Let HubTran show you how much better your back office can be.

Why are so many factoring companies coming to us?

Simple. Because HubTran is the highest form of high tech: A solution that streamlines and simplifies without requiring massive investments of your time in training and integration. A solution that’s surprisingly affordable. A solution that works.

HubTran’s Factor Platform:

- Fully automates carrier document processing
- Tags and groups incoming documents
- Automatically extracts key data from rate confirmations and invoices
- Audits documents against your business rules
- Streamlines communications with your carriers
- Handles multiple workflows (e.g., Fuel Advance, Exception Management, Debtor Billing, etc.)
- Fully integrated with your factoring software

HubTran’s per-transaction pricing, with no licensing or integration fees, makes it the affordable way to completely streamline your back office. It’s just plug and play and watch it pay off.

HubTran can help you transform back-office hard labor into efficiency. Why not start the transformation today?

Contact us for a walk-through. Learn how HubTran can work for you.

630-544-0459
sales@hubtran.com

HubTran
Get your back office moving.
# TABLE OF CONTENTS

**AUGUST 2017 | VOL 19 | No. 4**

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
<td>FACTORING THE STAFFING INDUSTRY IN TODAY’S NEW WORKFORCE</td>
<td>By Raphael Torres, Senior Vice President, Wells Fargo Capital Finance &amp; Jim Cretella, Esq., Member, Otterbourg P.C.</td>
</tr>
<tr>
<td>16</td>
<td>FACTORING COMMERCIAL CONSTRUCTION PROJECTS</td>
<td>By Frank Skelly</td>
</tr>
<tr>
<td>24</td>
<td>3PLS ABILITY TO SELECT CARRIERS WITHOUT LIABILITY—NOW MORE DIFFICULT</td>
<td>By Nancy O’Liddy</td>
</tr>
<tr>
<td>30</td>
<td>SET-OFF OF TRANSPORTATION RECEIVABLES FOR FREIGHT LOSS AND DAMAGE CLAIMS</td>
<td>By Jeffrey Cohen, Esq.</td>
</tr>
<tr>
<td>33</td>
<td>THE (NOT SO) OBVIOUS CONSIDERATIONS IN GOVERNMENT CONTRACT FACTORING</td>
<td>By Leslie J Polt, Esq.</td>
</tr>
</tbody>
</table>

## COLUMNS

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>LEGAL FACTOR: PROCEEDS</td>
<td>By Steven N. Kurtz, Esq.</td>
</tr>
<tr>
<td>20</td>
<td>SALES &amp; MARKETING: MARKETING AND SALES INSIGHTS</td>
<td>By Tony Furman</td>
</tr>
<tr>
<td>26</td>
<td>WHAT’S NEW AT IFA</td>
<td></td>
</tr>
</tbody>
</table>

## ADVERTISER INDEX

<table>
<thead>
<tr>
<th>Company</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3i Infotech, Inc.</td>
<td>10</td>
</tr>
<tr>
<td>CapitalPlus Equity, LLC</td>
<td>21</td>
</tr>
<tr>
<td>Crestmark Bank</td>
<td>18</td>
</tr>
<tr>
<td>FactorFox Software, Inc.</td>
<td>13</td>
</tr>
<tr>
<td>FactorView</td>
<td>23</td>
</tr>
<tr>
<td>First Corporate Solutions</td>
<td>36</td>
</tr>
<tr>
<td>Gulf South Receivables Fund, LLC</td>
<td>17</td>
</tr>
<tr>
<td>HubTran, Inc</td>
<td>2</td>
</tr>
<tr>
<td>International Factoring Association</td>
<td>15, 22, 26</td>
</tr>
<tr>
<td>Loeb Term Solutions</td>
<td>6</td>
</tr>
<tr>
<td>ProfitStars</td>
<td>7</td>
</tr>
<tr>
<td>Tax Guard</td>
<td>8</td>
</tr>
<tr>
<td>Utica Leaseco, LLC</td>
<td>23</td>
</tr>
</tbody>
</table>
The saying “The Only Thing That is Constant is Change” is attributed to Heraclitus in 500BC. Although the world around us is changing, the value and meaning of this quote has not.

For those who have been involved in the Factoring industry, it is easy to see how changes have caused Factors to evolve. Remember when the big names in the Factoring industry were Heller Financial and Congress Talcott?

Factoring continues to evolve and the IFA’s fall training courses are designed to help you adapt to the changes. We are returning with our “How to Compete Against the New World of Fintech” on October 26-27 in Las Vegas. After the success of last year’s sold out Fintech course, we are returning with all new speakers and topics to instruct you on how to plan for the future. The emphasis this year will be on the “Tech” portion of Fintech. This course will feature seven different presenters as well as an exhibit hall that will feature many new tech products. This is a training course you can’t afford to miss.

Also, we are returning with our “Advanced Factoring & Legal Forum” featuring Mike & Jared Ullman. We will be discussing complex business and legal issues that arise in lending and Factoring transactions. This course will take place on October 19th & 20th in Las Vegas.

Our final Las Vegas course this fall will be a new roundtable meeting specifically for your Operational staff. This course is designed to allow your operational staff to meet with others in a similar position to discuss methods in order to increase your efficiency. This is an area where members can learn from each other and help to make the entire industry more efficient. We will also feature guest speakers that will focus on enhancing increased efficiency. Attendees should be involved in the Factoring industry for at least two years. This course will occur on October 11th & 12th.

The focus of our Transportation Factoring Meeting which will be held September 7th & 8th in Louisville, KY will be on the disruptions to the Transportation sector. Emphasis will be placed on predictions of how the technology will affect this important sector.

Our Senior Executives Meeting will take place on January 24th-26th at the Mauna Kea Beach Resort on the Big Island of Hawaii. This the only high-level meeting that exists for senior executives of Factors and Asset Based Lenders to gather and discuss issues of importance to them. Many attendees consider this to be the one meeting that owners and senior executives of Factoring companies should not miss. This year we will focus on planning for the future with our roundtable discussions and guest speaker.

The AFA continues its work representing and protecting the Factoring industry. We have established “Champions” in both the House and Senate in Washington DC that will help protect the Factoring industry from becoming unintended consequences of possible legislation. If you are involved with the Factoring industry, please support the AFA as it supports you.

The IFA also has various webinars and meetings planned on a variety of other topics to support the Factoring industry. Information about our upcoming courses can be found at www.Factoring.org.

Thank you for your support and we look forward to seeing you at a future IFA event.

By Bert Goldberg
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 about 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 magazine invites the submission of articles and news of interest to the factoring industry. For more information on submitting articles or advertisements, email news@factoring.org, or call 805-773-0011.

The views expressed in the Commercial Factor are those of the authors and do not necessarily represent the views of, and should not be attributed to, the International Factoring Association.

**INDUSTRY NEWS**

**Amerisource Funding Named One of Houston’s Top 30 Companies**

Amerisource Funding | Amerisource Business Capital were recognized as one of Houston’s top privately-owned companies. The Houston Chronicle recently published their list identifying the Top 100 Companies, based on annual revenue.

**Gibraltar Business Capital Launches Informative Video Series on Factoring**

Gibraltar Business Capital launched a video series aimed at helping small and mid-market businesses understand factoring. The 13-part video series addresses the top questions related to factoring including how factoring works, how Gibraltar evaluates risk, and Gibraltar’s unique approach to factoring. The video series complements Gibraltar’s guide, Factoring Fundamentals: Access Working Capital Via Invoice Financing.

**Five Communicator Awards Recognize Efforts of Crestmark**

Crestmark was honored by the 23rd Annual Communicator Awards with one Award of Excellence and four Awards of Distinction for its direct mail and collateral pieces. Crestmark’s promotional pieces were standouts among more than 6,000 global entries received by the Academy of Interactive and Visual Arts.

**Amerisource & Patriot Partner to Offer Significant Savings**

Amerisource Funding | Amerisource Business Capital and Patriot Software partnered together to offer significant savings to Amerisource current and prospective customers. Patriot offers straightforward and affordable payroll solutions to small businesses. All Amerisource customers are now eligible to receive a discount on the full-service payroll and accounting software available from Patriot.

**HubTran CEO Selected as Finalist for The Executives’ Club Innovator of the Year Award**

HubTran Inc. has been selected as one of three finalists for The Executives’ Club Innovator of the Year Award – Corporate Category. This award is presented to an individual and company in greater Chicagoland whose new product, service, process or business model has resulted in organic growth and measurable economic benefit to the region.

**INDUSTRY TRANSACTIONS**

**Bibby Financial Services (BFS) Expands Support of California Apparel Industry with $2 Million Factoring Facility to Casual Apparel Company**

BFS used its commercial financing expertise and knowledge of apparel businesses to structure a flexible financing package that simplified the funding process and reduced the amount of paperwork the client was required to submit.
Utica Leaseco, LLC Completes Transaction Totaling $1,250,000 during the week of July 24, 2017
Utica Leaseco LLC completed the funding of a $1,000,000 of a Capital Lease on new and existing equipment and a $250,000 inventory line for a manufacturer in Texas. Utica was able to provide the turnaround capital based solely on the collateral value of the equipment and inventory.

Loeb Term Solutions Solves Growth Issues for 5 More Companies by Providing Equipment Financing Solutions
Loeb Term Solutions financed over $9 Million Dollars’ worth of industrial machinery helping 5 companies within the metalworking, automotive machining, and food processing industries leverage working capital from their machinery and equipment.

Far West Capital Closes 30 New Relationships in Second Quarter
Far West Capital provided $9.5 million in working capital facilities for 30 growing businesses in the 2nd quarter of 2017.

Gibraltar Business Capital Closes $10.8MM Asset-Based Line of Credit for Eden, NC-Based KDH Defense Systems
A strong understanding of how government contracts work gave Gibraltar Business Capital the tools it needed to structure the credit facility using raw materials, work-in-process inventory, finished goods and equipment as collateral.

PERSONNEL
Former MB Financial SVP joins Gibraltar Business Capital Team
Gibraltar Business Capital hired Stan Scott as Vice President, Account Executive. With more than 25 years of experience in the commercial credit arena, Stan Scott will be managing a robust asset-based lending portfolio.

The Loeb T. K. O.

TRUST

KNOWLEDGE

OPTIONS

Your Trusted Resource for Equipment Solutions for 137 Years

- Equipment Term Loans
- Auction Services
- Certified Market Appraisals
- Offlease Equipment Solutions

800-560-LOEB (5632) © 773-548-4131
LOEBEQUIPMENT.COM © LOEBWINTERNITZ.COM © LOEBAPPRAISAL.COM © LOEBTERMSOLUTIONS.COM
Arshonsky & Kurtz, LLP, and Michael Ullman, Esq. principal of Ullman & Ullman, P.A.

Crestmark Welcomes Michelle Belcher as CRM Project Manager
Crestmark Executive Vice President and National Sales Director Ray Morandell announced the appointment of Michelle Belcher as CRM project manager, officer; a newly created position to enhance business practices and data management across the company.

Tinamarie Sulpizios Joins HubTran as Director Business Development
Tinamarie brings significant experience serving brokers, 3PLs and factoring companies, most recently as Director of Sales at Ansonia Credit Data.

Robert Zadek, Esq. Named as General Co-Counsel to the International Factoring Association
The International Factoring Association (IFA) has named Robert Zadek, Esq. of Buchalter as Co-General Counsel to the organization. He will join existing Co-General Counsel Steven N. Kurtz, Esq. partner of Levinson & Kurtz & Kurtz, LLP, and Michael Ullman, Esq. principal of Ullman & Ullman, P.A.

NORTHEAST CHAPTER EVENTS

September 12
10:00am-10:45am
Coach Diner, Hackensack, NJ

September 27
11:00am-12:00pm
Trattoria Rosa Bianca, Yardley, PA

October 3
10:00am-10:45am
Coach Diner-Hackensack, NJ

October 17
2:00pm-5:30pm
IFA NE/NYIC Joint Program & Luncheon-Shark Tank Workshop
Arno’s Ristorante-New York, NY

October 24
11:00am-12:00pm
Trattoria Rosa Bianca, Yardley, PA

November 13
10:00am-10:45am
Coach Diner-Hackensack, NJ

November 28
11:00am-12:00pm
Trattoria Rosa Bianca, Yardley, PA
Public records searches miss 60% of outstanding tax liabilities. Tax Guard can show you what you’re missing.

See Tax Problems Before You Fund
Tax Guard reports provide 10 years of borrower tax compliance with missing tax returns, tax deposit verification, and lien filings to measure your risk prior to funding.

Monitor Tax Issues While You Fund
Monthly monitoring includes proactive alerts to notify you of potential risks.

Solve Tax Problems So You Can Fund
Our tax experts offer transparent resolution strategies for you and your borrower to ensure no disruption to the funding relationship.
Factoring the Staffing Industry in Today’s New Workforce

A fundamental shift is taking place in today’s workforce. Historically, contingent labor, which is an umbrella term used to describe a variety of non-traditional employment arrangements, such as independent contractors, temporary employees and leased employees, made up a relatively small portion of the overall workforce. Companies tended to view contingent labor primarily as a way to conditionally augment their workforce in anticipation of a growth cycle while temporary employees tended to view the position as a stepping stone to full-time employment.

BY RAPHAEL TORRES, SENIOR VICE PRESIDENT, WELLS FARGO CAPITAL FINANCE & JIM CRETELLA, ESQ., MEMBER, OTTERBOURG P.C.

Over the past few years, the portion of the workforce that consists of contingent labor has dramatically increased. In fact, a recent study by research firm Ardent Partners found that the portion of the global workforce consisting of temporary, contract or other contingent labor is currently over 30% and could grow to 50% by 2020. Although the exact figures will vary depending on how “contingent labor” is defined, the industry consensus is that, under any definition of the term, the portion of the workforce consisting of contingent, contract or temporary labor has steadily increased over the past few years and will continue to increase in the years to come.

This rapid growth in the use of contingent labor is fueled in large part by a fundamental and generational shift in how both employers and workers view the workforce. In the wake of the great recession of 2008-2009, employers are increasingly looking for flexibility and efficiency within their workforce. Similarly, the millennial generation, and to a lesser extent, prior generations, are increasingly looking for flexible work arrangements. Simply put, more and more employers and workers alike are embracing contingent work arrangements in lieu of the traditional nine to five permanent position.

The nature of a staffing company is also evolving. In the not so distant past, the staffing industry was a fairly simple concept, in that most staffing firms focused primarily on providing temporary labor, contract labor and, occasionally, permanent placement. Today, by contrast, staffing firms often play a much larger role in managing their client’s overall contingent workforce needs by offering a variety of peripheral services, including payroll services, independent contractor compliance services, professional employer services and managed service provider services.

Not only are staffing companies expanding the universe of services they provide, they are also increasingly servicing industries that, until recently, had little demand for contingent labor. Historically, much of the demand for contingent labor came from the clerical and light industrial industries. However, with professional and skilled workers increasingly seeking a flexible work arrangement and employers increasingly seeking “on demand” executive-level talent, the staffing industry is expanding into skilled IT, medical, oil and gas, creative and sales professions.

Factoring has traditionally been one of the more popular forms of financing for staffing companies, in large part because staffing companies typically do not have substantial assets beyond their receivables and factors, relative to many other forms of financing, are generally more interested in the credit quality of the account debtors than the strength of the client’s (borrower’s) balance sheet. However, given the recent growth of the staffing industry, it should come as no surprise that more traditional lenders are increasingly pursuing financing opportunities in the staffing industry.

As a result of this increased competition, factoring, at least in the staffing industry, is somewhat evolving into a hybrid between a traditional factoring product and an asset based revolving loan facility. Whereas, in the past, factoring was generally viewed as a high-priced
solution typically used by weaker companies, the influx of competition among more traditional financial institutions is increasingly forcing factors to reduce their pricing, and to restructure their facilities, in order to more closely align with an asset based revolving loan facility.

Despite the additional competition for factors to the staffing industry, the projected growth of the staffing industry, coupled with the continued popularity of the factoring product within the staffing industry, presents an incredible opportunity for factors. However, the nature of a staffing company and the speed with which the staffing industry is evolving arguably makes financing a staffing company a type of specialty finance.

For example, staffing companies, like any other business, can suffer unforeseen business setbacks that strain their liquidity, such as a bad debt or industry slowdown. It is not uncommon for a company outside the staffing industry to seek to ease this strain by stretching its trade payables until the problem resolves. However, most staffing companies do not have enough trade debt to leverage for this purpose and, therefore, a staffing company might be tempted to instead “squeeze” the IRS by delaying payment of payroll taxes to free up cash for working capital purposes.

Of course, late or non-payment of payroll taxes can be costly for the staffing company and for the factor as well. For instance, an IRS lien will prime the factor with regard to any advances made or receivables created after 45 days from the earlier of when the tax lien is filed or the factor obtains notice of the tax lien. Also, with relatively thin margins, it can be difficult for a staffing company to dig out from underneath a significant tax liability, at least within the short term. As such, factors considering whether to finance a staffing company may wish to require the staffing company sign an IRS form 8821 which gives the factor, or a third-party tax monitoring service, the ability to confirm with the IRS payroll tax deposits and filings.

Staffing companies are increasingly contracting with professional employment organizations (PEOs) for the PEO to take over some of the “employer duties” of the staffing company, such as the payment and reporting of payroll tax, and workers’ compensation insurance. When a staffing company uses a PEO, it can be difficult for the factor to monitor the staffing company’s payroll tax deposits and filings with
an 8821, as the PEO is unlikely to allow a factor to its client to have visibility into the PEO through an 8821. It can also be difficult for the factor to obtain visibility into workers’ compensation coverage maintained by a PEO for its staffing company client, especially where the PEO does not itself maintain the policy but rather obtains it through another PEO (i.e., “piggybacks” off that other policy). For these reasons, factors should conduct due diligence on any PEO used by their staffing company clients, including determining whether the PEO is licensed under state law (where applicable) and whether the PEO is accredited by either the IRS or by a reputable third party, such as Employer Services Assurance Corporation.

Securing and managing workers’ compensation insurance can sometimes be a challenge for staffing companies. One reason is the number and variety of class codes a staffing company will need to carry on its policy. Depending on the business of the particular customer, each new account that a staffing company services may require the addition of a new class code to the staffing company’s workers’ compensation policy. Misclassification of workers by a staffing company is often the result of inexperience on the part of the staffing company. However, even innocent misclassification of workers can result in retroactive premium increases as well as penalties and interest. As relatively low margins and little excess cash flow can make it difficult for staffing companies to overcome such an unexpected and sometimes substantial liability, factors may wish to confirm that their staffing company clients employ the services of an experienced and reputable risk manager, either in house or through a credible PEO, to mitigate the potential for misclassification of workers.

Additionally, high deductible workers’ compensation policies, and even self-insurance, are increasingly popular within the staffing industry. While these types of policies can increase cash flow in the short term through premium savings relative to a more traditional policy, they can be more expensive in the long term if, for example, the insured experiences a sizeable number or significant dollar amount of claims. To minimize the potential number and amount of workers’ compensation claims, especially for a staffing company with self-insurance or a high deductible policy, it is important for staffing companies to develop and maintain comprehensive risk and claims management procedures, which might include on-site supervision by the staffing company of employees while on assignment at client companies. Of course, even a guaranteed cost insurance policy, which typically has higher premiums but less downside risk than high deductible policies or self-insurance, can still cause an unexpected strain on cash flow if, for example, a staffing company expands its business during the policy period but does not plan for the resulting retroactive premium adjustment to reflect the increased payroll. In any event, as workers’ compensation is increasingly impacting the staffing industry, factors to the staffing industry should be well versed in workers’ compensation in general and should also pay close attention to their staffing client’s workers’ compensation programs.

Is the financing of staffing companies still a niche product? It depends on how you define “niche.” If niche equates to specialization, then arguably, yes. However, if niche equates to size, then probably not, especially if the industry continues to grow as widely anticipated. Regardless, the staffing industry currently presents an excellent opportunity for factors looking to grow their business.

The opinions expressed in this document are general in nature and not intended to provide specific advice or recommendations for any individual or association. Contact your banker, attorney, accountant or tax advisor with regard to your individual situation. The opinions of the author do not necessarily reflect those of Wells Fargo Capital Finance or any other Wells Fargo entity.

Raphael Torres, leader of the Staffing Services team with Wells Fargo Capital Finance, brings more than 14 years of banking experience. Raphael began his career as a collateral analyst and was quickly promoted to a relationship manager, handling some of the team’s most complex transactions. Most recently, Raphael served as a portfolio manager. Raphael has been an active member of the American Staffing Association. He has won the Staffing Services team’s “Team Member of the Year” award, in both 2009 and 2012, and is a recipient of one of Wells Fargo’s most prestigious awards, The Golden Spoke. Raphael can be reached by phone at (954) 761-4029 or by email at Raphael.E.Torres@WellsFargo.com.

Jim Cretella is a member of the law firm of Otterbourg P.C. He focuses on the representation of institutional lenders, factoring companies and specialty lenders in connection with the negotiation and documentation of a variety of asset based, factoring and other lending transactions. Jim has extensive experience in the financing of staffing companies, and a variety of supply chain and other trade finance transactions, including off-balance sheet receivable purchase facilities. He can be reached by phone at (212) 905-3611 or by email at jcretella@otterbourg.com.
Proceeds

After taking a detour into the political arena for the last two articles, suffering a couple of beatdowns, but also gathering some praises (and thanks to everyone for the feedback), I have decided to come back to the basics. In doing so, I wanted to focus on one word that arguably could be the foundation of the factoring industry.

So, like Pee Wee Herman used to say, the word of the day is proceeds. Indeed, proceeds is what drives the factoring industry. The factors advance funds to the clients by purchasing accounts, and expect repayment from the account debtors, which payments are the proceeds of the factor’s advance. Factor clients take advantage of the early collection of their accounts receivable, by selling the accounts to the factor, and the proceeds from the account sale to the factor provides immediate working capital. The most common thought as to what proceeds really are, for most finance people, are the funds received upon the sale or other disposition of an asset. However, the concept of proceeds is quite broad. It provides significant protections, but can also get you into trouble. Therefore, it is important to have a good working knowledge of what constitutes proceeds.

UCC Sec. 9-102(a)(64) is the definition of proceeds, and it’s fairly long. However, it can be broken down into the following main groups. First, proceeds constitutes whatever is received from the sale, lease, license or other disposition of your collateral. For example, the factor client sells inventory, for which you have a lien. The payments received constitute cash proceeds. The right to collect the payment at a later date, is an account, which is also considered proceeds of the inventory. Second, proceeds can be what is received on account of a damage or interference claim. For example, the secured party has a lien on inventory. A fuse goes bad, starts a fire, and the inventory is destroyed. The debtor makes a claim to its insurance company. The insurance money paid on account of the insurance claim constitute proceeds of the inventory collateral. Third, proceeds also include rights arising out of the collateral, which is broad, but can include litigation or reclamation claims. For example, a person purchases inventory from the debtor, but fails to pay. The secured party with a lien on the recovery of the lawsuit, because the litigation claim is a right derived from the inventory lien. Finally, the outer reaches of proceeds include things such as loss, nonconformity, interference or infringement claims against the collateral. So, sticking with the inventory example, if the inventory constitutes trademarked goods, and a bad person is selling counterfeit goods, the trademark infringement claim would be an infringement claim against the secured party’s general intangible collateral, as trademarks are automatically swept up into general intangibles, and the trademark infringement claim should constitute an infringement claim against the collateral. Another important thing to note about proceeds, is that once you have a lien on a specific asset, you automatically have a lien against proceeds and no separate collateral description is required, although everyone includes proceeds in their collateral descriptions contained in the security agreement.

A problem occurs where a secured party who has a lien against
accounts, and expects to have a lien on the cash proceeds when the debtor deposits the funds into the bank account. Intuitively, one would think that if you have a lien against all accounts, and all accounts are deposited into the debtor’s bank account, that the funds in the bank account would constitute the perfected proceeds of the secured party’s lien against accounts. However, this is not the case. The UCC classifies this bank account as a deposit account. Deposit accounts constitute a separate item of collateral, and perfection is not accomplished through a UCC-1 financing statement. Rather, if you are not a bank which has the deposit account, a control agreement is needed between the secured party and the financial institution where the bank account is maintained. A control agreement is the only way to obtain perfection over funds in a deposit account. A control agreement is typically a fairly standard document that is almost always done under the form of the bank where the deposit account is maintained. It allows the debtor to use the deposit account, but also provides that once the secured party gives notice to the bank, that the bank will honor the secured party’s instructions and hold the funds in the deposit account for the secured party’s benefit. The area where the secured party’s perfection on the deposit account is typically called out is when a lien creditor, who has a court order allowing it to collect or levy funds against your debtor, serves a levy against the deposit account. Normally, the secured party who fails to obtain a control agreement loses in priority to the lien creditor who seeks to enforce a judgment, or a court ordered prejudgment remedy against the funds in the deposit account. Some states, like California, have a way out for the secured party who fails to obtain a control agreement, and allow for the secured party to prevail against the lien creditor, if it can be shown that the debtor deposited all of its collections on accounts in the deposit account, and the funds in the deposit account can be traced to the accounts. The funds in the deposit account must be the direct and traceable proceeds of the secured party’s lien against accounts. However, this is always an uncertain result, and it is advisable that if the secured party wants to have a perfected lien against money in the deposit account, that it enter into a control agreement.

Since insurance claims and recoveries are a form of proceeds, one should be aware of this item of collateral. Actually, this is fairly straightforward. If your debtor has any kind of stuff, whether it’s inventory, equipment, a place of business where things are stored, the debtor should have insurance. All one needs to do is find out the debtor’s insurance company before you close a deal and confirm which losses are covered. The insurance company will have lender endorsement forms which when completed, make you the payee on any insurance claim and provide you notice in the event that a policy is not paid. If you do not have the lender endorsement form signed in the beginning, and you learn of the claim, make sure that you have all details and do what is needed to make sure that the insurance proceeds of your collateral is paid to you, or make your arrangement with the borrower/factor client before the funds are paid over by the insurance company to your debtor.

One must keep proceeds in mind when entering into intercreditor agreements. Often, it is common for a factor and an inventory lender to enter into intercreditor agreements. The area when the secured party’s perfection on the deposit account is typically called out is when a lien creditor, who has a court order allowing it to collect or levy funds against your debtor, serves a levy against the deposit account. Normally, the secured party who fails to obtain a control agreement loses in priority to the lien creditor who seeks to enforce a judgment, or a court ordered prejudgment remedy against the funds in the deposit account. Some states, like California, have a way out for the secured party who fails to obtain a control agreement, and allow for the secured party to prevail against the lien creditor, if it can be shown that the debtor deposited all of its collections on accounts in the deposit account, and the funds in the deposit account can be traced to the accounts. The funds in the deposit account must be the direct and traceable proceeds of the secured party’s lien against accounts. However, this is always an uncertain result, and it is advisable that if the secured party wants to have a perfected lien against money in the deposit account, that it enter into a control agreement.

Since insurance claims and recoveries are a form of proceeds, one should be aware of this item of collateral. Actually, this is fairly straightforward. If your debtor has any kind of stuff, whether it’s inventory, equipment, a place of business where things are stored, the debtor should have insurance. All one needs to do is find out the debtor’s insurance company before you close a deal and confirm which losses are covered. The insurance company will have lender endorsement forms which when completed, make you the payee on any insurance claim and provide you notice in the event that a policy is not paid. If you do not have the lender endorsement form signed in the beginning, and you learn of the claim, make sure that you have all details and do what is needed to make sure that the insurance proceeds of your collateral is paid to you, or make your arrangement with the borrower/factor client before the funds are paid over by the insurance company to your debtor.

One must keep proceeds in mind when entering into intercreditor agreements. Often, it is common for a factor and an inventory lender to enter into intercreditor agreements. The area when the secured party’s perfection on the deposit account is typically called out is when a lien creditor, who has a court order allowing it to collect or levy funds against your debtor, serves a levy against the deposit account. Normally, the secured party who fails to obtain a control agreement loses in priority to the lien creditor who seeks to enforce a judgment, or a court ordered prejudgment remedy against the funds in the deposit account. Some states, like California, have a way out for the secured party who fails to obtain a control agreement, and allow for the secured party to prevail against the lien creditor, if it can be shown that the debtor deposited all of its collections on accounts in the deposit account, and the funds in the deposit account can be traced to the accounts. The funds in the deposit account must be the direct and traceable proceeds of the secured party’s lien against accounts. However, this is always an uncertain result, and it is advisable that if the secured party wants to have a perfected lien against money in the deposit account, that it enter into a control agreement.

Since insurance claims and recoveries are a form of proceeds, one should be aware of this item of collateral. Actually, this is fairly straightforward. If your debtor has any kind of stuff, whether it’s inventory, equipment, a place of business where things are stored, the debtor should have insurance. All one needs to do is find out the debtor’s insurance company before you close a deal and confirm which losses are covered. The insurance company will have lender endorsement forms which when completed, make you the payee on any insurance claim and provide you notice in the event that a policy is not paid. If you do not have the lender endorsement form signed in the beginning, and you learn of the claim, make sure that you have all details and do what is needed to make sure that the insurance proceeds of your collateral is paid to you, or make your arrangement with the borrower/factor client before the funds are paid over by the insurance company to your debtor.

One must keep proceeds in mind when entering into intercreditor agreements. Often, it is common for a factor and an inventory lender to enter into intercreditor agreements. The area when the secured party’s perfection on the deposit account is typically called out is when a lien creditor, who has a court order allowing it to collect or levy funds against your debtor, serves a levy against the deposit account. Normally, the secured party who fails to obtain a control agreement loses in priority to the lien creditor who seeks to enforce a judgment, or a court ordered prejudgment remedy against the funds in the deposit account. Some states, like California, have a way out for the secured party who fails to obtain a control agreement, and allow for the secured party to prevail against the lien creditor, if it can be shown that the debtor deposited all of its collections on accounts in the deposit account, and the funds in the deposit account can be traced to the accounts. The funds in the deposit account must be the direct and traceable proceeds of the secured party’s lien against accounts. However, this is always an uncertain result, and it is advisable that if the secured party wants to have a perfected lien against money in the deposit account, that it enter into a control agreement.
agreements for the same debtor. The factor provides working capital by purchasing accounts. The inventory lender provides working capital by advancing against inventory. In some situations, the inventory lender and the factor will have an intercreditor agreement that provides that the inventory lender is first on accounts unless the factor funds against that account and a certain amount of the proceeds are paid over to the inventory lender. However, there are several instances when no specific arrangements are made and the parties seek to set forth their respective priorities against what they advance against. So, in this case, the inventory lender is first on inventory and the factor will expect to be first against accounts. However, keep in mind that proceeds automatically attaches to one’s specific item of collateral. Therefore, the proceeds of the inventory lender’s collateral will be accounts. Thus, it is important to keep in mind proceeds when entering into an intercreditor agreement and make sure that the priorities are exactly what you want them to be—not what the document may or may not say.

Litigation claims are an important item of proceeds. For example, a person who fails to pay for the sale of inventory, and then is the subject of a litigation claim, who later settles, is settling and paying with your proceeds. In the factoring context, you may charge back an account that fails to pay for some reason. With many factors, as long as sufficient arrangements are made and the chargeback is handled, the litigation claim to collect on the charged-back account is often forgotten. But, again, the litigation claim to collect on the unpaid account constitutes the proceeds of your collateral in accounts.

It is important to keep in mind proceeds when entering into an intercreditor agreement and make sure that the priorities are exactly what you want them to be.

Therefore, it is important to track what happens after a chargeback. If there are litigation claims, make sure you know what is happening at all times. If necessary, put the litigation lawyer on notice of your claim on the proceeds. Things can change quickly, and it is always important to monitor your litigation claim proceeds collateral.

The outer limits of litigation claims are those for infringement. Infringement are generally considered claims for damages by some form of wrongful use of the property. Often infringement claims are brought as tort claims. Common examples are trademark or copyright infringement claims. Another example of an infringement claim would be a claim in negligence against someone who may have temporary storage of inventory collateral. There is another class of litigation claims, which are taken as original collateral, which are known as commercial tort claims. Commercial tort claims are described as tort claims arising out of the debtor’s business, and must be set out in the security agreement and perfected by a financing statement that specifically describes the claim. Sometimes it is difficult to tell infringement claims which are proceeds of collateral apart from a commercial tort claim. This confusion will come into play if your debtor fails and is in a bankruptcy proceeding. Your debtor, who is a victim of wrongful conduct, and filed a chapter 11 case, will have the ability to argue in bankruptcy court that you are unsecured on what is now being classified as a commercial tort claim—or a creditor’s committee, or even the Office of the United States Trustee, can do the debtor’s bidding. In a chapter 7 case, you will have the chapter 7 trustee trying to separate you from you collateral. Frequently, a business fails as a result of wrongful conduct caused by a third party. These claims are often valuable. Sometimes, litigation claims are stated in contract and tort. Moreover, there is very little case law as to the difference between an infringement claim to your collateral versus a commercial tort claim. The difference is important because proceeds automatically attach to your collateral, while commercial tort claims require precise specificity as to the collateral description in both the security agreement and the UCC-1. Moreover, you can’t merely say all commercial tort claims in your contract and later rely upon this description if the debtor has a valuable litigation claim. Therefore, special attention must be given to these litigation claims, preferable before the factor client/borrower fails, and you will likely need to draft your way around this problem.

Factors and other lenders basically make their living on proceeds, as do the factor clients and borrowers. But, proceeds constitute a very broad base of collateral, and can creep its way into all kinds of dealings. In some situations, you may not even realize the benefit of your proceeds because the drafters of Revised Article 9 saw to it that proceeds are automatically attached and perfected. But, in other instances, proceeds can be very subtle and it is important to know where you stand with respect to this item of collateral.
THE WORLD’S LARGEST ASSOCIATION FOR THE FACTORING INDUSTRY

ANNUAL CONFERENCE
AMICUS BRIEF PROGRAM
AE CERTIFICATION PROGRAM
DISCUSSION GROUPS
LEAD GENERATION
www.factorsearch.org
DISCOUNTED PRODUCTS
FACTORING SURVEY & LEGAL FORMS
TRAINING COURSES
MENTOR PROGRAM
SOCIAL MEDIA COMMUNITY
MEETINGS, FORUMS & MORE

2017

9/7-8 Transportation Factoring Meeting
The Seelbach Hilton, Louisville, KY

9/13 How Technology Can Help Detect Fraud
Webinar, 1pm - 2pm PDT

10/4 Basic Bankruptcy Practice & Procedure
Webinar, 1pm - 2pm PDT

10/11-12 Operations Roundtable
Planet Hollywood, Las Vegas, NV

10/19-20 Advanced Factoring & Legal Forum
Planet Hollywood, Las Vegas, NV

10/26-27 How to Compete Against the World of Fintech - Round 2
Planet Hollywood, Las Vegas, NV

11/2 True Sale of Accounts
Webinar, 1pm - 2pm PDT

11/15 UCC Debtor Name Essentials
Webinar, 1pm - 2pm PST

1/24-26 President’s & Senior Executive’s Meeting
2018
Mauna Kea Beach Hotel, Hawaii Island, HI

3/6 Luncheon Meeting with NYIC & IFA Northeast Chapter
2018
Arno Ristorante, New York, NY

5/9 Factoring Essentials Training
2018
Fontainebleau, Miami Beach

5/9-12 2018 Factoring Conference
2018
Fontainebleau, Miami Beach, FL

2018

www.factoring.org
info@factoring.org
800-563-1895
805-773-0011

The International Factoring Association is registered with the National Association of State Boards of Accountancy (NASBA) as a sponsor of continuing professional education on the National Registry of CPE Sponsors. State boards of accountancy have final authority on the acceptance of individual courses for CPE credit. Complaints regarding registered sponsors may be submitted to the National Registry of CPE Sponsors through its website, www.learningmarket.org.
Factoring Commercial Construction Projects

Tempting but dangerous, lucrative but risky...that’s factoring in the construction industry.

BY FRANK SKELLY

Construction is booming, yet it’s an industry with a desperate need for financing solutions. I would argue that cash flow issues in the commercial construction industry dwarf that of any other industry, particularly those of the commercial subcontractor. Margins are moderate, operating expenses significant, supplies are expensive, and favorable terms are few and far between. Billing is typically monthly, and payments usually show up about 55 days after the subcontractor has already carried a full month’s worth of expenses. The 1st tier subcontractors are the ones that bear the brunt of the cash flow burden on commercial projects as almost all general contractors have ‘paid when paid’ or ‘paid if paid’ clauses in their agreements.
The result is the typical 1st tier subcontractor carries up to 90 days’ worth of expenses and payroll. Even if they are fortunate enough to have terms with their suppliers, 30 days simply doesn’t cut it. On commercial construction projects, the little guy carries the financial burden. If one were to describe the ultimate candidate for factoring, it would surely be the typical 1st tier commercial subcontractor. For the most part, it’s an industry that has not been touched by factors and it is ripe for the taking.

**HOWEVER, CHALLENGES DO EXIST.**

When factoring traditional industries, the risk is usually apparent. We know if we get good verification from a creditworthy account debtor 99 times out of 100 we will get paid...in the construction industry, it’s not nearly that simple.

In construction, once verification is secured the factors work is just beginning. The risk is not limited to the creditworthiness of the account debtor; it’s the subs, suppliers, and vendors brought onto the project where the real danger lurks. Miss one supplier and you have a problem. Workers don’t get paid, union dues are missed, insurance lapses... it’s even worse.

Although an estoppel should carry the day in a court of law, from a practical standpoint, it takes years to get to that day. In the meantime, if there are unpaid subs, suppliers, vendors, payroll or union dues, the factor will not get paid regardless of the strength of the estoppel.

The reason is simple: subs, suppliers, vendors, and laborers all have mechanic’s lien rights and those rights trump almost everything. The system makes it very easy for unpaid subs, suppliers, vendors, and workers to file a lien and encumber a project. Some states even provide for Stop Notices which allow an unpaid sub, supplier, vendor or worker to freeze 150% of the money they claim is due them. From a practical standpoint, the sub, supplier, vendor or worker’s lien will always get paid right away while the factor will be left hoping for that day in court.

To be fair, estoppels do put pressure on the general contractor, but they will always feel more pressure from the project’s owner to get the lien removed. Since nobody is ever in a rush to pay something twice, the factor will be left holding the bag. The good news is these powerful liens cut both ways...although they can be a huge liability and put your collateral at risk, they are also one of your biggest assets if you know how to use them to your advantage.

---

**WE FUND FACTORING PARTICIPATIONS**

**GULF SOUTH RECEIVABLES FUND, LLC**

- Participations funded up to $1 Million
- Debtor or client-specific participations
- Global portfolio participations available for small ticket factors
- 48 hour decision turnaround time
- 15 years factoring experience
- Not a servicer, so we won’t solicit your clients or compete against you in the marketplace
- No direct liens required against you or your client, so our participation remains anonymous to your clients
- U.S. based factors only
- Don’t lose deals because of size or concentration again

Contact Knox Clark for more information
504-495-1084 • knox@gssfund.com
RISK IS EVERYWHERE.

Although your construction clients know who they have hired to work on their jobs, it doesn’t mean they want you to know who they are. Getting your clients to voluntarily identify everyone they have hired can be challenging. Sometimes clients omit them intentionally with the hopes of pulling more money out of a job, money that should be going to subs, suppliers & vendors.

However, there are times when your client will not know all the subs, suppliers and vendors working on the job. This can happen when your client hires a 2nd tier sub who in turn has subs, suppliers, and vendors of their own. This can be problematic and can lead to offsets and deductions if any of these parties aren’t paid. It is critical that the factor understand not only who their client has hired to provide products or services on the project but also who those parties have hired (see ‘true stories’ below). Other challenges involve calculating union dues and which unions need to be paid (there are different unions for different trades). If changes occur on the job that you are unaware of it is very easy to overlook a party that should be getting a portion of the proceeds the factor is disbursing.

MCA’s can be especially problematic; if a default occurs, funds intended for project-related expenses such as payroll, workers comp, and suppliers might end up being intercepted by the MCA.

Consider the following true stories.

• The client was pouring concrete slabs for a chain of retail stores in the southeastern region of the US. We reviewed the contract carefully, and the client dutifully identified all the subs, suppliers, vendors and workers on the job. As the job progressed we secured the appropriate lien releases, cut joint checks and funded the client. It turns out that about halfway through the job our client had opened an account with another concrete supplier which we were unaware of. We continued to fund the job but as we were about to collect the final $139,000 payment we were contacted by the general contractor who wanted to know why there was a lien on his project from a concrete supplier. How do you make sure your client doesn’t open other supplier accounts during the job?

• The client was a 1st tier sub-contractor hired by the prime contractor...
to hang sheetrock at a yearlong project worth $1 million, located at a Connecticut university. Our client brought in a labor subcontractor to help them stay on schedule. About midway through the job, the Department of Labor shows up on the job to ensure prevailing wage conditions are being met. Unbeknownst to our client, the 2nd tier subcontractor providing the labor was not complying with the required payroll conditions (Davis-Bacon Act). DOL fined the general contractor $200,000 which, of course, the general contractor immediately offset against $365,000 due us. Although we had an estoppel, the general contractor refused to pay. 37 months later, we finally had a trial date.

- An Asset Based Lender who lost their credit line and was attempting to sell its portfolio which included a $1 million line to a construction company. With over $1.2 million in AR the ABL felt secure, except when they approached us they learned the hard way that most of that AR was encumbered by subs, suppliers, vendors, workers and union dues. When the dust settled, the ABL realized that they only had $126,000 coming to them and that was only if the $1,200,000 was paid in full.

**WHAT IS THE SOLUTION?**

Good verification is critical; relying on anything less than an estoppel is asking for trouble. Identifying and paying anyone with lien rights is a must. Monitoring the job closely is mandatory. The overall health of your client is key when factoring construction.

**Specific steps to take:**

- Manage all sub, supplier and vendor releases, do not leave it to the client.
- Collect certified payroll and union status letters with each funding.
- Pay all subs, suppliers, vendors, payroll service and union dues by joint check.
- Monitor deadlines for filing a Notice to Owner (Florida) or a Notice of Furnishings (MI) or a 20 Day notice (CA), each state has different requirements. Miss one of these deadlines and your ace in the hole is gone...your client loses their lien rights and so do you.
- Monitor lien filing deadlines.
- Monitor bank statements along with open and closed AP reports. This is an excellent way to see whether the client has brought in an MCA or if they are not disclosing subs, suppliers, or vendors.
- Insist your clients use outside payroll & bookkeeping services.
- Monitor that insurance policies, including workers’ comp, remains in effect.
- Ensure compliance with the Little Miller Act & Davis-Bacon Act on all public jobs.
- Comply with the 12 states that have statutory mechanic’s liens.
- Be aware that at least 15 states have sub, supplier, vendor & workmen’s trust fund statutes that the factor needs to be aware of.

Some of these steps are easy to adapt, such as monitoring insurance (have agent name you as additionally insured so you will be notified if policy is cancelled); others are not so easy.

Having funded over 250 commercial construction projects in 34 states in the past five years, I can tell you that it is a lucrative niche but it is also fraught with danger. However, if you have the stomach for the risk that comes with factoring construction and develop the right system of checks and balances, it can be profitable.

Frank Skelly runs a cash management and funds control group which provides financing to the commercial construction industry. He works with Factor King, LLC, a New York-based factoring company. Frank has a 30-year background in both finance and construction. He has previously served as CEO of an investment bank and President of a distressed real estate investment fund. He can be reached by phone at (800) 918-7830 or by email at FSkelly@factorking.com.
The last few years have seen unprecedented competition for new clients. After nearly a quarter century in this business, I’m still energized to find new marketing and sales channels and strategies. As we look back on where we are so far in 2017, here are some thoughts for this year.

FINTECH AND FACTORING BEDFELLOWS

"Adversity makes for strange bedfellows" is a common adaptation of William Shakespeare’s famous quote, "Misery acquaints a man with strange bedfellows". These days, fintech seems to be the industry that factoring companies love to hate. In my experience, however, I find an interesting opportunity in the proliferation of fintech. In fact, I recently partnered with a fintech lender to solve a nagging problem: other fintech lenders.

Fintech lenders, also known as marketplace lenders, merchant cash advance (MCA) lenders, and ACH lenders market to cash-squeezed small and medium-sized enterprises (SBEs) that are easy prey to brokers hawking expensive and inflexible loans to the most desperate of borrowers. While fishing for tuna, fintech occasionally nets some dolphins. I try to free those “dolphins” with less costly and more flexible options wherever possible. Not only do I find that fintech lenders are hooking some businesses that don’t need their product, I

Tony Furman is president and co-founder of Interstate Capital Corp, a New Mexico-based factoring company. Interstate Capital was formed in 1993 and factors nearly $1 billion per year of invoices for over one thousand active clients. Learn more at InterstateCapital.com. Tony can be reached by phone at 1-800-422-5995 ext. 118 or by email at tfurman@interstatecapital.com.
also find that even some of my own factoring clients are unknowingly obtaining much more costly fintech loans. These are clients I could accommodate with, for instance, over-advances and other support. The solution may simply be a matter of better educating my clients.

I have partnered with a fintech company to which I refer prospects who already have a fintech loan. In the past, I used to throw my hands in the air when I came across a really great factoring prospect that is already indebted to a fintech. Why? Because many fintech lenders file UCC-1s and are loath to subordinate their security interest to factoring companies. A lost opportunity? Maybe not. Now, when I run across a prospect that would be “factorable,” if not for a stubborn fintech lender that won’t subordinate, I simply refer the prospect to my fintech partner who is happy to refinance the old fintech loan and take a second lien behind me.

DIFFERENTIATION AND AUTOMATION AS A MARKETING TOOL

Scaling a factoring business requires differentiation. How do you stand out from the crowd? One effective way to differentiate yourself is to charge lower rates than your competitor. This race to the bottom may not be necessary if you have a sufficient number of arrows in your quiver to set you apart from the competition. For most of us, lowering rates to compete with the lowest-cost providers is simply not an option, due to capital constraints, cost of borrowed funds, or overall cost structure. No doubt, it is difficult to compete with competitors who charge lower rates, but if there’s one thing the fintech industry has proven, it’s that SBEs are not as cost conscious as we once thought. So there is hope. Market your strengths, market value over cost, and differentiate yourself whenever possible from your lower-rate competitors.

Take a play out of the fintech playbook through automation and differentiating yourself by creating less friction. Remove every roadblock and barrier to make it easier for people to apply. Ever been to a fintech website and applied for a loan? You should. Just don’t take the loan. Focus on how fintechs have differentiated themselves from other lenders and factoring companies by reducing transactional friction and speeding the process. Granted, factoring companies do require more extensive underwriting and documentation, but sometimes, it’s not what you ask for—it’s how you ask for it.
DON’T ASK FOR THINGS YOU DON’T NEED

Do you really need a fax number? If so, maybe you should be looking for a different demographic of client. Fintechs have become successful because they don’t ask for things they don’t need. They design systems to save applicants time. There is an inverse correlation between the time it takes to complete a form and the likelihood of that form ever being submitted. Make your online forms simple and streamlined. Make it easy for applicants to supply information you do need. Don’t ask for information you can easily obtain yourself for free. Every keystroke you make an applicant hit reduces the chances the application will be submitted. Don’t make applicants download a PDF application, print it, sign it, scan it, and email it if you are able to collect the same information through a secure online form on your website. Reducing transactional friction is one of the most often overlooked means of differentiation.

Don’t require originals if you don’t need them. In almost all cases, digital copies are enforceable, so think hard about slowing onboarding process down by requiring your clients to sign and overnight originals. Since rethinking the subject of originals, I believe we have reduced the amount of pipeline leakage. A large number of my clients are truckers, so one of the biggest causes of funding delays used to be our applicants being unable to get to a printer.

STEP OUTSIDE YOUR COMFORT ZONE

If your marketing specialization is digital, try stepping out of your comfort zone by expanding your non-digital marketing. If you have a centralized sales organization, try some decentralization. If you do direct mail, try display advertising. If you have never been an exhibitor at a trade show, try it. You never know where your next big origination channel will develop. I have friends in the factoring industry who do very well with trade shows and others who simply dismiss them. While I don’t exhibit at many trade shows, I find that diversification of marketing can pay good long-term dividends.

For years, I conceded that obtaining referrals from outside referral channels was something my organization was just not good at. We have always obtained lots of referrals from our clients, but we have never been a “broker-centric” model where we rely to a large extent on...
non-digital origination channels or any single channel for our leads. The lack of past success led me to the wrong conclusion and as a result, I long shunned the development of a referral partner network. Still, I do not actively pursue brokers who are in the business of finding money for their clients, but about a year ago, I hired a Director of Partnership Development.

The objective for this strategy is to develop a large network of non-brokers who regularly refer to business. If we stumble upon a great broker, that’s fine, but it’s not the objective. From my past experience with brokers, I’ve learned they are an independent bunch, and earning their long-term loyalty or exclusivity is all but impossible. Non-broker referral partners generally are not in it for the referral money (although that certainly keeps us top of mind). The difference between a referral partner and a broker is that a referral partner is not a professional “money finder”; they are typically exclusive relationships, and they are motivated purely by referral fees. Broker’s on the other hand, are motivated first by the amount of commissions they will earn from the relationship, and secondarily, all other factors. Granted, brokers are professional “money finders”, so they have an expectation for high conversion and retention rates. I receive perhaps a dozen calls or emails from brokers each month. The first (and often only) question they ask is “how much commission do you pay”. Referral partners seldom ask about compensation.

With creativity and a consistent customer focus, our factoring company’s marketing efforts keep exceeding our ambitious projections. We don’t mind stepping out of our comfort zone—and that keeps our work both satisfying and rewarding, year after year.
The Transportation Intermediaries Association (TIA) fully supported the proposed Safety Fitness Determination (SFD). The SFD would have cleared up how safety ratings for motor carriers are presented to the public, and remove the confusion and liability traps that surround the four-tiered rating system. TIA supported the CSA Reform language included in the FAST Act, but the SFD is based on absolute measures and is not directly tied to CSA. Therefore, the SFD should not be delayed until the CSA study, certification, and corrective actions are taken. The entities that hire motor carriers, like 3PLs and shippers, cannot wait any longer for a clear cut line to determine which carriers are safe to use and which carriers are not. The SFD would have provided the 3PL industry with that line. Additionally, the SFD would identify and remove the most egregious motor carriers from our nation’s highways, and drastically improve safety.

On March 22, 2017, the Federal Motor Carrier Safety Administration (FMCSA) announced its notice of withdrawal of the January 21, 2016 notice of proposed rulemaking (NPRM) on Motor Carriers Safety Fitness Determination (SFD). The SFD would have revised the methodology for issuance of a safety fitness determination for motor carriers, and would have determined when a motor carrier is not fit to operate commercial motor vehicles (CMVs) in or affecting interstate commerce based on the carrier’s on-road safety data; an investigation; or a combination of on-road safety data and investigation information.

On January 21, 2016, (FMCSA) published in the Federal Register the notice of proposed rulemaking (NPRM) for the much-anticipated carrier safety fitness determination (SFD). FMCSA proposed to amend the Federal Motor Carrier Safety Regulations (FMCSRs) to revise the current methodology for issuance of a SFD for motor carriers, changing the process by which commercial motor vehicle operators are categorized as fit, or not fit, to operate in interstate commerce.

3PLs Ability to Select Carriers Without Liability—Now More Difficult

As I am sure you have read over the last few years, more and more 3PLs and shippers are being brought into lawsuits time and time again, for the negligent hiring of a motor carrier.

BY NANCY O’LIDDY
The proposed rule would have based the determination of a motor carrier’s fitness based on (1) on-road safety data in relation to five of the Agency’s seven Behavior Analysis and Safety Improvement Categories (BASICs); (2) an investigation; (3) or a combination of on-road safety data and investigation information. As part of this on-road safety data set, FMCSA would ensure that absolute measures would be used to determine the fitness of a motor carrier, in lieu of the algorithms used by the CSA initiative. The Agency also proposed eliminating the current four-tier rating system and moving to a “red-light/green-light” system of “unfit” carriers.

The Agency received 110 comments, many of which asked the Agency to delay the rulemaking until the FAST Act study, corrective action plan, and certification were completed. TIA was among a few commenters that supported the rule, and would like to see it become a Final Rule as quickly as possible.

Although TIA understands that the data still needed some corrective action, TIA supported the SFD rulemaking because it cleared up how safety ratings for motor carriers are presented to the public, and removed the confusion and liability traps that surround the four-tiered rating system. The entities that hire motor carriers, like 3PLs and shippers, need a clear-cut line to determine which carriers are safe to use and which carriers are not.

On June 27, 2017—The National Academy of Sciences (NAS) who was tasked by Congress in the FAST Act, to conduct a thorough comprehensive examination of the Federal Motor Carrier Safety Administration’s (FMCSA) Compliance, Safety and Accountability (CSA) initiative, has released their much-anticipated report. Congress commissioned the NAS to conduct this study because of concerns from motor carriers, shippers and brokers about the validity of the system, and the impacts of the scores on third-parties.

In summary, the NAS found that the CSA and Safety Measurement System (SMS) is:

- **structured** in a reasonable way, and its method of identifying motor carriers for alert status is defensible. However, much of what is now done is ad hoc and based on subject-matter expertise that has not been sufficiently empirically validated. This argues for FMCSA adopting a more statistically principled approach that can include the expert opinion that is implicit in SMS in a natural way.

Additionally, the NAS based on the current information available to them, was unable to make a recommendation if a motor carrier’s SMS results and scores should be made publicly available. The NAS recommends that the Agency conduct a detailed review and analysis of the potential impacts to industry and the public of making those scores publicly available. Ultimately, this means that the scores will likely remain hidden from view until further analysis is conducted.

Specifically, the NAS makes the following recommendations to the FMCSA for improvements:

1. **FMCSA should implement an item response theory (IRT), which is a paradigm for the design, analysis, and scoring of tests, questionnaires, and similar instruments measuring abilities, attitudes, or other variables. It is a theory of testing based on the relationship between individuals’ performances on a test item and the test takers’ levels of performance on an overall measure of the ability that item was designed to measure. Several different statistical models are used to represent both item and test taker characteristics. This would:**

   - **move** towards leaning on data alone, and not expert opinions.

   - **enhance** transparency of the evaluation system.

   - **support** the direct estimation of variability of scores and rankings.

   - **allow** the Agency to adapt to future changes.

2. **FMCSA should continue to work with State Agencies and law enforcement to improve the quality of data in MCMIS. The two areas in need of immediate attention would be: carrier exposure and crash data and fault. The NAS calls for the**

   - **Continued on page 27**
The American Factoring Association was founded in the wake of the financial crisis of 2008 for the purpose of educating policymakers on the role factoring has in the US economy.

In 2009, the Association began the process of conducting meetings with Congressional policymakers as well as key officials from Treasury, Federal Trade Commission, Office of the Comptroller of the Currency, Federal Reserve System, and the Federal Deposit Insurance Corporation. These meetings have served to educate policymakers and key government officials regarding factoring. Perhaps, more importantly, it allows us to build relationships upon which we can rely in advance of circumstances which require us to request assistance.

The years following 2009 provided for a great deal of uncertainty for the financial services industry. Dodd-Frank, Operation Choke Point, and the formation of the Consumer Financial Protection Bureau were just a few of the initiatives that created this uncertainty. Some industry participants believe that most of the aforementioned threats to the industry have been all but alleviated. However, threats are brewing all of the time, and, as such, we must remain vigilant to ensure a bright future for our industry and the small businesses that rely upon us to fuel their growth.

Recently, Congressman Emmanuel Cleaver launched an investigation into Fintech and online lending companies. While I do not believe Congressman Cleaver’s investigation is intended to target members of the factoring community, we could certainly be adversely affected by unintended consequences that might arise from steps taken to address what the investigation might uncover. A growing percentage of the factoring community is transacting business enabled by technology and a greater online presence. If we do not remain steadfast in our efforts to educate policymakers and government officials, we could find ourselves negatively affected by legislation that may or may not have been drafted with us in mind.

In order to stay the course, the AFA requires the support of the industry participants and those deriving direct benefits from the industry. Lobbying requires money. If you desire a bright future for the factoring industry, I encourage you to donate today. We have members who donate between $500 and $10,000 or more; and of course, we have members who give amounts in between. The important thing to note is that if we do not ensure a bright future for ourselves, we will only have ourselves to blame when we are adversely impacted by legislation and regulation.

The goal of the AFA is to increase membership and financial support from every IFA member. We urge every IFA member to contribute to the AFA as we are in the midst of our annual membership fund drive. Currently, we have Bronze Members who have contributed as little as $500, up to Diamond Members who have contributed in excess of $10,000. This is a very inexpensive insurance policy to help protect our industry from needless regulation which will be both costly and prohibitive. Please consider supporting the American Factoring Association.
3PLs
Continued from page 25

development of a National Minimum Uniform Crash Criteria to be imple-
mented nationwide.

3 FMCSA should investigate new ways of collecting data that will likely benefit the recommended methodology for safety assessment. This would include data on carrier characteristics—including information on driver turnover rates, type of cargo, method and level of compensation, and better information on exposure.

4 FMCSA should structure a user-friendly version of the MCMIS data file used as input to SMS without any personally identifiable information to facilitate its use by external parties, such as researchers, and by carriers. In addition, FMCSA should make user-friendly computer code used to compute SMS elements available to individuals in accordance with reproducibility and transparency guidelines.

5 FMCSA should undertake a study to better understand the statistical operating characteristics of the percentile ranks to support decisions regarding the usability of public scores.

6 FMCSA should decide on the carriers that receive SMS alerts using both the SMS percentile ranks and the SMS absolute measures, and the percentile ranks should be computed both conditionally within safety event groups and over all motor carriers.

TIA participated and provided testimony during one of the NAS public meetings, where we advocated on behalf of the third-party logistics industry to keep the data from being displayed on public view, and outlined the liability concerns of having the scores publicly available. TIA will continue to work its membership to provide guidance when selecting carriers by keeping our Carrier Selection Framework updated and available at www.tianet.org.

2017 Members

As of August 1, 2017

Diamond Member ($10,000+)
Apex Capital Corp
Crestmark Bank
D & S Factors
Gulf Coast Business Credit
International Factoring Association
J D Factors
LSQ Funding Group
MP Star Financial, Inc.
TBS Factoring Service, LLC

Platinum ($5,000—$10,000)
Far West Capital
Federal National Commercial Credit
Goodman Factors, a division of Independent Bank
Interstate Capital Corporation
Millennium Funding
Pavestone Capital
Phoenix Capital Group, LLC
Republic Business Credit, LLC
Sallyport Commercial Finance, LLC
Sunbelt Finance
TAFS, Inc.
Triumph Business Capital
United Capital Funding Corp.
Vertex Financial, Inc.

Gold ($2,500—$5,000)
Accord Financial, Inc.
AmeriFactors Financial Group, LLC
AmeriTrust Capital Corp.
Assist Financial Services, Inc.
Bay View Funding

Silver ($1,000—$2,500)
Alleon Capital Partners, LLC
American Funding Solutions LLC
Amerisource Funding, Inc.
Brookridge Funding
Business Finance Corporation
Commercial Business Funding Corporation
Contractors Capital Solutions
Coral Capital Solutions LLC
Entrepreneur Growth Capital
Factor King, LLC
FactorHelp, Inc.
Gateway Commercial Finance
J.O.B.E. Services, Inc.
Levinson, Arshonsky & Kurtz, LLP
QC Capital Solutions
Match Factors, Inc.
Mazon Associates, Inc.
Nationwide Capital Funding, Inc.

Bronze ($500—$1,000)
Advantage Business Capital
Business to Business Capital Corp.
Camel Financial, Inc.
Cash Flow Resources, LLC
Concept Financial Group
David Levy—President, Utica Leasco, LLC
Dean Landis—President, Entrepreneur Growth Capital
Firmco Business Funding
Greenback Capital
J.D. Kinney—Director—Business Development,
QC Capital Solutions
John Ferguson—President, DML Capital Group, Inc.
Kevin Janusz—President, Cross Key Capital
Kim Deveney—President, American Funding Solutions
Merrell Holbrook, Jr.—COO, Assist Financial Services, Inc.
Primary Funding Corporation
Raffi Azadian—President, Azadian Group LLC

Other (Under $500)
TradeGate Finance, Inc.
ASSOCIATIONS

The following trade associations offer member pricing for events attended by IFA members:

Beijing Commercial Factoring Association (BCFA)

Colombian Association of Factoring (CAF)

Commercial Factoring Expertise Committee of China (CFEC)

Ecuadorian Factoring Association (ASOFACOR)

FCI

Romanian Factoring Association (RFA)

CERTIFIED EMAIL

RMail

Go Paperless. Switch to RMail to Send your Important Notices. RMail services allow factors to end disputes attributed to missing, misplaced or delayed receipt of notification emails for notices of assignment, notices of default, borrowing base certificates, and other important notifications. It also helps speed invoice collections with proof of invoice delivery irrefutably starting the accounts receivable aging clock.

www.rpost.com/ifa

IFA Members save $300! Subscribe to 1000 units RMail plan for only $390! (Normally $690)

CONSULTING

12five Consulting

12five Consulting provides technology and social media consulting to the commercial finance industry. Born out of its sister company, 12five Capital, 12five Consulting understands the technological needs of the commercial finance industry, as it was their application of these tools that led to their expertise. 12five specializes in software optimization, cloud computing implementation and social media representation.

Phone: 630-270-3072 • www.12five.com
Email: ryan@12five.com
IFA Member Benefit: One free hour of initial phone consultation

FactorHelp

FactorHelp has come to be regarded as the factoring industry’s premier resource provider. Their manuals, in use on every continent of the world, are setting the industry standard, and their reputation as the one-call solution for factoring problems is growing. By consistently introducing innovative, viable products, vigilantly cultivating an extensive alliance of Strategic Partners and providing the professional expertise demanded of an industry leader, FactorHelp strives to maintain its goal of providing the unparalleled service the factoring industry expects from a solutions partner.

Phone: 972-722-3700 • www.factorhelp.com

IFA Members receive a discount of 10% on their consulting fees and 5% discount on all FactorHelp products in the IFA store.

CREDIT

Ansonia Credit Data

With more than 250 Factors and over $800 billion in data, Ansonia provides Factors and ABL lenders an innovative way of managing debtor and fraud risk. Our business credit reports feature current and historical days-to-pay information collected directly from the accounts receivable departments of small and large factors, and other companies across all segments.

Phone: 855-ANSONIA • 855-267-6642 x.103
www.ansoniacreditdata.com

IFA Member Benefits: Free VIGILANTE™ Portfolio Analysis. Try Ansonia’s unique new program for monitoring credit portfolio risk. Call today to receive a comprehensive review of your entire portfolio.

Credit2B

Trusted by all of the majors because of the sheer volume of Factor trade and 98% third-party data coverage of active businesses in North America, Credit2B is a cloud-based platform that empowers accurate and timely decisions by connecting the experiences of trade credit grantors around their common business customers. We combine this highly valuable trade network information of approximately $700B in recent receivables with live bureau and public filing information to provide comprehensive financial risk profiles, all in real time. Our dashboard also provides Factor specific scoring, Factor client risk pools, monitoring, peer benchmarks and comprehensive trade data pack solutions for integration into your enterprise software.

Phone: 212-714-4500
Website: www.credit2b.com

IFA Member Benefits: Join the largest virtual factor community. Receive 10% price discounts for being an IFA member. Complimentary invitations to our hosted events in NYC.

Dun and Bradstreet (D&B)

D&B is your source for the best business insight in the world. D&B’s global database contains the deepest, broadest, most rigorously quality-assured business insight available, covering more than 210 million businesses worldwide. With this insight, D&B has been enabling companies to Decide with Confidence™ for more than 170 years.

Phone: 973-605-6344 • Website: www.dnb.com

IFA Member Benefits: New & Returning customers: receive DISCOUNTS off D&B solutions. Discount is for IFA members that are not current D&B customers or have been gone for a period of one year. Existing customers: receive discounts on other D&B solutions not under contract. (ie. Hoovers, Supply, DNBi Modules)

FactorsNetwork

FactorsNetwork provide an online platform where Factors work together to increase their profitability and competitiveness. Members are able to pull Credit Reports for free as well as monitor and analyze their portfolio. Transportation Factors benefit from our CarrierMonitoring and ChameleonCatcher programs and their clients love our LoadBoard. You can even use the Sales Tool to help find new clients.

Phone: 435-659-4612 • www.factorsnetwork.com

IFA Member Benefits: 33% cost savings for the annual membership fee. It is normally $3 per day, but IFA members will pay $2 per day.

CREDIT CARD PROCESSING

Clarus Merchant Services

Clarus Merchant Services offers a custom program developed specifically for how the Factoring Industry processes their credit card transactions. Our program provides detailed reporting that allows tracking of each invoice and fee transaction for easy account reconciliation with their customers and clients. We work with each member to ensure all processing costs are covered and that they are doing so within the guidelines of MasterCard / Visa. In addition we provide IFA members direct access to their account manager for immediate response and support.

David Powers, Member Relationship Manager
Phone: 540-222-3925 • www.clarusdc.com
Email: dave.powers@clarusdc.com

IFA Member Benefits: Any IFA member that purchases the CardX program will receive a one-time $200 rebate once the member has purchased the CardX program. IFA members receive 33% discounts on other D&B solutions not under contract. Discount is for IFA members that are not current D&B customers or have been gone for a period of one year. Existing customers: receive discounts on other D&B solutions not under contract. (ie. Hoovers, Supply, DNBi Modules)

ePaymentAmerica

ePaymentAmerica is the nation’s leading provider of processing services for the factoring, A/R financing, and P/I/O financing industries. They offer IFA members exclusive VISA, MasterCard, American Express and discover pricing, a discount on their virtual gateway, and a discount on PCI Compliance Certifications.

Phone: 901-385-5327 • www.epaymentamerica.com
Email: factoring_program@epaymentamerica.com

IFA Member Benefits: Interchange Plus Pricing* Bundled Monthly Service Fee of $30.00 (includes IRS regulatory compliance, account maintenance, PCI compliance, virtual gateway & online management tool.) *Based on volume/transaction count.
IFA members will receive an additional 60 days information to assist in accomplishing their growth.

Commercial Finance Consultants
Established in 2002, CFC is the premier provider of human talent to the factoring industry. CFC’s goal is to provide their clients with the best available human capital and the most current industry information to assist in accomplishing their growth potential.

Phone: 469-402-4000 • www.searchcf.com
Email: dar@searchcf.com
IFA members will receive an additional 60 days added to the guarantee on all placements.

FactorFox
FactorFox Cirrus is a cloud application for factors, their clients, brokers, lenders, and others who enter or access data. Entries can be made and reports accessed from any internet-connected computer, tablet, or smart phone. As a web-native program, there is no extra cost for setting up your account or to access your data; further, you receive three hours of free training online. FactorFox’s various versions make it suitable for nearly any size factor.

Phone: 866-432-2409 • www.factorfox.com
In addition to the one-month free trial for everyone, IFA Members receive an additional month to try the complete program.

ProfitStars
ProfitStars® is an industry-leading provider of complete portfolio management systems for commercial finance, including FactorSoft®. Its innovative Commercial Lending Management System™ offers a common framework for factoring, asset-based lending, inventory finance, and lines of credit. ProfitStars’ dynamic Commercial Lending Center Suite™ includes Commercial Lending FinancialCenter™, BusinessCenter™, BusinessManager®, and LendingNetwork®.

Phone: 205-972-8900, option 3
www.profitstars.com/commerciallending
IQA members will receive 10% off new ProfitStars lending solutions product purchase. For IFA members who are currently ProfitStars customers: Free one day FactorSoft refresher course, per year, at ProfitStars’ training facility in Birmingham, AL.

Tax Guard
Tax Guard fills a critical gap in a commercial lender’s credit risk management toolset with efficient, real-time and actionable insight into the true, non-public IRS tax compliance status of their prospects and clients. Our due diligence reports, tax compliance monitoring and resolution solutions support commercial lenders throughout every stage of the funding life-cycle.

Phone: 646-502-4478 • www.tax-guard.com
Email: Rich Porterfield; rporterfield@tax-guard.com
IFA Members will receive a 20% discount on the same-day due diligence order.

SuperShuttle
SuperShuttle is the nation’s leading shared-ride airport shuttle service, providing door-to-door ground transportation to more than 8 million passengers per year. Their friendly drivers, comfortable vans and reasonable rates take the hassle out of getting to and from 33 airports in over 50 US cities and surrounding communities.

IFA Member Benefits: Save 10% on your roundtrip transportation by booking online with SuperShuttle at www.supershuttle.com. Use the following Discount Code: CLLMC

Mauna Kea Beach Hotel, Hawaii Island, HI

First Corporate Solutions
First Corporate Solutions is a full service public records provider specializing in the research, retrieval and filing of public records nationwide and internationally. Their services include industry standards such as UCC, lien and litigation searching, UCC, and corporate filing services, nationwide registered agent coverage and real property title searching, as well as unique solutions such as state and county account monitoring designed specifically for Factors.

Phone: 800-406-1577 • www.ficso.com
Email: info@ficso.com
IFA members will receive a 10% discount off of the retail rates of their signature state and county account monitoring product.
Set-Off of Transportation Receivables for Freight Loss and Damage Claims

When a factor proceeds to complete its checklist to determine if a motor carrier’s freight charge receivables are a good risk, the inquiry may start and end as follows: 1) Is there a valid invoice?; 2) Is there Proof of Delivery?; 3) Is there a Rate Confirmation Sheet?; 4) What are the terms of transportation (contracts, bills of lading—which give rise to the obligation for payment of a freight charge receivable)?

BY JEFFREY COHEN, ESQ.

While it is common practice to make the first three inquiries, where factors often run into problems is by failing to make the fourth inquiry. Shipper-carrier contracts and bills of lading may contain provisions which impact collectability of freight transportation receivables. All too often this inquiry is simply not made and the factor is left in the dark regarding key contractual provisions which many times address, among other things, a shipper’s set-off rights impacting recoverability of freight charge invoices. A brief summary of the law of freight loss and damage follows to help understand why this missed step is important in the context of set-offs made by shippers for unpaid freight loss and damage claims.

THE LAW OF FREIGHT LOSS AND DAMAGE

For almost a century, the Carmack Amendment to the Interstate Commerce Act, which is codified, at 49 U.S.C. §14706, has been the exclusive remedy for freight loss and damage claims against motor carriers engaged in interstate transportation of goods. The Carmack Amendment imposes strict liability upon “carriers” and “freight forwarders” without proof of negligence. Carmack preempts state and common law in instances where goods are lost, damaged, or untimely delivered. It makes carriers
liable for the full actual loss, damage, or injury caused by them to property they transport, and declares unlawful and void any contract, regulation, tariff, or other attempted means of limiting this liability.

The purpose of the Carmack Amendment is to establish uniformity and predictability with respect to a carrier’s liability for loss or damage to cargo in transit. It specifically preempts any cause of action for breach of contract against a carrier arising out of the same loss in transit and thereby provides interstate carriers with reasonable certainty in assessing their risks and predicting their potential liability. The “ordinary measure of damages” in Carmack Amendment cases is meant to put the shipper back in the position it would have been in had the carrier properly performed. Courts have generally determined that these damages are the difference between the market value of the freight at origin and destination.

A carrier may limit its liability under the Carmack Amendment only if it takes certain steps designed primarily to afford the shipper with a real opportunity to choose full Carmack liability. The four steps a carrier must take to have an enforceable limitation of liability before transporting the goods are as follows: (1) maintain a tariff, if required (since deregulation, a tariff is almost always not required); (2) obtain the shipper’s agreement as to his choice of liability; (3) give the shipper a reasonable opportunity to choose between two or more levels of liability; and (4) issue a receipt or bill of lading prior to movement of the shipment.

**WAIVER OF THE CARMACK AMENDMENT**

Following deregulation of the transportation industry, Congress authorized, by statute, motor carriers and shippers to enter into private transportation contracts and waive application of the Carmack Amendment. The governing statute, 49 U.S.C. § 14101(b), provides that if a shipper and carrier agree in a contract to waive the rights and remedies otherwise applicable under the Carmack Amendment for the transportation covered by the contract, then “the transportation provided under the contract shall not be subject to the waived rights.” 49 U.S.C. § 14101(b)(1) (emphasis added). This provision allows for written waiver of Carmack when agreed to between the shipper and carrier.

Where the Carmack Amendment is waived, the exclusive remedy for a freight loss claim against a carrier is for breach of contract. 49 U.S.C. § 14101(b)(2). As a result, motor carrier liability for freight loss claims is either governed by Carmack or—where a waiver exists—breach of the governing transportation contract. This brings us back to the fact that it is imperative for a factor to know and understand the terms of transportation as these terms may provide the basis for set-off rights or other unfavorable provisions which impact recoverability, including application or non-application of limitations of carrier liability.

**Is Set-off of Freight Charges “Illegal” Absent a Contract That Permits It?**

A freight loss and damage claim is an independent claim by a shipper against a carrier which will rise or fall on its own merits, just as a claim by the carrier for unpaid freight charges is an independent claim which will rise and fall on its own merits. Factors often ask, “Is it ‘illegal’ for a shipper to set off a loss and damage claim against unrelated freight charges?” The short answer is, while not “illegal” as the word is commonly used, absent a contract which allows for set-off, it is a breach of the basic transportation agreement between a shipper and a carrier in which the shipper agrees to pay the carrier to move freight from point A to point B. However, it is equally actionable for a carrier not to pay a valid loss and damage claim.

Where does this leave factors in the real world where set-off happens every day? When set-off occurs, resulting in significant leverage for the shipper, most of the time the carrier will either pay the freight claim or negotiate a resolution. However, if a resolution cannot be reached, the carrier may sue the shipper for recovery of the unpaid freight charges, and the shipper may file a counterclaim for its freight loss and damage claim. If the carrier wins, after what could be long and costly litigation, it may be awarded a small amount of prejudgment interest along with the freight charges. The cost of this prejudgment interest in most cases will be well worth it for the shipper considering the benefit they have derived from holding the carrier’s funds and the leverage that affords. A shipper is likely aware that it has no independent basis to hold unrelated freight charges, but from a real world perspective and absent a contract which provides financial consequences for doing so, many shippers determine that it’s worth it. The only certain way to avoid
such set-offs is to preclude them by contract and assign a cost to such a practice, such as interest imposed on receivables paid outside of terms, late fees and recovery of attorneys’ fees expended to collect freight charges. These favorable terms could be mandated by the factor to be applied by the carrier in some instances.

**UNFAVORABLE SHIPPER-CARRIER CONTRACTUAL LANGUAGE**

Unfavorable provisions which could dramatically impact recoverability of factored carrier receivables are commonly included by shippers in proposed shipper-carrier contracts. Even without separate shipper-carrier contracts, the terms of the bill of lading itself can impact the recoverability of freight charges. All bills of lading are simply not alike.

During a factor’s due diligence process, shipper-carrier contracts and bills of lading should be evaluated for unfavorable terms which impact collectability. If these types of provisions are identified, a factor might choose to exclude the invoices for loads associated with a particular shipper, or seek additional compensation to account for the added risk. Prudent motor carriers have shipper-carrier contracts evaluated prior to entry by experienced transportation counsel to identify these and other onerous provisions which could impact liability and collectability of freight charges. The factor, standing in the shoes of the motor carrier, should also have these contracts evaluated by competent transportation counsel. Carriers may warrant in their factoring agreements that each freight invoice is due, owing and not subject to set-off, defense or adjustment. This may be technically accurate at that time, but under certain shipper-carrier contracts the charges may not be “without set-off” for long. Some examples of unfavorable terms included in shipper-carrier contracts related to set-off rights include:

- **Shipper shall have the right to withhold payments on such amounts that are the subject of a dispute.** In addition to any other remedies available to Shipper under this Agreement or under law or in equity, Shipper may decline to make or withhold from payment due hereunder for any amount that is disputed or any amount Shipper deems necessary to reasonably protect it from loss arising out of the Services, or Carrier’s performance or failure of performance of its obligations, plus a non-refundable administration fee equal to 50% of the withheld amount.

- **Shipper shall have the right to offset against any amount that Shipper owes to Carrier, any expenses, losses or damages that Carrier is obliged to compensate Shipper hereunder and any overpayments or duplicate payments that Shipper previously made to Carrier.**

These contractual provisions in a shipper-carrier contract may eliminate the carrier’s ability to assert a claim for breach of contract seeking unpaid freight charges and drastically reduce the chances of recovery. All discretion resides with the shipper and none with the carrier. These are certainly not the shoes a factor wants to stand in when seeking recovery of receivables for work performed by the carrier. If provisions such as the language cited above are identified in the governing terms of transportation, additional caution must be exercised, and if the leverage exists with the shipper, the language should be eliminated.

**CONCLUSION**

Multiple sets of terms may govern the transportation of freight for any one move. These terms may impact the collectability of freight charges and cannot be overlooked when performing due diligence of a potential motor carrier factoring client. Set-off, absent a contractual provision providing for this practice, is a breach of contract, but one with little consequence. A vigilant factor can work to require, when possible, favorable terms which incentivize payment and assign a cost for set-off.

**Jeffrey D. Cohen, Esq.** is a transportation attorney and the President of Cohen, Keenan Cohen & Merrick P.C., representing the interests nationally of motor carriers, rail carriers, freight brokers, factors, and others involved in the transportation industry for the past 18 years and before that served as an Assistant District Attorney prosecuting insurance fraud. Mr. Cohen has served as lead trial counsel in state, federal district and bankruptcy courts across the country handling transportation litigation matters. Mr. Cohen also regularly prepares and reviews the following types of agreements/terms: shipper-carrier, broker-carrier, broker-shipping, commissioned agent agreements, non-competition agreements, load/rate confirmation form, tariffs and rules circulars. He can be reached by phone at 215-609-1104 or by email at jcohen@freightlaw.net.
The (Not So) Obvious Considerations in Government Contract Factoring

Over my long career there have been times, such as the present, when interest in factoring federal government contracts has spiked. As Steve Kurtz observed in his recent article (Commercial Factor, June, 2017), this may be due, in part, to Washington's new focus on military spending and infrastructure improvements. Whatever the reasons, all indications are that there will be a significant increase in federal outsourcing of materials and services, and therefore greater need for outside financing, especially to small and mid-sized suppliers.

BY LESLIE J POLT, ESQ.

Most experienced financial services professionals and their legal counsel have at the very least a passing familiarity with the basics of factoring federal contract receivables. To briefly recap: the factor (and its factoring client) must each be registered on the System for Award Management (“SAM”) and have its individual federal CAGE code. When presented with a federal contract financing opportunity, the factor and/or its counsel should review the contract in order to: (i) identify both the contracting officer (“CO”) and payment/disbursement office (“PO”) for purposes of notice of assignment, (ii) verify that the contract is not subject to a “non-assignment” clause, (iii) identify any provisions that might impact on invoice processing and payment, and (iv) send notices of assignment in proper form to the CO and the PO. The financing source registers under the appropriate on-line payment processing platform (Invoice Processing Platform for Departments of Transportation, Homeland Security, HHS, Interior, and several others; iRapt (formerly called Wide Area Work Flow) for defense contracts, among others) in order to be able to monitor invoice processing.

Government receivable factoring is by no means risk-free. The elimination of the credit risk is offset by other risks specific to the nature of the government as a purchaser and account debtor. The more obvious risks include: (i) termination of the contract for default (“T for D”), (ii) termination for the convenience of the government (“T for C”), (iii) lack or loss of contract funding or appropriation, and (iv) suspension or debarment of the contractor/client for past violations of any of the myriad of procurement rules and regulations. But, there are others, perhaps not as well known, but carrying equal if not greater impact; in the remainder of this article I will touch on some of them.

Disregarding the Assignment of Claims Act.

I’m frequently asked whether it is necessary for the secured creditor or factor to go through the time-consuming and detailed process of sending the Assignment of Claims and Notice of Assignment to the CO and the PO in the precise number of original and “true” copies as dictated by the Federal Assignment of Claims Act (“AOCA”) and Federal Acquisition Regulations (“FAR”). The argument against compliance is that the AOCA is not a perfection statute, but rather a “notice” statute enacted solely for the government’s protection and convenience. The Uniform Commercial Code (“UCC”) financing statement perfects the assignment or security interest in the account receivable, and the factor can obtain perfection by control over the remittances by means of a control agreement with the client and the client’s depository bank that directs the bank to sweep collections daily to the factor’s collection account. In other words, what’s wrong with implementing a government contract factoring program on a non-notification basis?

Conventional secured lending is normally structured as non-notification financing, with remittances being sent to a deposit account of the debtor that is under the lender’s control. A fundamental protection to secured lenders is UCC §9-406. Upon discovering that the debtor has attempted to divert remittances to an uncontrolled account, the lender’s redress (aside from declaring an event of default) is to promptly notify account debtors of the security interest by means of a UCC §9-406 “pay proceeds” letter that instructs the customer to make all future remittances to
the lender. However, §9-406 does not apply to federal contracts; it is preempted by the AOCA and FAR. Notice under §9-406 is ineffective and most likely will be disregarded by a contracting or payment officer. Sending out the AOCA notice on pending contracts after learning of a diversion is most likely a futile gesture since the agency may have already processed payment to the client before the assignment can be acknowledged and the new payment data programmed into the agency’s payment system. In short, by electing not to follow the notice procedures under AOCA, the factor assumes a greater risk of diversion of its collateral.

The other risk of AOCA non-compliance relates to the government’s extensive rights of offset. Under the UCC the payment obligation of the account debtor can be reduced or offset by any claims and defenses the account debtor may assert against the contractor, whether or not arising out of the assigned contract. However, once the account debtor receives notice of assignment to the factor, UCC §9-404 cuts off any future offset claim unless it arises out of the assigned contract. The AOCA has provisions that parallel UCC §9-404 and which limit the government’s offset rights once it receives AOCA compliant notice of assignment. The United States is considered a “unitary” creditor, meaning that the government’s obligation to pay factored invoices is subject to offset for any liability of your customer to any arm of the government, for tax liability, default in performing unrelated contracts, ERISA or labor law liabilities, etc. The extent of the government’s offset rights is beyond the scope of this article, but suffice it to say that a factor or assignee that opts to ignore the AOCA will remain subject to all of the offset rights available to the US.

## Payment to Client Despite Valid Notice

As previously mentioned, UCC §9-406 says that once the account debtor has received a proper notice of assignment and instruction to pay the assignee, it can no longer “discharge” its obligation by continuing to pay the contractor-client. If the account debtor disregards the payment instruction it remains liable to the assignee/secured creditor. Federal law follows that rule. The difficulty comes when the factor learns that payment was made to the client even though the factor believed in good faith that it had submitted the proper documents and obtained acknowledgment under the AOCA. How does the factor enforce its right to payment.

The assignee will most likely initiate contact with the CO and PO to negotiate some form of settlement. That raises questions of the officer’s settlement authority, since your demand will result in the government paying the same claim twice, potentially exceeding budgeted expenditure, and compelling the agency to pursue the contractor for recovery of the payment that was made in error. But, what if the agency flat out refuses to pay the factor? What is the factor’s recourse if the PO asserts that the assignment was defective because of some minor deficiency or technical non-compliance with the factor’s notice (for example, only 2 copies were mailed rather than the requisite 3 copies). The burden is then shifted to the factor to establish either that it fully complied with AOCA and received the proper acknowledgments or any technical defaults were nevertheless waived by the government. There are many reported cases where the court found that the US had waived strict AOCA compliance; examples include: (i) paying the factor for earlier invoices directly, and (2) providing written assurances to the factor the notice had been received and that the contract had been amended to reflect the factor’s payment instructions.

The factor may have the facts and law on its side, but establishing your rights against the US in court is a time consuming and expensive process. In the case of non-governmental account debtors, the secured creditor might initiate an enforcement action in any state or federal court that has both subject matter and personal jurisdiction over the account debtor. Not so when the account debtor is the United States. The exclusive method of enforcing your claim against the US is before the United States Court of Federal Claims, located in Washington, D.C. Obviously, that burden itself is a deterrent to judicial enforcement of all but the largest claims.
Moreover, a contractor/client can dispute contract payment issues administratively and at lower cost under the Contract Disputes Act, but its lender or factor has no standing under the Contract Disputes Act and must proceed in the Court of Federal Claims.

3 Refusal to Process Assignment

The overwhelming majority of COs are well-versed in AOCA procedures and will fully cooperate with an assignee that submits proper documentation. On occasion, however, the assignee will face a situation where CO refuses to acknowledge the assignment. The officer may even assert the agency does not recognize or process assignments. It is true that certain contract payables are not subject to assignment, either because the contract is a micro-purchase, or credit card purchase, or the contract value is lower than the $1,000 statutory minimum, or by its terms are expressly made unassignable in the interest of the Government. Some agency COs establish an arbitrary contract floor (for example—$100,000) before the assignment will be processed. Such refusal normally exceeds the statutory authority of the government representative, who typically does not have discretionary right of refusal. It takes little imagination to see the potential economic consequence of a client unable to convert its receivable into working capital. While there is no bright line resolution, the experienced government contract factor may succeed in obtaining acknowledgment if it can establish a line of communication with the CO and the CO’s supervisor. Failing that, the factor should consider obtaining perfection by control over the client’s deposit account into which the remittances will be deposited.

4 Wage and Hour Law Priorities

Federal contractors (and their subcontractors) must comply with federal laws governing wages, hours and conditions of employment. The Davis-Bacon Act applies to construction contracts, and requires payment of wages and fringe benefits not less than those prevailing in the relevant geographic region, as determined by the Labor Department. The law permits the Department to withhold funds payable on any project violating the act, or on any other federal project of that contractor, and to place those funds into trust for the underpaid employees. Most factors will not come into contact with the Davis-Bacon Act, since they do not take assignments of construction progress invoices. However, many factors finance small and mid-size providers of non-professional services to the government, such as janitorial, guard and security services, and the like. The McNamara-O’Hara Service Contract Act extends the same protections to their employees and the employees of subcontractors. Furthermore, the regulations under that Act expressly state that the Department’s offset rights take priority over a bona fide assignee under AOCA. At the very least, your client must represent, warrant and covenant its past and future compliance with applicable wage laws.

5 Who is your client?

The government has recognized procurement arrangements with multiple contractors, frequently in the interest of economies arising from pooling of resources. Teaming agreements can be structured as prime/subcontractor, joint venture or partnership. The teaming arrangement is normally disclosed to the federal agency prior to bidding or before commencement of work on the contract. The Small Business Administration requires 8a contractors to obtain SBA approval before entering into a teaming arrangement. Because the PO will only pay the prime, or the venture itself, the factor must have a full understanding of the relationship between its factoring client and the teaming venture, such as who is invoicing the agency and in what capacity; in other words is it a factorable invoice. Most important, the teaming or joint venture agreements must be reviewed for adequate specificity as to allocation of duties and performance and apportionment of revenues. Several judicial cases have held teaming agreements to be nothing more than a vague “statement of objectives” or an “agreement to agree”, and therefore unenforceable. That determination is based on applicable state, not federal, law. © 2017 Leslie J Polt, Esq. •
UCC MANAGEMENT GOT YOU DOWN?


First Corporate Solutions is that company.

RISK MANAGEMENT WITH GLOBAL UCC & CORPORATE DUE DILIGENCE
WWW.FICOSO.COM | 800.406.1577 | SEARCHING | FILING | MONITORING