Commercial Code" and is considered to be one of the top attorneys in the country regarding Factoring. This should be an excellent and unique lecture.

Also returning will be Mike Ullman, Esq. This year Mike will be discussing a variety of topics including recent rulings affecting Factoring, Invoice Stipulations and Government Agency requirements.

We are very excited to have Peter Ricchiuti, an economics professor from Tulane University speaking. If you have not heard Peter speak, this is a session not to be missed.

Our other general session will be on Money Laundering. This was the most requested topic from the 2003 conference, and we have assembled a panel of experts to discuss how to protect yourself.

Our breakout sessions will include the following speakers and topics:

- Dr. Joaquim de Posada discussing team building and building a successful business.
- Teri Langhams discussing how to Create a Unique Personality for Your Company.
- Jon Keith discussing methodologies you can use to improve your memory.
- Richard Worthy discussing how to determine how you measure up to your competition.
- Workout Panel discussing various workout techniques.
- Operation Panel discussing what you should require before you book a deal.
- Fraud Panel discussing a specific fraud that crossed multiple Factors.
- Factoring 101 & 102 for those new to factoring.
- Accounting lecture discussing how to account for factoring transactions.

Activities

The 2004 conference will offer a variety of activities. This year's Golf Tournament will be held Wednesday, April 21st at the Miami Beach Golf Club. This is a unique course which has recently undergone a \$10 million renovation. Also on Wednesday, we will be offering a half day deep sea fishing trip.

Saturday we will be offering a snorkeling and SCUBA diving trip at the John Pennekamp Underwater Park. We will also be holding the Operations Round Table meeting, which is considered by many attendees to be the highlight of the entire conference.

Friday's Banquet dinner will be held at the world renowned Nikki Beach Club, on the beach in South Beach. Nikki Beach has been coined the undisputed premier address in the world to enjoy "Paradise on Earth."

This conference is destined to be a major success and one you don't want to miss. Additional information on the conference can be found at www.factoringconference.com. Registration opens in November, 2003.



Bert Goldberg is Executive Director of the International Factoring Association. He can be reached at 805-544-8327 x12 or email him at bert@dissol.com.

THE COMMERCIAL FACTOR

NEWSLETTER FOR THE FACTORING INDUSTRY

The International Factoring Association
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The International Factoring Association's (IFA) goal is to assist the Factoring community by providing information, training, purchasing power and a resource for 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 or 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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Businesses that extend credit to their customers know the scenario: Company A solicits the market for business. A potential customer inspects Company A's goods or services. Company A persuades and encourages the customer to place orders or engage services.

Company A gets a commitment for the goods or services offered, but has no idea of the customer's credit history. Company A requests credit information from the customer.

The customer gives references of three vendors and other generic info to the company. Company A contacts the three references and all 3 references give positive responses. Company A ships the goods or performs the service followed by never getting paid or waiting forever.

What happened??? The customer has three friends!!!!

Do you really think the customer would list a vendor reference that got paid in 120, 150, or not paid at all?? Would they list a vendor who refused to continue to ship, because of all the unwarranted charge backs?? Not a chance!!!!

This type of customer will keep three vendors paid on time every time and pay the other vendors when either the cash flow allows or they simply feel like it.

References are virtually worthless, because it is a loaded deck with the three reference cards on top. The potential customer tells you whom to contact and you go through the motions to make yourself feel more secure. You might as well check the moon and the stars or some sort of tarot cards. Same difference.

The only time references are effective is when the customer has such lousy pay they don't even have one friend, let alone three and all vendors have negative comments. They stiffed everybody and only hope the company will not check credit whatsoever. Believe it or not many companies don't check anything on small orders. They just ship it out the door or perform the service and hope for the best. They figure the occasional loss is less expensive than checking the credit. This is a big mistake, because customers that have really bad pay often place dozens of small orders, knowing some of the product will make it to their destination or the service will get performed. The sum of the losses on small orders equate to sizeable bad debt for companies with these types of policies.

Have you ever heard about this trade show scam? The scam-artist group opens a business with a legitimate address, orders goods from numerous vendors and then pays everyone like clockwork for 6 months or so. The scam artist's next step is to attend a trade show and order \$500,000 of goods in small orders from hundreds of vendors. They give the paid vendors as references as listed on an impressive looking credit sheet. Somewhere around 70% of the goods ordered are received and at a given time point, whatever received goods have not already been transferred to their final destination are packed and moved. The legitimate address is abandoned to avoid detection via the given purchase order address, the vendors are paid nothing, and the goods are sold through a liquidator, collaborated retailer, large flea market, internet, or combination of all. They get whatever price brings a fast sale and most likely net around \$100,000 or better. The gang of thieves disappears offshore resting for a while and do it again next season at a trade show in a different state in a different industry under a different name.

You need historical payment information and other meaningful data from sources not made available to you from the potential customer. You need to acquire accurate backdoor info that shows how they have paid their vendors in the past and info about the specifics of the company.

You say to yourself, historical payment information would not have caught the scam noted above. You are correct, but a good credit analysis company that monitors an industry would have seen the hundreds of inquiries coming forth on the customer and ran up the red flag. This is why it is important to belong to the network established by the credit analysis company and not just be a stand-alone credit department.

Historical payment information from vendors is the key, but you also must take into consideration the type of vendor and rank their importance to the potential customer. If the reporting vendors are all service companies and you are selling "widgets" you need to take that into consideration when ranking. A good credit analysis company will assist you in this area as well.

Cash-starved customers first make payroll, then utilities, rent, bank payments, and lastly pay vendors. Vendors are then paid in an order of necessity to the customer's business. If your goods are not the main line or have sold very slowly, or your services are not absolutely necessary, you can bet you will be put on the backburner to get paid.

So my point is, not only look at the vendor historical payment information, but also try to rank the vendors as far as importance to your potential customer. Then try to calculate where your business fits into the pecking

CONTINUED ON PAGE 4

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order of payment priority. Other important areas to scrutinize are years in business, legal structure of the entity, adverse public filings, earnings, and assets/liabilities.

Where do you find this data? It is not easily accessible and not readily available. If you find it, you usually pay such a high price, it might not be economically feasible to acquire it for your order. The smaller the customer and the fewer years in business will make finding the data even more difficult. You don't need to pay for reports that tell you how many bricks they have in their building or how many they guess they have in their building. These reports are very expensive and a good deal of the info is just rhetoric to fill the report.

If all third party, backdoor data quests fail, don't be afraid to ask hard and specific questions directly to your customer. The purpose of asking questions of your customer is not necessarily one of getting exact factual information, but one of hoping they will tell you something, that will give you a clue to look elsewhere. This is the old technique called "smoking them out".

The least expensive method of getting info on a small order is by getting a recommendation from a credit analysis company and not a report. Recommendations usually cost around \$5 and are based upon

a submitted high credit amount predetermined by the company for the potential customer. You don't get the background info that was used to make the decision, instead you get something straight forward and to the point like "ship" or "don't ship." That's all you need for small orders and if you want the background info, it will be available for around twice or three times the \$5.

There are only a handful of credit service companies who specialize in this field of payment data and analysis. Try to find one that specializes in your industry or a related industry and not one that is so large, you only become an account number. Along with this you need an analysis company that monitors your industry for fraudulent activities and offers low cost recommendations as well as full reports.

You are indeed in a position of "Seller Beware!!"

Remember two things:

- Know how they pay before you ship, not after.
- Everybody has three friends.



Steve Mertensmeyer is President and founder of Myrs Credit Advisors, Inc. Send email to: spmertensmeyer@myrscredit.com or 816-421-1919.

GENERATING LEADS IN THE FACTORING INDUSTRY

By David Rains

New Business Development is essential to the lifeblood of a factoring company. This is especially true in the economy we have experienced the past couple of years. Many of the deals are so ragged and hairy that you could not trim the hair or mitigate the risk if you had a hedge cutter. Then, add to the mix the addition of hundreds of new factors that have entered the industry in the past 10 years to create a myriad of competition. With competition comes rate cutting, sometimes to the point that you have to say, "The risk is simply not worth the reward." It is vital that marketing dollars and time are spent wisely.

In our industry we have three funnels which are used effectively to generate new business. They are BDO's (Outside Business Development Officers), In-House Sales Personnel, and Brokers. To the extent possible, all can and should be utilized in developing an effective marketing plan of action.

What methods should they utilize for the best results? What are the most effective and proven methods and are there any new methods? First, I would like to re-visit some old proven methods of generating leads and then explore some methods that you might not have been considered.

A deep referral system of local Bankers, CPA's, Bankruptcy Attorneys, Turnaround Management professionals, ABL lenders, Equity Groups, and Investment Bankers should be developed to feed the BDO's with a consistent lead flow. The challenge with having all of those eyes out there is that constant contact must be maintained on a minimum of a quarterly basis. This requires committed effort and organization to develop strong relationships and keep your company name fresh in the mind of the referral source.

Cold-calling is an excellent format for generating new business but it requires a strong discipline on the part of the BDO to maintain the pace required to be successful. Rejection is prevalent and it is very time-consuming.

Of course, that next call might be the gold nugget that you have been seeking for days.

Telemarketing: Because cold-calling can be a brutal and time demanding task, some companies have effectively turned to telemarketing. The challenge in utilizing telemarketing is finding a company who understands the factoring product and can provide you with qualified leads.

Direct Mail: Direct mail to specific industries is touted by some and sworn to have little or no effect by others. With direct mail, the mistake that many make is to do one small mailing and assume that it has no effect. Direct mail, like television or magazine ads needs

[CONTINUED ON PAGE 5](#)

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to be repeated to be effective. Two additional mistakes that many make in direct mail are flawed lists and bad brochure or postcard designs.

Print ads in trade journals advertising your products have been very effective for some but the same rules apply to this as direct marketing. Ads need to be repeated often, they should be well thought out and designed, and they should be targeted to the specific industry.

Become a member of the International Factoring Association, keep your information up to date and accurate and utilize Factor Search which is provided by the Association.

Some new techniques to some and not so new to others are:

Attend and be intricate members of your local chambers of commerce, business associations, and other entities where small business owners meet. Volunteer to serve on their committees and network with the business owners. When they need you or their friends need you, you will be a member of their clique.

Auto-dialers which dial targeted telephone numbers after hours to leave a compelling and personal voice mail which outlines your product and asks them to return your call. I personally hate these types of calls, however they are effective.

Credit Unions are now authorized by congress to make SBA and Commercial loans. It might be time to add them to the list of people to meet and network.

Email campaigns. This is a tricky one because the backlash against spam is heating up daily. If this method is used, it should be personalized and always have a feature to opt-out so that the person has a method of saying, do not invade my privacy anymore. Again, maintaining the lists and handling the opt-outs are definitely a hassle.

Hold educational seminars targeting small business groups. Factoring has had a bad connotation in some instances in the US. It is very well respected in Britain and one of the keys to overcoming the persona of factoring is education. You could joint venture with a BDO in SBA loans and perhaps a leasing BDO to present a complete picture of financing for small businesses in a seminar format. Rent a banquet room, run a large ad for a few days and then hold a free seminar on "Financing for Your Small Business."

Exhibit Booths at trade shows can be effective. Because of the cost, the trade show should be chosen carefully. Local bankers conventions, staffing conventions, small business fairs,

and targeted franchise conventions should be considered.

Give speeches and/or be a key note speaker at trade conventions of the industry that you want to target. This takes time because you have to present solutions on relevant topics, but this portrays you as the expert and they will come to you for help in financing when they need your product.

Write articles for trade journals. For example, if you want to target the staffing industry, pick a topic like financing and present the different methods of financing their business. Be factual and ensure that the article is not an ad, but an informative piece that helps the business grow. However, it does not hurt to show ways that your company has been able to assist other companies, like themselves, grow.

Create and send out a company newsletter to your clients and others who might need financing. Several companies use this method and it is effective if you can generate a good mailing list.

Offer your clients an incentive to refer new business to you from companies that they might know who could utilize the factoring product.

Sponsor events at industry conventions. This can be expensive but it gives you great name recognition and it might give you first look at a deal, when factoring is needed.

Lastly, Web based marketing solutions are essential today. People are swarming to the web in droves. A must is a great looking website,

but that is not enough. Only by utilizing good keywords optimization can you make your website be on the first page of the search engines. If you cannot make it to the top ten, then you probably will not get a chance because the majority of people will not go to the second page of a search engine keyword search. The sponsors (paid ads) are unusually in the top 2 places on a search engine such as Google and the 10 below that are designated by such various formulas that the search engines have devised to get the most relevant site. Edgar Web Designs did the FactorHelp website and he showed me how important the "behind the scenes" coding of key words and optimization are to the Web. Because of his awesome job for us, I will now shamelessly plug him and say that he can be contacted through the FactorHelp.com website. He knows the factoring industry and he is great at web design / search engine optimization.

The job of marketing is to create meaningful activity, which will give you an opportunity to see more new business. By utilizing a combination of the different techniques above, you will increase your lead generation, which will increase your deal flow. The job of sales is to get out and close the deals after the leads are generated. Unfortunately, the size of most companies in the factoring industry depends on a single person or a handful of people to accomplish all of tasks of sales and marketing. That is an effective model, however I would suggest that a combination of these techniques be tested to see which best fits your company's culture. All of the above techniques are currently being successfully utilized in the factoring industry by companies

[CONTINUED ON PAGE 6](#)

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Scott Winicour joins **Gibraltar Financial** as Manager of Sales and Marketing for its new Capital Growth Division which specializes in Small Business Factoring Services for companies doing \$1,000 - \$50,000 in sales per month. Start up companies are encouraged to apply.

Vertex Financial Corporation has relocated to:

8750 North Central
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Tel: 214-368-5881
Fax: 214-368-5889

ABL/Factoring, Inc. is proud to announce the acquisition of the Factoring Division of MRI Sales Consultants of Dallas. The president of the new division "Commercial Finance Consultants" (CFC) will be David Rains, former SVP of Sales Consultants of Dallas. All of the former contact information will remain the same and CFC can be reached at:
972-203-6064
or by email at dar@ablfactoring.com
Additionally, the website is www.ablfactoring.com

i This is a new feature in **The Commercial Factor**. To have your corporate news printed, please send it to info@factoring.org



around the nation. If one combination does not fit the current talent that you have employed, then try some different methods. The key is to try new and innovative techniques until you have the proper mix. May you have a profitable quarter and a great new year.

i David Rains is President of ABL/Factoring, Inc. which has two divisions that service the factoring industry. The www.FactorHelp.com division concentrates on providing the best resources to assist factoring companies become more successful by providing funding sources, proven service providers and vendors, and proprietary publications such as a "How To" Operations Manual for factors while the "Commercial Finance Consultants" (CFC) division recruits the very best people across North America for the factoring industry. David's email address is dar@ablfactoring.com or he can be reached at 972-203-6064.



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CIT Group said that its commercial services division acquired a portion of the U.S. factoring assets of GE Commercial Services, worth \$446 million. Terms of the deal were not disclosed. CIT Commercial Services has estimated annual volume of approximately \$20 billion. GE's annual volume is estimated by HFN to be around \$3 billion.

Business and Industry, September 22, 2003

Crestmark Bank in Troy is negotiating to buy its competitor and neighbor, factoring firm Dimmitt & Owens Financial Inc. in Troy, local banking and turnaround experts said. "My understanding is that they've been in acquisition discussions with Crestmark Bank," said Lawrence Gardner, president of the Troy turnaround firm Lawrence Gardner Associates. Dimmitt & Owens is a 33-year-old company and possibly the largest factor in Michigan. The company has offices in Troy, San Francisco and Chicago. In 1995, the last statistics available, the company bought \$150 million in receivables. Dimmitt & Owens filed for Chapter 11 bankruptcy protection in U.S. Bankruptcy Court in Detroit on Sept. 2 and then two days later asked a judge to dismiss the case. Judge Phillip Shefferly granted the order to dismiss on Sept. 5. The notice was entered into the court record on Sept. 9.

Crain's Detroit Business, September 15, 2003

Herbert R. Silverman, 91, a prominent figure in the development of commercial finance, died at his Manhattan home. Mr. Silverman was an innovator in factoring.

With innovators such as Mr. Silverman, it became an industry attuned to the changing ways business was done. He founded Centaur Credit Corp., a commercial finance company, which merged in 1945 with James Talcott Inc., one of the oldest factoring firms. Talcott grew into one of the largest commercial lenders. Mr. Silverman retired as chairman of the executive committee of Talcott National Corp. in 1975.

The Baltimore Sun, August 25, 2003

A federal law that creates a trust for unpaid sellers of fresh fruits and vegetables uprooted a factor's argument that it was not responsible for a debtor's unpaid invoices for produce deliveries. Concluding the factoring transaction was a loan rather than a sale, a federal

appellate court determined the factor was not a bona fide purchaser immune to the claims of trust beneficiaries. Sunbelt Fruit & Vegetable Co. Inc., a wholesaler of fresh fruits and vegetables, entered into a factoring agreement with Fidelity Factors. Sunbelt agreed to sell Fidelity all of its accounts receivable, and to notify customers to pay Fidelity directly. Sunbelt purchased some of its produce from Reaves Brokerage Co. Inc. After Sunbelt went out of business, Reaves sued the wholesaler and Fidelity under the Perishable Agricultural Commodities Act to recover 195,060 in unpaid invoices for produce deliveries. The U.S. District Court, Northern District of Texas granted a default judgment against Sunbelt and denied Fidelity's motion for summary judgment. Determining was liable for the unpaid invoices under the PACA, the court entered judgment against Fidelity in the amount of 195,060.

Lender Liability News, August 11, 2003

Greenfield Commercial Credit (Canada) Inc. (Symbol: GRF) (the "Company" or "Greenfield Canada") announced today that it has acquired a portfolio of seven factoring accounts based in the United States. Each of the accounts generates various monthly factoring volumes of up to \$200,000 per month.

Canadian Corporate Newswire, August 5, 2003

E.S. Bankest provided a financial service known as factoring. However, Espirito Santo has alleged in federal court in Miami that E.S. Bankest — which owes the bank \$170 million — swindled it out of untold millions. Lawyers have confirmed that the U.S. attorney's office has opened a criminal investigation and two of the principals in E.S. Bankest, brothers Hector and Eduardo Orlansky, have hired criminal attorney Ed Shohat to represent them.

The Miami Herald, September 10, 2003

Nasdaq has granted Private Business Inc. a 180-day extension to meet the requirements for continued listing on the Nasdaq SmallCap Market. The Brentwood-based provider of cash flow management tools (Nasdaq: PBIZ) had been notified it didn't comply with market rules because its stock price closed below \$1 per share over 30 consecutive days of trading.

Nashville Business Journal, September 12, 2003



UPCOMING IFA EVENTS

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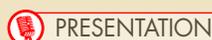
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PRESENTATION



BARKLEY CLARK, ESQ. FROM SHOOK, HARDY & BACON

"Recent judicial decisions that are of special interest to factors"

Thursday, December 11, 2003 at 1PM PST

\$40 (\$50 for Non-IFA Members)



AMY BRESLIN, CPA AND BRIAN YOUNG, CPA

FROM BRESLIN & YOUNG FINANCIAL CONSULTANTS, LLC

"After the Deal is Done, Periodic Accounting,
Operational & Credit Reviews"

Thursday, January 22, 2004 at 1PM PST

\$40 (\$50 for Non-IFA Members)



TELECONFERENCE CALLS



STOP THE BLEEDING

By Dr. Ron

P8

It's the phone call from the client that all of us dread. "Sorry to have to tell you this but we filed for Chapter 11 bankruptcy yesterday." As soon as a factor is aware that a client is under court protection, a number of things happen - or more to the point - do not happen. Some of the more significant developments, which can tie your hands for a while, are as follows.

Something called an "Automatic Stay" is in effect. This means all parties, including you, the factor, cannot make any collection effort from your client or from the account debtors. You cannot place the client in default, you cannot ask for repayment, you cannot reconfirm account debtor balances and you cannot reconfirm remit to addresses with the account debtors.

You cannot purchase any invoices dated after the petition date (the date the Chapter 11 filing was made). If you have made advances to purchase invoices after the petition date without the knowledge that your client had filed, that money is in trouble, not inexorably, but you may have a difficult time getting that money back.

Your client, now referred to as the Debtor-in-Possession or the "DIP," has probably petitioned the court for a "Cash Collateral" order. This is a HUGE problem as it means that the DIP can use the collections from your invoices to operate its business. If the DIP does get permission to use your collections, it will be required to replace the collateral used (cash collections) with "like" collateral (could be unverified invoices). When this happens the factor almost always gets the short end of the stick.

The first and most obvious question is how to avoid this kind of a problem. There is only one answer and that is to be in touch with the client's problems and needs. If you sense that a Chapter 11 filing is possible, discuss it openly with the client and offer to finance the client during the Chapter 11 reorganization. (Be careful not to offer advice as lender liability issues could arise.) If the client decides to go forward with a Chapter 11 filing, the factor and the client should agree to new financing terms and conditions in advance of the filing, but without signing any documents at that time. Instead, have your special bankruptcy attorney draft an Interim Financing Order that will permit you to factor the DIP's invoices during the Chapter 11. Then, at the same time the client's attorney files the petition for Bankruptcy, the client's attorney can also file a motion for an emergency hearing at which time the Interim Financing Order can be presented to the Judge. The Judge signs the order, the new factoring documents are signed, and you are off and running as though nothing happened.

Although it can work this easily at times, there are usually some problems to overcome. Often the Bankruptcy Judge will sign the Interim Financing Order as presented, but just as often there will be objections made by interested parties such as the IRS, other secured lenders, unsecured creditors, etc. It may be helpful to get all the parties to agree to things in advance via stipulation. When a DIP gets financing agreed to by all the parties in advance, it is known as a Pre-Packaged Bankruptcy Financing.

If you are going to finance a client in a DIP situation, there are pitfalls you must avoid and rewards you must strive for. To ensure the proper risk reward ratio, it is always best to hire an attorney who specializes in bankruptcy law. But these attorneys do not come cheap and it is difficult to get the client to pay for your attorney. Why so difficult? Because the client is broke and even if you are

successful in having the client pay for your legal work, the court might make you repay the client at a date subsequent to the bankruptcy filing. The solution? Keep your attorney bills to a minimum by asking the client's special bankruptcy attorney to prepare the Interim Financing Order. Then have your attorney merely review the Interim Order. At Gibraltar, we have a checklist of important items to be included in such a document. We provide that checklist to Debtor's counsel (and we can provide the list to you as well if you email Dr. Ron). We have even provided opposing counsel with Interim Financing Orders that were used in other cases. In these ways, our attorney's time is kept to a minimum while the documentation is done to our satisfaction.

One protection that the Interim Financing Order should contain is a cross collateralization clause. A cross collateralization clause allows your pre-petition advances to be collateralized not only by pre-petition collateral, but by post-petition collateral as well. The converse is also true, i.e. post petition debt is collateralized by both pre and post petition collateral. Lately, many courts are loath to provide this protection to a factor. Instead, something called a "roll-up" can be employed which affords a similar type of protection to a factor, and in some cases, may even be better. In a roll-up situation, the factor uses post-petition collateral to fund the client, with some or all of the proceeds going to pay pre-petition debt.

Why do all this? Just to keep the client on your books a while longer? Is it worth it? There is more reason than that. The cross collateralization clause in the Interim Financing Order can be instrumental in making sure you get all your pre-petition money back. The Interim Financing Order can address and eliminate the issue of some of your money being in jeopardy if you advanced cash to the DIP after the Chapter 11 filing but before you realized that the client was indeed a DIP. The Interim Financing Order, when signed by the Judge, can neutralize

other possible attacks to your lien position and most other legal problems that could arise. And, if you become the new factor for the DIP, there is no need for the Debtor to ask for a cash collateral order.

However, one problem remains. The Interim Financing Order is just that, it is an interim order. It does not always follow that it becomes a

[CONTINUED ON PAGE 9](#)

Chapter 11 dilemmas?

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final order. Often others will object to the Interim Order as they are not benefited by it as much as you are, perhaps even harmed by it. These issues are sometimes litigated and decided by the Judge. Sometimes a little horse trading between the parties is appropriate resulting in a stipulated agreement being brought before the Judge. This is another reason why it is critical to obtain competent bankruptcy counsel, counsel that is not only steeped in textbook bankruptcy knowledge, but one that also knows his or her way around the bankruptcy court.

Keep your client and get all your money back. Chapter 11 bankruptcy - it can be a good thing!

Note- For purposes of this discussion we have assumed that the "factor" is indeed a "lender," a subject often discussed and, if you remember, presented in the June 2003 Dr. Ron column. "If it looks like a duck, walks like a duck and quacks like a duck, it's a loan." We have also assumed that a Trustee has not been appointed and the Debtor is operating as a DIP.



This month contains a new feature to be regularly published in the IFA newsletter. It will be called Caveat Emptor, which means "let the buyer (of invoices) beware." These short articles will highlight a particular problem or issue with respect to buying invoices within a specific industry. Look for Caveat Emptor in this and subsequent issues of The Commercial Factor.

P.S. I need all the ideas you can give me for Caveat Emptor articles. Appropriate credit will be given the writer (you'll get to see your name in print). Please see below for Dr. Ron's email address.

To contact Ron Winicour, a/k/a Dr. Ron, or to request copies of documentation, past articles, etc., please send an e-mail to: rwinicour@gibraltarfinancial.com. In the alternative, mail your request to Dr. Ron at Gibraltar Financial Corporation, 60 Revere Drive, Suite 840, Northbrook, IL 60062.

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Presented by Dr. Ron

"Bill and hold" is not the factor's most favorable arrangement between the client and the account debtor. "Bill and hold" usually occurs when a large quantity of product is being shipped and the account debtor for whatever reason does not want immediate possession of the entire order. The account debtor wants your client to make periodic deliveries. If your verification procedures are up to snuff, a "bill and hold" situation will be caught if the person verifying the invoice at the account debtor's location is aware of the situation. Clearly, your invoice payment is at risk under these circumstances.

As always, be aware of what your client does for a living and understand the procedures involved in the sales and delivery processes. "Bill and hold" occurs most frequently in the printing industry and with fulfillment houses.

Be careful out there folks. Until next time, **Caveat Emptor!**



Dr. Ron needs all the ideas he can get for the Caveat Emptor series. Clue him in at rwinicour@gibraltarfinancial.com and get your name mentioned in this publication!



GUARANTEES V. INDEMNIFICATIONS - ABSOLUTE AND CONDITIONAL

Factors routinely require the owner of a factored client to guarantee the obligations of his or her company. The documents evidencing that guarantee are far from routine. The titles commonly seen demonstrate this variety: Guaranty, Indemnification, Validity Indemnification, Conditional Guarantee, Validity Certificate, Authentication Certificate, etc., etc., etc. No one seems to even agree on the spelling - is it a Guaranty or a Guarantee? Too many factors think these documents accomplish the same thing. In reality, there are major differences and the scope of coverage varies widely.

Pull out your standard guarantee and indemnification forms and compare them to the points outlined below. If they fall short, time to call your attorney.

Guarantee v. Indemnification

To everyone except lawyers, there is no difference between a guarantee and an indemnification. While they are similar and can accomplish the same thing, the two concepts developed very differently and reflect different philosophies and policies. The law of guarantees developed exclusively in the context of lenders and borrowers. The law of indemnification developed largely in the context of insurance contracts and other non-lending matters. Much of the law concerning guarantees has been codified in the Uniform Commercial Code, while the law of indemnification is almost all based on court decisions. As a result, the law concerning guarantees is better defined, more predictable, and will be more consistent from state to state.

For a factor, a guarantee is always preferable to an indemnification.

Validity and Conditional Obligations

Factors often take a Validity Indemnification or other conditional obligation. The most common problems this author sees with these documents is that they are too restrictive and leave too many loopholes for the guarantor/indemnitor. Consider these points:

What events trigger liability of the conditional guarantor or validity indemnitor?

• *Representations and Warranties*

These involve assurances that the accounts are genuine and will be paid. The broader the reps and warranties, the better the position of the factor. The language of the reps and warranties should track the reps and warranties in the Factoring Agreement. A strong document will trigger liability upon non-payment for almost any reason.

• *Fraud and Misconduct*

Under these provisions, the guarantor/indemnitor is liable only if the lender incurs a loss due to fraud or misconduct. Express language that conversion of payments (direct pay) triggers liability avoids disputes over whether conversion amounts to the required misconduct.

Scope of Liability

• *Level of Participation in Fraud or Misconduct*

Must the guarantor/indemnitor have participated in the fraud or

misconduct or is liability triggered if there was fraud by another party of which the guarantor/indemnitor had no knowledge?

• *Which accounts?*

Is the guarantor/indemnitor liable only for the accounts which are the subject of the fraud or misconduct or does fraud as to some accounts impose liability for all unpaid accounts?

• *Attorneys fees?*

The guarantor/indemnitor is typically liable for attorneys fees incurred in collecting from him or her. Is the guarantor/indemnitor liable for attorneys fees incurred in collecting from the client and others upon a triggering event?

Consents and Waivers

• Does the guarantor/indemnitor grant the factor discretion as to how payments and recoveries will be applied? Without consent, the factor may be required to apply payments and recoveries to the guaranteed obligations before the non-guaranteed obligations.

• Does the guarantor/indemnitor waive subrogation, contribution and indemnification rights? Impacts preferential transfers in bankruptcy.

• Some courts have held that mere execution of a guarantee is not sufficient to submit the guarantor to jurisdiction of the courts where the factor is located. Be sure the documents include a consent to jurisdiction.

Other Points

• Does the guarantor/indemnitor have the right to terminate his or her obligations as to future liabilities by giving notice? If so, get rid of that clause!

• Revival clause - if payments must be returned due to a bankruptcy preference, the obligation of the guarantor/indemnitor is revived.

• Does the guarantor/indemnitor reside in a community property state, which may require the spouse's signature?

• What about all the important boilerplate included in your factoring agreement?

Give your guarantee or indemnification agreement an annual check up. Compare it to these points and tune it up. When the inevitable case comes and your only hope for recovery is from the guarantor and he or she has assets and is fighting your claim, you'll be glad your document has been tuned up and is in top condition.



John A. Beckstead, Esq. is a partner in the Salt Lake City Office of Snell & Wilmer L.L.P. He can be reached at jbeckstead@swlaw.com or 801-257-1927.

The IFA is in the process of implementing two new projects designed to assist our members in improving their Factoring operations. Both projects will increase the education and communication within small business Factoring companies throughout the country. As a member of the Board of Directors for the IFA, I have been asked to overview each project and to solicit your input, comments, and suggestions regarding these initiatives. I look forward to your feedback at marrind@crf.com.

IFA Regional Meetings

The concept of having regionalized gatherings has been discussed over the past year and the first regional meeting for the IFA has been scheduled. This is a test program to gauge the desire of IFA members to get together on a more frequent basis other than the annual conference. The initial format is an evening session that includes a cocktail hour, dinner, and a guest speaker. Other formats are certainly available and welcome to be tested by the regional volunteers hosting each meeting. Previous suggestions include an open discussion forum (similar to the very popular Operational Round Table that is conducted at the annual conference), breakfast or lunch formats, and pure social events. The frequency and location of each regional event will be determined by the local members and will vary depending upon the support received. The IFA will assist in marketing the event to the membership. Again, the primary objective is to assist in providing a format of further education and networking for and among our members.

The first event has been organized by IFA board member Gail Schulte Coulthred and will be held in Northern California at the Silicon Valley Capital Club in San Jose, California. The featured speaker is the always entertaining and informative Bob Zadek.

Date: **Thursday November 20th, 2003**

Time: **6:00 - 9:00PM**

Location: **Silicon Valley Capital Club
50 W. San Fernando St., Ste. 1700
San Jose, CA 95113**

Cost: **IFA Members: \$80 per person
Non-Members: \$90 per person**

More information regarding the first Regional Event can be found at www.factoring.org. We certainly appreciate Gail taking the time and

effort to organize this inaugural event.

As mentioned, the IFA would like to test this concept in other parts of the country and is in the process of identifying regional volunteers who are willing to plan such events. If you are interested in hosting an event in your area, or have suggestions regarding the Regional Meetings, please contact myself, or any board member of the IFA.

The IFA Factoring School

Degrees in Factoring from major universities are tough to locate, and hiring personnel that have been trained by other Factoring companies can be problematic. The IFA would like to assist its members with regards to their training needs. Therefore, discussions are being held by the Board of Directors to establish a school that will offer detailed training classes for Factoring professionals.

As a Factor serving the niche of small business financing, our needs are unique. Other training courses, such as those offered by the CFA or the various banking associations, do not exactly meet the needs of the small independent Factoring company. The IFA Factoring School will be designed "by Factors for Factors."

The initial training course being considered is designed for operational personnel. Topics will include the following:

- Invoice Verification Procedures
- Checking the Paper Trail
- Reviewing and Approving Debtor Credit Limits
- Dealing with Credit Memos
- Reserve Management
- Collection Calls
- Management of the Accounts Receivable Aging
- Monitoring Tax Payments
- Collection Procedures
- Specific Industry Concerns and Pitfalls
- Client Service Techniques
- Early Warning Signs
- Working with Government Contracts
- Management Policies and Strategies

- Documentation and Compliance Procedures
- Assignment Procedures and Issues

The course would most likely encompass a 2-3 day period and be held at strategic locations taking into consideration affordability and ease of travel. Instructors will be prescreened by the IFA and will be considered experts within their respective disciplines. This initial program is designed for your Operation Managers, Account Executives, Client Service Personnel, Verifiers and Collectors. The format goes beyond the degree of a simple workshop, and will focus on educating and testing your staff in accordance to proper industry standards.

The board would very much appreciate your initial comments regarding the creation of such a school. Additionally, your suggestions regarding format, location, curriculum and faculty volunteers are welcome. This is a preliminary "balloon" before we embark on this very extensive project. Please send your comments to marrind@crf.com.

We appreciate your assistance, comments and participation in these and other IFA projects. The Board of Directors looks forward to continuing to serve the IFA and its members.



David Marrin is the Executive President of Capitol Resource Funding, Inc. He can be reached at 703-683-5220.



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- Factoring & Bankruptcy - The Treatise
- Account Debtor Tricks to Deceive the Factor
- Takeout Negotiations Between Factors

John Beckstead, Esq., Snell & Wilmer

- Secret Liens
- Arbitration & Forum Selection Clauses
- Collection Accounts by Subordinate Creditors
- Takeout Agreements for Both Sides

Jay Levy, Writer/Producer/Rabbi

- Business Ethics

Fraud Panel

- Discussion of Fraud Schemes Used on Factoring Firms

David Cohen - Investigative Resources of Texas
 Richard Kort - Accelerated Business Credit
 Jerry Rozen - Accounts Receivable Funding Corp.
 Ken Walseben - The Hamilton Group

Mac Fulfer, Esq., Author - Amazing Face Reading

- Non-Verbal Communication
- Face Reading

Richard Dennis, Federal Reserve Bank

- State of the Economy
- Economic Forecast

Brian Peretti, Esq. U.S. Dept. of the Treasury

- USA Patriot Act

Kent Walker, U.S. Postal Service

- Can You Redirect Your Client's Mail?
- Opening Confidential Mail

Dan Axelrod, Adizes

- Making the Transition from Entrepreneurial to Professional Management

David Cohen, Investigative Resources of Texas

- Background Investigations

Verification Panel

- Various Procedures & Techniques Used to Verify Invoices

Robert Beard - Texas National Bank
 Steven Kurtz, Esq. - Greenberg & Bass
 Thomas Smeltz - Benefactor Funding Corp.
 Ron Winicour - Gibraltar Financial Corporation

Mike Ullman, Esq.

- How to Protect Yourself When Your Client is Committing Unspeakable Acts
- Broadcast Fax - Is It Legal?

Marketing Panel

- Discussion of Marketing Options

Jeff Callendar - Dash Point Financial Services
 Laurence J. Pino, Esq. - ACFC
 David Rains - MRI Sales Consultants of Dallas
 Daniel Robbins - TranCentral, Inc.

- All Speaker CD's
- Bob Zadek, Esq.
- John Beckstead, Esq.
- Jay Levy
- Fraud Panel
- Mac Fulfer, Esq.
- Richard Dennis
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- Kent Walker
- Dan Axelrod
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- Mike Ullman, Esq.
- Marketing Options

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