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CRF News

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The Strong US Dollar:

Implications for the Economy and US Exporters

Editors Note - *For a number of reasons, the US dollar, over the last several months, gained strength when compared to other major currencies of the world. A strong dollar has both positive and negative economic impacts depending upon the situation of a company or consumer. For US companies that engage in significant export sales, the strong dollar may present major challenges. The following is an article by an economist, the results of a CRF Survey and some perspectives of knowledgable people on the issue.*

The Strong Dollar is Taking Its Toll on Exporters

By Dan North, Euler Hermes

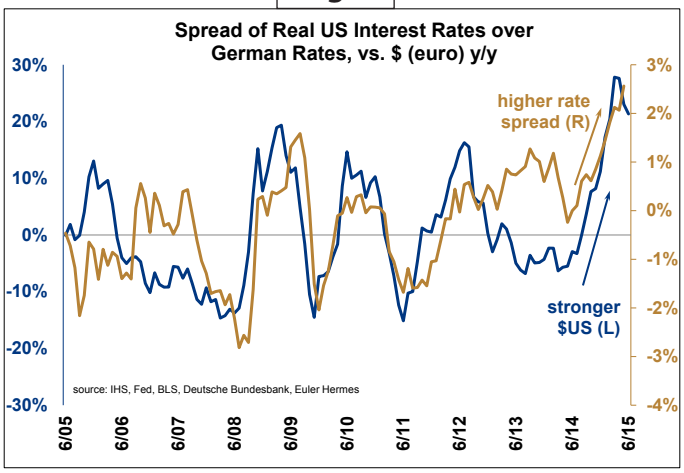
The value of the U.S. dollar has increased sharply over the past 12 months, creating strong headwinds for U.S. exporters. Unfortunately those headwinds are unlikely to abate any time soon.

The dollar has strengthened primarily because of the divergence of monetary policies between nations, and this divergence is quite likely to continue widening. The U.S. Federal Reserve is leaning towards tighter, or less accommodative monetary policy, while most of the other major central banks around the world are leaning towards looser, or more accommodative monetary policy. The Fed ended its policy of printing virtual money via its Quantitative Easing (QE) programs in the fall of 2014, and it is widely expected to start raising interest rates later in 2015. At the same time, the Bank of China, the Bank of Japan, the Bank of Canada, the European Central Bank, and the central banks of many other countries, which combined represent about 50% of the world's GDP, are either engaging in QE, lowering interest rates, or both.

Highlights of What's Inside

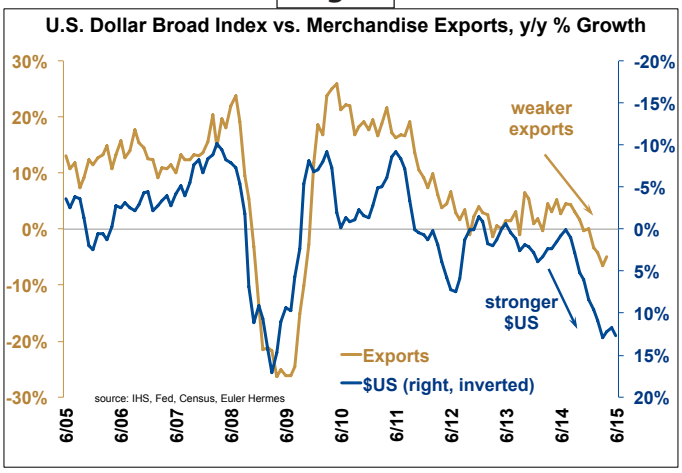
The higher interest rates available in the U.S., and the dollar's increased scarcity relative to other currencies, have made the dollar more attractive. Investors prefer to earn the higher interest rates available in the U.S., and so will buy dollars to make those investments, bidding up the value of the dollar relative to other currencies – more demand for something drives up its value. As an example, Figure 1 shows the difference, or spread, between U.S. interest rates and German interest rates as represented by the brown line. The value of the dollar relative to the corresponding currency, the euro, is shown as the blue line. Clearly as the spread of U.S. rates over German rates goes higher, it drives the value of the dollar higher. Unfortunately it is unlikely that this trend will ease significantly any time soon. The Fed has been signaling that it will begin raising interest rates later in 2015 and will probably continue raising rates for one or two more years after that. At the same time the European Central Bank is lowering interest rates and it has explicitly said it will engage in QE well into 2016.

Fig 1



Of course an unfortunate effect of a stronger dollar is that it makes U.S. exports more expensive and therefore less competitive. Figure 2 shows the value of the dollar compared to a basket of currencies (as opposed to just the euro in Figure 1). The value of the dollar, shown as the blue line, is plotted inversely in Figure 2, so that as the line goes down, the value of the dollar is going up. Clearly a stronger dollar correlates very well with weaker exports as shown by the brown line.

Fig 2



As a result, total exports have fallen 5% in the past year as shown in Figure 3. Virtually every category of exports shrank over that time period except Capital Goods (ex-Auto), which are a traditional strength in U.S. exports. In fact when capital goods are stripped out altogether, exports fell a full 10%.

Figure 4 breaks out exports by country. First, note that 34% of all exports stay in North America, 19% going to Canada and 15% going to Mexico. Exports to Canada fell by 9% y/y as the value of the U.S. dollar rose 15% vs. the Canadian dollar. Euler Hermes' GDP forecasts for Canada for 2015 and 2016 are shown further to the right in Figure 4 and are clearly anemic at best. Therefore exports to Canada face two headwinds; a strong U.S. dollar making those exports more expensive to Canadian consumers and businesses, and a weak Canadian economy which decreases the demand from Canadian consumers and businesses. Mexico looks more promising however. Despite the fact that the dollar gained 19% y/y against the peso, exports to Mexico actually grew 1% y/y, and Mexican GDP forecasts look considerably stronger than those for Canada. While forecasts for growth in China look much better, it is important to keep in mind that a growth rate of around 7% is a substantial step down from growth rates targeted by government policies and from previous rates of well over 10% or more. GDP forecasts for Japan and Europe look quite weak as well. Therefore, demand forecasts from major trading partners aren't terribly encouraging.

Fig 3

Category	% of Total Exports	y/y growth
Capital Goods ex-Auto	34%	3%
Industrial Supplies/Mats	30%	-12%
Consumer Goods	12%	-2%
Automotive	10%	-3%
Foods, Feeds, Beverages	9%	-12%
Other Goods	4%	-7%
Total	100%	-5%
Total ex Capital Goods	56%	-10%

Source: IHS, Census, BEA, Euler Hermes

The effects of the stronger dollar are widespread. In a recent survey by the Credit Research Foundation (CRF), 92% of the respondents reported that they sold into international markets, and a full 79% of those respondents indicated that the stronger U.S. dollar has either slightly or significantly reduced profit margins. To offset these losses, 26% said that they were either changing sales terms into U.S. dollars, shortening terms of sale, or increasing hedging activities.

Fig 4

Country	% of Total Exports	Exports	$	2014	2015(f)	2016(f)
Canada	19%	-9%	15%	2.4%	1.5%	1.7%
Mexico	15%	1%	19%	2.2%	2.9%	3.5%
China	8%	3%	-0.4%	7.4%	7.0%	6.8%
Japan	4%	6%	22%	-0.1%	1.2%	1.7%
Europe	21%	-2%	21%	0.8%	1.4%	1.7%
World	100%	-5%	13%	2.7%	2.7%	3.1%

Source: IHS, Census, Fed, BEA, Euler Hermes

Exporters aren't the only ones who are having to adjust to the stronger dollar. Domestic producers who compete with imported goods are facing stiff competition from a flood of cheaper imports. For example, while overall prices in the U.S. over the past twelve months have increased about 2%, import prices have actually fallen 5%. As a result, imports have become more competitive, and real (inflation adjusted) import sales grew about 4.5% over that period, almost twice as fast as overall economic growth. Businesses in the metals sector in particular have been faced with a tsunami of cheap foreign metals entering the U.S. market. In some cases, import prices of metal products have fallen by 30% or more, causing import volumes to soar as much as 30%.

The news isn't all bad however. As noted above, business can adapt to a stronger currency through a number of measures. Also note that even though the value of the dollar rose by 13% against a basket of major currencies, exports fell by only 5%, not a catastrophic amount. Clearly, price isn't the only determining factor when foreigners choose which goods to buy. The "Made in America" label still projects very high quality, so a substitute for an American made product may not be readily available.

Furthermore, with macroeconomic issues, as with the world in general, there is no change which isn't offset one way or another by some other change, that is, there is no free lunch. For example, while the stronger dollar makes exports more expensive, which harms exporters, it makes imports less expensive, which is good for importers and good for consumers of imports, including most Americans. A stronger dollar is bad for tourism here in the States, but it's good for American tourists going overseas. Cheaper imports keep a lid on inflationary pressures which is bad for wage earners but good for wage-payers. A stronger dollar tends to hold commodity prices down which is bad for commodity producers but good for commodity users. The stronger dollar decreases repatriated profits but it also makes investments in U.S. assets more attractive, increasing the flow of capital into the U.S. Therefore currency movements tend to shift losses and gains between groups, but as long as the movements aren't terribly large and sudden, the offsetting effects tend to have a minimal impact on the entire economy as a whole.

Of course these positive offsets offer precious little solace to exporters. The stronger U.S. dollar has clearly had a negative effect on them, particularly for those that don't export capital goods, a traditional American stronghold. Unfortunately since U.S. monetary policy is diverging from the rest of the world, the value of the dollar is unlikely to weaken significantly any time soon, and is more likely to

continue demonstrating strength. In addition, demand for U.S. exports is expected to be anemic going forward as our major trading partners continue to struggle with slow growth. But U.S. businesses are flexible, and despite adverse conditions, they are quite likely to adapt and persevere.

About the Author:

Dan North – Chief Economist Euler Hermes North America.

Dan North has been with Euler Hermes North America since 1996, using macroeconomic and quantitative analyses to help manage Euler's risk portfolio of more than $120 billion in annual U.S. trade transactions.

As an economist he has appeared on CNBC, Fox Business News, France 24, and Bloomberg Radio and Television. He has been quoted by Barron's, Business Week, Paris Le Monde, Tokyo Nikkei, the New York Times and the Wall Street Journal. After having predicted the 2008/2009 recession and its implications accurately, he was ranked 4th on Bloomberg's list of the 65 top economic forecasters in 2010.

CRF Survey on the Strong USD

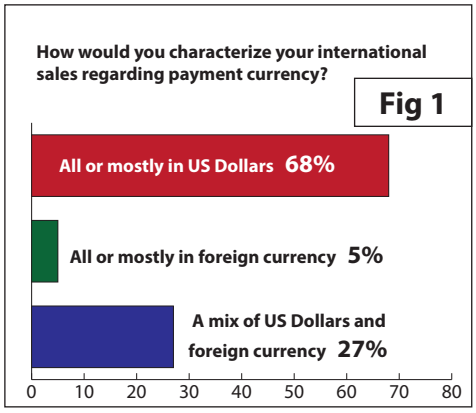
The US dollar (USD) was strong throughout 2015 compared to most other currencies. Various news reports have indicated the USD has risen as much as 18% against a selection of international currencies in the past year. That makes many US goods more expensive overseas, and many imported goods cheaper.

Many US exporters have seen sales volume flatten or decline as a result. The sluggish sales activity has affected a broad spectrum of the economy from industrial output to agricultural sales, although economists also point to a general slowdown in economic activity in much of Europe and portions of Asia.

In an attempt to gauge what affect the strong dollar value has had on companies that export products and services overseas, CRF launched a survey on this topic in April 2015. The survey was confined to a few high level questions.

Survey Results

Only 8% of respondents indicated they did not sell into foreign markets. When asked if they expected to engage in exports over the next two years, 31% indicated they were "very likely", 23% said they "possibly" would, and 46% said they were "unlikely" to engage in international sales.

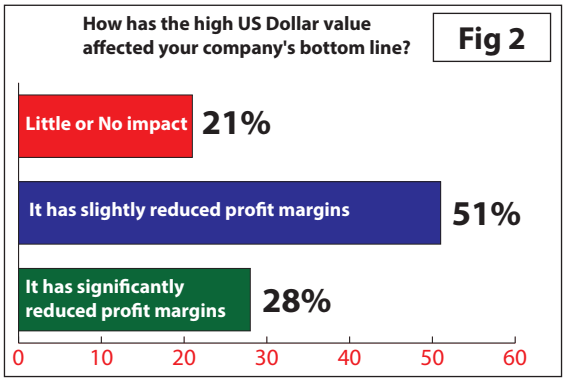


Currency Exchanged in International Sales

The survey asked which currencies were used for international sales (Fig 1). The great majority (68%) indicated all or most transactions were done in US dollars, 27% reported a mix of US dollars and foreign currency, and 5% dealt primarily in foreign currency.

Impact of Strong US Dollar

The CRF Survey also asked what impact the strong dollar had on their bottom line (Fig 2). Slightly less than a third (28%) experienced a significant reduction in profit margins, while 51% said their profit margins were slightly reduced, and 21% indicated that the strong dollar had little or no impact on their profit margins.

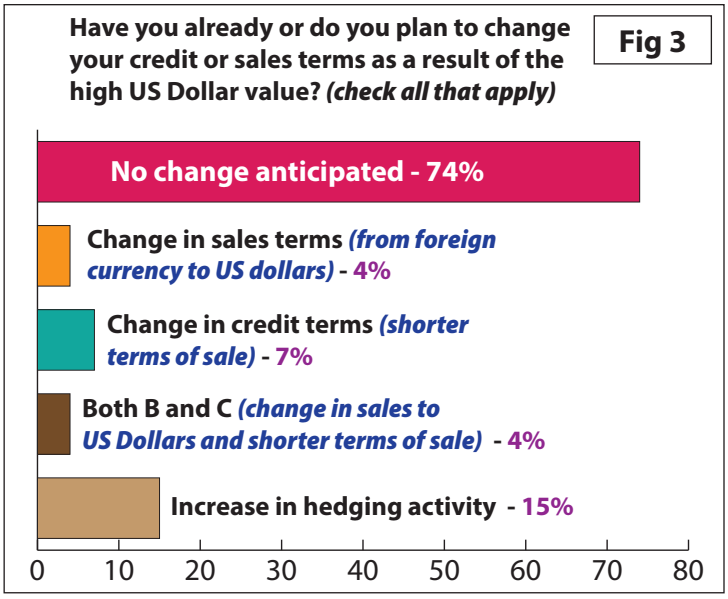


Credit Policy Changes

The final question asked what, if any, changes in credit and sales policies were adopted or being considered as a result of the strong US Dollar (Fig 3). Almost 75% indicated they do not plan to change course. For those considering (or have made) changes in strategy, the focus was

on: hedging (15%); credit terms (7%); sales terms (4%) or a combination of credit and sales terms adjustments (4%).

If the strong US dollar continues throughout the balance of 2015 and into 2016, as the previous article in this issue by economist Dan North suggests, those exporters that have not yet made any credit or sales policy changes may have to reconsider their approach.



Anita Spilman
ICTF President

Strong US Dollar: A View from the President of the International Credit & Trade Finance Organization

The strength of the U.S. dollar is a double-edged sword: it benefits consumers in some ways, and now may be the best time for Americans to vacation in Europe, but from a business standpoint, it can hurt multinational companies and negatively affect their bottom line.

A stronger U.S. dollar means U.S. goods become more expensive to buyers abroad, harder to sell and even less competitive. More expensive means higher credit risk too. U.S. companies paid in foreign currency, and bringing the money back home would bring significantly less due to the conversion back to U.S. dollars.

Many large multinationals hedge foreign exchange risk, but the speed of the dollar's gain has caught some by surprise. The attractiveness of the U.S. goods moves in the opposite direction to the rise of the U.S. dollar, unfortunately.

I saw a statistic a few months ago that almost 50% of the total sales of the S&P 500 companies came from abroad. This is significant, as a higher dollar reduces the dollar value of the international revenues of these companies.

Hedging is a strategy in place and utilized by major multinationals, and just like credit insurance and other risk mitigation strategy, it should be in place on an ongoing basis if you want it to work.

A Few More Thoughts on the Impact of the Strong US Dollar on Companies that Sell Overseas

JoAnn Tuinier CCE is the Sr. Credit Analyst for US Pharmacopeia, a not-for-profit seller of reference material standards for prescription and over-the-counter medicines as mandated by US law and the Federal Drug Administration. "Our primary product is a book - kind of like a cookbook for pharmaceuticals," said Tuinier.

Tuinier noted that her organization's sales overseas involve a mix of foreign and US currency. She said the strong US dollar has slightly reduced profits when products are paid for in foreign currency.

As a result of the strong US dollar (USD), Tuinier said that modifications were made in her company's ERP system to reflect changes in exchange rates between US and foreign currency. She pointed out that personnel in her company's Treasury Department "and above" set the currency exchange rates.

When currency rates are changed, there are far reaching affects. Tuinier pointed out, "It's a tough decision because it involves so much of the company when you do that." She noted, for example, that currency changes affect the purchasing of overseas products, as well as foreign employees who are paid in foreign currency.

Some overseas companies try to change the currency they use for payments made to her company. "We had one customer in Germany that wanted to pay in Canadian dollars," she said. "We ask that when customers change the currency (they use for payment) that they continue to use that currency for 12 months forward.

On the issue of making changes to currency exchange rates, Tuinier said, "The big takeaway is you can't make those decisions in a vacuum. A lot of consideration has to be made on issues you may not think of immediately."

Regarding such issues that must be considered, Dawn Burford pointed one out. Ms. Burford is the Director of Customer Financial Services with InSinkErater, a manufacturer and distributor of household and commercial kitchen products and services. She noted that for companies such as InSinkErator, that have operations overseas and sells in that country's currency, the value of the USD may have minimal impact on their balance sheets.

Ms. Burford noted, however, that when financials are rolled up into a consolidated balance sheet of a US-based parent company, the impacts of a strong USD may result in weaker financials. In her case, the parent company is Emerson. "Even though the results may be positive locally, when it gets consolidated, it shows deterioration," she said.

Diane Patterson, Credit & Collections Manager at Thermo Fisher Scientific Asheville LLC noted that selling to customers in foreign countries can cause those customers' sales to suffer - if their products are sold in foreign currencies.

Ms. Patterson pointed out that selling to foreign customers in USD will require them to pay more in foreign dollars to make up for the strong USD. The increased costs to the foreign buyers will often cause them to increase their prices, which can result in a lower sales volume for them locally. If foreign buyers sell fewer products in their countries, then they may buy less from their US suppliers — a negative chain reaction caused by a strong USD.

Suppliers Accepting Credit Card-Present Payments Take Heed To Adopt New Technology By October 1, 2015 Or Bear Risk Of Fraud Loss

By Scott Blakeley, Blakeley LLP

The Wall Street Journal reports that credit card use in the B2B space continues to increase as a preferred payment channel for customers. Suppliers accepting cards in the B2B space commonly receive payment through card not present forms, whether through payment portal, email, fax or over the phone. For those suppliers that accept cards in the cardholder's presence, card issuers are changing card acceptance rules to give cardholders greater protections from identity theft.

"Chip and pin" or "smart cards" are credit or debit cards that store data on integrated circuits rather than on traditional magnetic stripes. The transition to "chip and pin" or "smart card" technology is now largely underway in the United States. The transition is being assisted by the shift in liability for card-present fraud that will be implemented on October 1, 2015.

Currently, if an in-store transaction is conducted using a card obtained fraudulently, cardholder losses from that transaction lie with the payment processor or issuing bank. From October onwards, that liability will shift to the supplier that has not changed its system to accept chip technology. If a customer uses a chip card, the failure to update the card reader may permit a counterfeit card to be successfully used. In that scenario, the supplier will bear the cost of the fraud. Again, the supplier will only be responsible for the cost of the fraud if the fraudulent transaction is a card-present transaction.

The major benefit of using a "chip and pin" payment card, and what compelled the US to migrate its cardholders to the new generation of cards, is improved security and fraud reduction. Whereas magnetic stripe card transactions rely on the holder's signature and visual inspection of the card, the use of a PIN and cryptographic algorithms provide authentication of the card to the processing terminal and the card issuer's host system.

The identity of the cardholder is confirmed by requiring the entry of a personal identification number (PIN) rather than signing a paper receipt. Unlike magnetic-stripe cards, every time a smart card is used for payment, the card chip creates a unique transaction code that cannot be used again. This eliminates the possibility of card duplication fraud as the transaction code becomes obsolete and cannot be used in further transactions.

While much of the rest of the world has already been using "chip and pin" cards for several years, the US is now committing to migrate its credit card use to this more secure format. There is a historical viewpoint regarding the reason for this delay by the US in updating its credit card technology standards. In the past, fraud was much more prominent in markets outside of the US. What has happened, especially over the course of the past few years, is that since other markets have migrated to "chip and pin" cards and become more secure, fraudsters have moved their focus to the US market. Essentially, they came to the US market because they were looking for less secure networks from which to steal fraudulent credit card information.

For suppliers in card-present transactions, the switch to this technology means adding new in-store technology and internal processing systems, and complying with new liability rules. For cardholders, it means activating new cards and learning new payment processes. And for the supplier and cardholder, it means a more secure form of payment by credit card, and fewer opportunities for fraud to occur. As the credit team is responsible for managing risk, including risk of fraud with payment channels, the credit team must prioritize compliance with this new technology within the organization for card-present transactions.

About the Author ...

Scott Blakeley is a principal with Blakeley & Blakeley LLP, where he practices creditors' rights and bankruptcy.

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Attorney Scott Blakeley

Just a few thoughts . . . .
from CRF's President, Bill Balduino

Bill Balduino
President, CRF

As you read this message (how is that for being presumptuous!!!), The CRF TEAM is extremely busy preparing for our largest in-person event of the year – the August Forum and EXPO in Seattle, WA. The meeting will be our fifth (5th) consecutive sellout with an awesome turnout in terms of both practitioners and the service providers that will be offering our community insight into their capabilities. **Hope to see you there!**

While we can all wish for a more robust economy, things at CRF are very positive and we continue to be humbled by your support and comments regarding our programs and educational offerings – **WE TRULY THANK YOU!!!**

I will recap some of the mid-year highlights in a separate e-mail to the community within the coming weeks.

But with summer here and the better weather providing an opportunity for all of us to stop and take a breath of air – I am asking you to do that relative to CRF……please think about things:

- How are we doing?
- What can (or should) we be doing better?
- What have we missed that is critical to you?

Feedback, Feedback, Feedback PLEASE….we really would like to hear from you and understand more – your thoughts, reactions and comments help us fashion **OUR COLLECTIVE DIRECTION!!!!!!**

Thanks for taking a few minutes to share your thoughts: billb@crfonline.org

Credit Research Foundation

Commercial Collection Agency Certification -

What Is Entailed And Why Is It So Important?

By Annette Waggoner

Editor's Note: The following article has been contributed to the CRF Newsletter by Ms. Annette M. Waggoner, Executive Director, COMMERCIAL COLLECTION AGENCIES OF AMERICA. It should be noted that the certification requirements process and resulting Certificate of Accreditation and Compliance from this association currently serve as the prototype and standard for third party commercial agency membership within the Credit Research Foundation. The same will be required annually with the renewals of any member third party collection firm.

"Are you certified?" A simple question that credit professionals should ask when contemplating the use of an outside collection agency to handle the recovery of delinquent accounts receivable. Although at first blush it seems simple, there are many facets to a superior certification program to consider, and not all certifications are alike.

To attain certification means that an agency is complying with requirements set forth by a certifying body set up for the purpose of protecting the credit community. "When we certify an agency, the agency undergoes an in-depth analysis on many planes", commented Annette M. Waggoner, Executive Director of Commercial Collection Agencies of America.

After the agency application is reviewed, an on-site visit is scheduled. The visit may last anywhere from one full workday to a day and a half. The association conducts a thorough examination of all trust accounts, a detailed audit of all bank reconciliations, an overview of account placements and a review of the legal department files. In addition, collection and sales staff operations are assessed and key personnel are interviewed. Following the visit, additional research is performed at the association headquarters.

Because certification programs rely on business survival rate studies, either from the Bureau of Labor Statistics or the Census Bureau, an important requirement is the number of years an agency has been in business.

Once an agency is deemed certified, it displays the certifying body logo, which gives credibility to the agency name and gives certain assurances to the credit granting community.

On an annual basis, agencies must meet the following important requirements to maintain the valuable certification:

BONDING

First, an agency should be properly bonded. Certified collection agencies must obtain a minimum dollar amount of surety bond coverage, and many certified collection agencies exceed that minimum amount. Bonds should be issued by a surety company that is rated A.M. Best A or better. A valued certification program will also encourage additional bonds, such as fidelity and crime bonds, in addition to proper business insurance policies.

LICENSING

Equally important is that an agency is properly licensed. There are, at minimum, over twenty states that require a commercial collection agency to be licensed. A high-caliber certification program requires that agencies also be licensed or registered in the city or cities in which it has offices, if required by state or local law. According to Terri Goins, licensing specialist, there are also city jurisdictions and secretary of state registrations required in addition to state licensing requirements, regardless of agency location. For a listing of states that require licenses for commercial collection agencies, credit managers can contact Annette M. Waggoner at awaggoner@commercialcollectionagenciesofamerica.com.

FIDUCIARY

An integral requirement for certification is that an agency must meet certain fiduciary responsibilities, which are found in the governing documents of the certifying body. For instance, an agency must promptly remit funds to creditors, submit semiannual trust account reports and maintain separate trust accounts, keeping the clients' monies separate from operating funds.

OPERATING

Meeting operational standards is another vital requirement. The certifying body's code of ethics serves as an additional vehicle to deliver acceptable conduct to which a commercial collection agency adheres. A few of the many examples of operational standards are that a certified agency:

- ✓ Employs professional practices which help attain maximum dollar recovery
- ✓ Conducts accounting procedures and maintains accounting records in accordance with GAAP
- ✓ Does not engage the in practice of law[1]

1 Commercial Collection Agencies of America Certification Requirements

It should be noted that while agencies do not engage in the practice of law, they have legal or "forwarding" departments which act as liaisons between clients and creditors' rights attorneys if litigation is desired. Acting as a conduit, these departments provide for an efficient, streamlined operation, as creditors deal with one source at an agency - not numerous attorneys across many states. The legal department is yet another place where creditors benefit from a superior certification program, which requires that agencies "in relation to creditors, identify clearly and accurately all charges to the creditor. Suit requirements (litigation costs and attorney retainers) requested by an attorney should be communicated to the creditor as communicated by the attorney."[2] This requirement prevents an agency from overcharging or inflating the cost of litigation, as well as makes sure that client funds are properly accounted for during and after the litigation process.

A certification program which "is a cut above" also requires that its agencies avoid deceptive practices and vehemently disallows agencies from engaging in subterfuge, such as stating that the agency is a private investigator conducting an investigation of the debtor.[3] Furthermore, a certifying body should state in its code of ethics that the marketing of services must be professional and courteous, and that certified agencies not engage in any activity that brings reproach to the industry or the organization.

Certified programs may also require that agencies provide statistical data regarding account placement in order for the association to provide useful trend reports to the credit industry. Credit managers welcome these reports and often share them with their sales departments and upper management. These valuable reports are also used as training tools in the credit and collection department.

EDUCATION

One of the most important certification requirements is that the agency representative fulfill continuing education classes annually. These sessions bring the agency current with new licensing requirements and laws, compliance regulations, emerging technologies and useful procedures, all of which improve processes and better protect creditors.

The agency, as an entity, earns certification. However, there is another important certification of which credit managers should be aware - individual collector certification. Once the agency is certified, it is incumbent upon its operations manager to ensure that collection and sales personnel receive the proper training to support each aspect of that agency certification program. One way to achieve that goal is to require individual collector certification.

The value such a program brings to its agency is that their collectors see it as a tangible employee benefit, the program assists in creating tenure amongst the collection staff, there is less risk of the agency facing litigation because of collector error, and if a majority of the agency's collectors receive individual collector certification, the agency can certainly be differentiated from other agencies in marketing efforts.

Benefit is also realized by the credit community when an agency certifies its individual collectors. These types of programs assure that staff is knowledgeable, competently trained and works continually to elevate the standards of the commercial collection industry.

When crafting a syllabus for an individual collector certification program, many things should be considered, including the tenure of the collectors being trained. For example, a "sampling" of courses included in the junior and senior levels of the individual collector certification program of Commercial Collection Agencies of America are:

- Code of conduct of a collector
- Key methods to achieve client satisfaction Negotiations
- A civil litigation overview
- Training on regulations such as the Fair Debt Collection Practices Act (FDCPA), Telephone Consumer Protection Act (TCPA) and various state regulations.[4]

One may ask if these courses are geared toward commercial collections, why cover consumer-oriented regulations, such as FDCPA and TCPA? The answer is that many times in a commercial case, the corporate principal has signed a personal guarantee and contact with the guarantor needs to be established. When those occasions arise, the collector is best suited to have full training on what can be said, or better yet, what to avoid saying.

Although the question "Are you certified?" is perhaps a simple one, attaining and maintaining certification, whether on the agency level or as an individual collector is complex, with many facets. The certifying body has the responsibility to consistently warrant that its agencies sustain a high level of proficiency, as it is crucial to uphold the professionalism of the collection industry.

About the author:

Annette M. Waggoner *currently serves as the Executive Director of Commercial Collection Agencies of America.*

Her past and present experience includes:

- *Executive director of Commercial Collection Agency Association*
- *Executive Council member of Commercial Collection Agency Association, Chair, vice chair, secretary and board member of the Midwest Region, chairing the 2010 Midwest meeting*
- *Vice President of Cosmopolitan Service Corporation*
- *President of Centurion Service Corporation*
- *Accounting officer at Chicago Title & Trust Company*
- *Business consultant, specializing in financial services to clients nationwide*
- *Member of International Womens Associates*
- *Member of the Hellenic Womens' Philanthropic Organization*

2 Commercial Collection Agencies of America Agency Member Code of Ethics

3 Commercial Collection Agencies of America Agency Member Code of Ethics

4 Commercial Collection Agencies of America Individual Collector Certification Program

Speaking of Collection Agency Certification ...

CRF posed this question to credit practitioners on LinkedIn regarding collection agencies:

Selecting the right collection agency to service your specific requirements can be daunting...
"What factors do you consider when choosing the right agency for your organization?"

The following are three responses to this question.

Kurt Albright
Director, Credit and Collections at Uline

"(I look for) overall results. I like to test new agencies prior to solidifying the relationship. I don't turn them over very often."

Michael C. Dennis
Risk Manager at Flextronics International

"In my opinion, all of these are important factors in selecting a third party commercial (business-to-business) collection agency:

- *Knowing the reputation of the collection agency*
- *Finding out whether the agency is licensed and bonded*
- *Asking what professional organizations to which the agency belongs*
- *Knowing how long the firm has been in business and whether they collect globally, nationally or regionally*
- *Requesting a written quote listing the agency's contingent collection fees*
- *Evaluating the simplicity or alternatively the complexity of their fee structure, as well as the negotiability of contingent collection fees particularly on large dollar claims*
- *Trying to determine the ease of doing business with the agency as well as their level of business acumen and professionalism*
- *Determining what free services the agency offers [such as a ten day free demand service, or free access to the collection agency's database of debtors already placed for collection]*
- *Asking for documentation about their historical collection success rate*
- *Finding out how the agency collects from debtors. For example, does it write letters, does it make collection calls, or does it send someone to meet face to face with the debtor?*

Rodney B. Wheeland
President
NACM Oregon, Inc.

We find clients have different needs. For example, some folks just want recovery and don't care what it takes (legally) to get it. Others want "soft" collections, and after the collection claim is resolved, they start selling them again. As Kurt (above) noted, reputation and trust are important, and I'd add customer service. The creditor needs to have open communications with the agency, sometimes with an individual collector. Add to these the recovery results and the fees. In our experience, the last two are usually crucial in the initial relationship, and after some experience, the service becomes most important.

Lyle Wallis Traveled the London Fog Path to CRF

By Tom Diana

Reflecting on his impending retirement, CRF Vice President of Research, Lyle Wallis, thought about the circuitous path that led him to a career in credit and ultimately to the Credit Research Foundation. Like many in the credit profession, he didn't start his career with the intention of becoming a credit professional. However, credit beckoned him and eventually led him to the position of Credit Manager at the then-famous maker of men's and women's outerwear, London Fog.

As it turned out, Lyle and several other credit professionals who worked at London Fog became CRF staffers, including CRF's former President, Terry Callahan. Although not by design, the now-defunct company hired and nurtured some top-notch talent that would be put to use in helping to serve the entire credit community through the ongoing programs and initiatives at CRF.

As his career was starting, Lyle received some sage advice from a personal friend of his father's, who happened to be the President of Alcan Aluminum at that time. His advice, which served as the blueprint for Lyle's career, was to learn as much as possible in his current job and then move onto something else in order to broaden his knowledge and experience over time. "That's what I did," Lyle said. "I was engaged in a lot of areas related to credit management."

Before he started on his career path, Lyle served in the US Navy and did a tour of duty in Vietnam while the US was still engaged in that conflict. After leaving the Navy, he went to college part-time, majoring in business administration with an emphasis in finance and economics. During this same time period, Lyle took the firefighter's acceptance test in his home town near Baltimore Maryland, but was told there was a 2-year waiting period.

VICTORY TOUR T — CRF Vice President of Research Lyle Wallis holds up a t-shirt he was presented to commemorate his "Victory Tour," a celebration of his final three CRF Forums before he retires in the Westminster, MD office at the end of 2015. Photo by Tom Diana

As dreams of putting out physical fires extinguished over the next few months, Lyle accepted a Credit Processor position with Euler Hermes. "I didn't know what that was, but I applied for it and got it," he said. "I figured it was related to finance." And like other professionals who find their way to credit he said, "I had no idea what I was getting into."

A month after taking the job with Euler Hermes, Lyle was offered a job in the Baltimore County Fire Department. "I must have gotten a good score on the test," Lyle said. He seriously considered pursuing a career in firefighting, but his wife Kathy informed him that she was not keen on being married to a guy who would often be working the night shift, so Lyle wisely chose wedded bliss over the excitement of a firefighting career and continued on his career path in credit.

"I had no idea what I was getting into," Lyle Wallis said about his first job in credit.

In keeping with his blueprint, after 13 months Lyle moved on to a Credit Manager position with GE Capital Corporation, where he approved credit for asset-based lending related to heavy equipment. "That's where I learned about UCC's and secured lending."

After about 13-14 months he moved on to become a sales representative at Associates Financial, leasing equipment. “I was actually on the road soliciting business,” Lyle said. “I had customers like Perdue and Eastern Airlines. I was always successful but insecure as I never knew where the next business would come from.”

During Lyle’s sales efforts, he walked into a customer’s office and happened to meet the CFO of General Supply Equipment Company. A Credit Manager position had just opened up and the CFO asked Lyle if he knew anyone who would be interested. Lyle volunteered for the job. “Before I walked out of there they hired me,” Lyle said.

HIS FINAL CRF OFFICE — During Lyle Wallis’s 17.5 years at CRF, he has worked in three different office locations. Two in Columbia, MD and the current one in Westminster, MD, where CRF relocated in September, 2011. Photo by Tom Diana

This new position involved both secured and unsecured credit, which was another new challenge that Lyle was able to add to his multi-job career strategy. He stayed there for three years, and continued working as a credit manager for several other companies. Lyle ended up at an asset-based lending company, but as it was the late 1970s when interest rates were high, he was laid off.

He then asked a friend, Paul Magnini (who would eventually become president of NACM) if he knew of any job openings. Mr. Magnini told Lyle to seek out a guy named Terry Callahan, who worked at Carroll County Maryland-based London Fog. At the time, Mr. Callahan was seeking an assistant credit manager.

The interview was set up for a Friday morning, after which he intended to begin a camping trip with his son. After spending an hour in the HR department of London Fog, Lyle met with Mr. Callahan at 11:30 am and didn’t get out of his office until 6:30 pm. “I sat there the whole time listening to Terry talk,” Lyle said with a knowing look in his eye. After the interview, Terry took Lyle down to meet the Controller. Lyle said that even though he wasn’t asked any questions during the interview, Terry stood up, shook his hand and said, “Okay, you’re hired. I’ll see you on Monday.” Later at about midnight, Lyle and his son were pitching their tent at the campground. Departing from his career playbook, Lyle spent 13 years at London Fog. During that time Mr. Callahan was promoted to Director of Financial Services and Lyle was promoted to Credit Manager. However, during his 11th year, London Fog began having financial troubles, as were many other US clothing manufacturers. Mr. Callahan left London Fog and Lyle was promoted to Director of Corporate Credit, and moved to an office with a Customer Services Manager named Barbara Clapsadle. Working for Lyle as an Assistant Credit Manager was Mike Durant, who years later would serve as a member of the CRF staff, and eventually become CRF Chairman.

In the meantime, Lyle left the financially sinking London Fog to work for a book publisher, where he was joined by Barbara Clapsadle. “I didn’t like the book publishing business,” Lyle said. Before leaving CRF for VF Corporation, Mike Durant contacted Lyle and asked if he were interested in taking his job at CRF. Lyle agreed and was hired by CRF President Terry Callahan on July 13, 1998. “And the rest is history,” Lyle added.

As Lyle approaches his retirement from CRF at the end of 2015, he reflects back on the career advice he was given. “I think what really helped me is that I followed the advice of the president of Alcan and I learned as much as I could at each job and moved on,” he said. “I think it’s the collective knowledge I learned in a variety of positions that’s helped me over the years. It’s a breadth of knowledge one acquires that somebody who stays in one industry may not have an opportunity to gain.”

Lyle said he enjoys helping other credit professionals with the knowledge he accumulated over his long career. He said that CRF provided him the best opportunity to share his knowledge. “The last 17.5 years with CRF is certainly the highlight of my career,” he said.

On facing his impending retirement he said with some humor, “I look forward to improving my golf game.” But between the home he recently purchased near a lake and enjoying time out on his boat, Lyle said he plans to do some fishing and spending more time with his three grandchildren. A fourth grandchild is expected in mid-July 2015. Hopefully, Lyle’s retirement will be as rewarding as his career in credit. His friends and colleagues wish him the very best.

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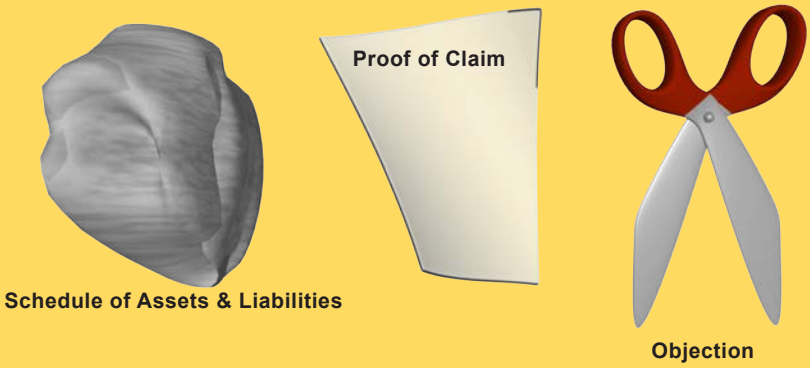

Rock-Paper-Scissors: The Bankruptcy Claim Process

By Jenette A. Barrow-Bosshart, Esq.

A member of Otterbourg P.C.

To the uninitiated, the bankruptcy claims process may seem confusing. However, it is very much like the game of Rock-Paper-Scissors, and by following the game, a creditor can enhance the likelihood of having its claim allowed.

The Game

In the game of Rock-Paper-Scissors, two parties - let's call them the debtor and the claimant - throw out hand gestures imitating a rock, paper or scissors. In the game, if a rock gesture and a paper gesture are thrown, paper will cover rock and win the round. If a paper gesture and a scissors gesture are thrown, scissors will cut the paper and win the round. If a scissors gesture and a rock gesture are thrown, rock will crush scissors and win the round. The bankruptcy claims process follows a similar pattern, except rock does not crush scissors.

Rock

Either with its bankruptcy petition or in a separate filing, a debtor will file a schedule of its assets and liabilities (the "Schedules"). The Schedules are supposed to include a listing of all of the debtor's assets and liabilities. The Schedules should, among other things, identify the claimant by name and address, list the amount, the nature (i.e., trade, lease, loan, etc.) and priority of the claim as prescribed by the Bankruptcy Code, and indicate whether the claim is secured or unsecured, contingent, unliquidated or disputed. The filing of the debtor's Schedules starts the bankruptcy claims process. The Schedules are the rock.

In a Chapter 9 case (a municipality proceeding) and in a Chapter 11 case (a reorganization proceeding, including liquidations thereunder), unless the debtor subsequently amends its Schedules, the way the debtor lists the claim will, absent the filing of a proof of claim or the Schedules being amended with respect to the claim, govern how the claim will be treated. If the claimant agrees with the way the claim is listed, it need not file a proof of claim to receive a distribution in the case, but it may, for reasons discussed below, want to file one anyway. In a Chapter 7 case (a liquidation proceeding controlled by a trustee) in which there are assets to distribute and in a Chapter 13 case (a reorganization proceeding for individuals with a regular income), regardless of how the claim is listed in the Schedules, the creditor must file a proof of claim to be eligible to receive a distribution.

Paper

A proof of claim is a written statement sworn to by a claimant setting forth the claimant's claim. It must substantially conform to the Official Form 10 of the Bankruptcy Rules. Often a blank proof of claim form will accompany the notice of commencement of the bankruptcy case, which notice will identify the deadline for filing the proof of claim (the "Bar Date"). For non-governmental creditors in Chapter 7, Chapter 12 (a family farmer/family fisherman proceeding) and Chapter 13 cases, the Bar Date is 90 days after the date that is scheduled for the first meeting of creditors. However, in Chapter 9 and Chapter 11 cases, the court, upon a motion filed by the debtor, will enter an order setting the Bar Date and notice of the Bar Date will be sent to the creditors. The notice may be accompanied by a proof of claim form. In some cases the form that is sent will be personalized to the claimant and indicate how the debtor listed the claim in its Schedules. Absent the timely filing of a proof of claim in Chapter 9 and Chapter 11 cases, the claim will be treated as set forth on the Schedules.

If the claimant's claim is listed in the Schedules as contingent, unliquidated or disputed, the claim will be subject to disallowance absent the timely filing of a proof of claim. Even if the claim is not listed in one of those categories, if it is listed in an amount less than the claimant believes is owed to claimant, is listed as having a different priority than claimant believes it is entitled, is listed with a different secured/unsecured status than claimant believes it enjoys, or if the claim is not listed at all, then absent the filing of a proof of claim, how the debtor listed the claim in its Schedules will control. The proof of claim is prima facie evidence of the validity and amount of the claim. If the proof of claim is timely and properly filed, it will be deemed allowed as filed absent a successful objection.

Some thought should be given to whether to file a proof of claim. The filing of a proof of claim may not only preserve claimant's claim and its proper treatment, but will permit the claimant to participate in various aspects of the bankruptcy case such as voting on a plan of reorganization and voting on the election of a Chapter 7 trustee. However, the filing of a proof of claim subjects the claimant to the Bankruptcy

Court's jurisdiction and its equitable powers. The filing also constitutes a waiver by the claimant of the right to a jury trial.

The notice of the Bar Date should be carefully reviewed as it will contain important information regarding the completion and filing of the claim. The proof of claim form should be completed and the completed form should contain, among other things, the claimant's name and mailing address, the name of the debtor who the claim is asserted against, the debtor's case number, the amount owed as of the date the bankruptcy petition was filed, the basis of the claim (i.e., contract, invoice, lease, note, etc.), the priority of the claim and whether the claim is secured. If there are multiple debtors, the claimant should take note of whether it has to file the claim against the specific debtor obligated on the claim, even if the cases have been procedurally consolidated for administrative purposes under a different related debtor's name and case number. If the claimant is unsure of which debtor to file the claim against, it should consider filing a proof of claim against each of the debtors. The ones that are considered duplicates will be subject to objection and can be withdrawn later. Supporting documentation should include evidence of the claim such as a copy of the contract, invoice, lease, note, judgment and Uniform Commercial Code filings, etc. If the documents are voluminous, the claimant may want to state that and indicate that the documents will be made available upon request. The claimant may want to include a calculation of the claim if, for instance, the claim is capped under the Bankruptcy Code with respect to non-residential real property lease rejection damages. The claimant should also consider specifically reserving (a) the right to amend, modify and/or supplement the proof of claim and (b) the right of setoff, which right may otherwise be lost. The proof of claim must be signed. Filing a false claim may result in criminal penalties against the person whose name is on the signature line whether the claim is filed electronically, by mail or otherwise.

The notice of the Bar Date will also indicate where and how the claim should be filed, which may be by filing with the Clerk of the Bankruptcy Court, with the debtor, or with the debtor's claims agent, if any. Often the instructions require the filing of a signed original proof of claim before the Bar Date, not a copy. In such cases, if the proof of claim is being filed against multiple debtors, multiple originals would be required to be filed. If a hard copy of the proof of claim is filed, the claimant may want to send the proof of claim by hand, by overnight mail or by certified mail to have proof of timely delivery. In addition, the claimant should include a duplicate copy of the signed proof of claim with a prepaid self-addressed return envelope, and request that a time and date received stamped return copy be provided to the claimant.

Claims filed after the Bar Date are subject to disallowance on the grounds of tardiness. A creditor may seek leave of the court to file a claim after the Bar Date has passed, which may be granted for reasons of inadvertence, mistake, and carelessness, if such inaction amounts to "excusable neglect" or if there are other intervening circumstances outside the claimant's control.

Although commonly done, filing a proof of claim is not the appropriate method of asserting a post-petition administrative claim unless the court orders otherwise. The appropriate method is by filing a motion seeking allowance of an administrative expense claim. A 20-days goods claim pursuant to Bankruptcy Code Section 503(b)(9) claim for the value of goods received by the debtor 20 days before its bankruptcy petition was filed that is entitled to administrative priority status despite being a pre-petition claim. Filing a 20-days goods claim is usually required by the Bar Date. Sometimes, separate filing and/or reconciliation procedures will govern how 20-days goods claims or other administrative claims are to be asserted.

As noted above, a timely filed and properly completed proof of claim is prima facie evidence of the validity and amount of the claim asserted. Thus, the proof of claim is like paper, it covers the rock (the Schedules), winning the round.

Scissors

Unfortunately for the claimant, the game does not necessarily end with the filing of the proof of claim. The debtor, a trustee or any party in interest may object to the proof of claim on substantive and/or technical grounds. There are a wide variety of potential grounds for an objection, including among others:

the claim is not properly calculated;

- the claim omits setoffs to which the debtor's estate is entitled;
- the priority of the claim asserted is higher than it is entitled to under the Bankruptcy Code;
- the claim was filed late;
- the claim was filed against the wrong debtor;
- the claim was not signed;
- the claim is not secured (if filed as a secured claim);
- the claim lacks sufficient documentation;
- the claim should be recharacterized as equity;
- the claim should be subordinated;
- the claim is contingent; and
- the claim is unliquidated.

The claim objection may be made at almost any time and is often made near the conclusion of the bankruptcy case after it is determined whether there are sufficient assets available for distribution. The conclusion of the case could be years after the claim was filed and years after confirmation of a plan of reorganization in a Chapter 11 case. It may even be filed after the respective individuals from the debtor's company and from the claimant's company who would have been familiar with the matters giving rise to the claim have left such employment. It may not be immediately clear which debtor the claim objection relates if, as an example, the debtor sold its intellectual property and changed its name in the bankruptcy. The claim objection may not have the claimant's company's name in the title of the objection as objections are often merely entitled as omnibus objections with a list of creditors to which the objection relates attached as an exhibit. The claimant's name may be buried in the exhibit to the objection. For all of these

reasons, claims objections may be overlooked or difficult for the claimant to address.

If the claimant does not timely respond to the objection by the date provided in the notice of the objection, the claim may be reduced, reclassified, recharacterized, subordinated or disallowed. However, the objector must submit some evidence to support its objection. Such evidence may be as simple as a declaration of the debtor's representative that the claim does not comport with the debtor's books and records. Once the objection is filed and some evidence is submitted, the burden of proof shifts to the claimant to prove the claim. If the claimant is a corporation, it may only respond to the objection through counsel. If a response is timely filed, a hearing on the objection will be scheduled. If an agreement is not reached beforehand, at the hearing the parties will be given an opportunity to prove or disprove the claim. A successful objection is like scissors cutting paper (the proof of claim). Unlike in the game Rock-Paper-Scissors, the rock (the Schedules) does not crush scissors (the successful objection), only a successful re-hearing on the objection or a successful appeal of the order on the objection may accomplish that.

Winning the Game

A claimant cannot always win the game, but if it follows the game and seeks the guidance of a bankruptcy professional when needed, the claimant will enhance the likelihood of having its claim allowed or resolved in the priority and amount it asserts is owed.

About the Author

For more than 25 years, Ms. Barrow-Bosshart has specialized in the representation of official and unofficial committees of unsecured creditors, trustees, unsecured creditors, banks, bondholders, hedge funds, commercial finance companies and other institutional lenders with respect to restructurings and insolvency proceedings in and out of Bankruptcy Court. Prior to joining the Otterbourg LLC, Ms. Barrow-Bosshart also represented debtors and debtors-in-possession. In the course of her career, Ms. Barrow-Bosshart has worked on numerous reorganizations, restructurings and liquidations, including many high profile "mega" cases.

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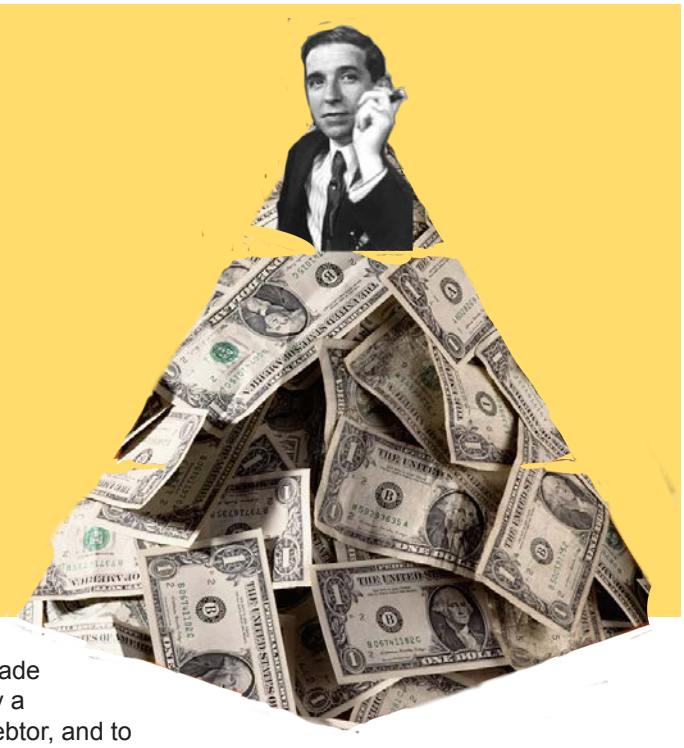
Defending Fraudulent Transfer Suits in Ponzi Scheme Bankruptcy Cases: Causes for Concern Following The Golf Channel

By: Joseph M. Coleman
John J. Kane



Introduction

In recent years, ordinary vendors have been caught in webs spun by an increasing number of Ponzi schemes. For example, in 2008 we witnessed the uncovering of the $3.8 billion Petters Co. Inc. Ponzi scheme, then the largest in United States history. It was quickly surpassed, however, by the $20 billion Madoff Investment Securities, LLC Ponzi scheme. Less than one year later, the Securities and Exchange Commission uncovered the $7 billion Ponzi scheme perpetrated by Robert Allen Stanford through Stanford International Bank.

Given the dollars involved in many Ponzi scheme cases, bankruptcy trustees and receivers are incentivized to pursue the recovery of nearly every single dollar paid from the scheme to investors, insiders, and even trade creditors. The result is frequently the filing of hundreds to thousands of adversary proceedings to recover those allegedly fraudulent transfers. Recent case law, such as The Golf Channel decision in the Stanford Ponzi scheme case, has armed those trustees with powerful tools to expedite litigation and leverage settlements and trial victories. This article will analyze how fraudulent transfer suits work in Ponzi scheme cases, and some of the trade creditor concerns associated with developing case law.

Basics of Adversary Proceedings to Avoid and Recover Fraudulent Transfers

Fraudulent transfer laws such as the Uniform Fraudulent Transfer Act[1], and its Bankruptcy Code equivalent found in Section 548 of the Bankruptcy Code[2], were enacted to protect creditors against the improper depletion of a debtor's estate. To that end, fraudulent transfer statutes allow creditors – or their representative trustee – to void fraudulent transfers made by a debtor, and to force the recipient of those transfers to return the transfer to the debtor's estate. Trustees may typically assert causes of action to avoid "actually fraudulent" transfers and "constructively fraudulent" transfers under both section 548 of the Bankruptcy Code and state law under the UFTA as incorporated by section 544 of the Bankruptcy Code.

The Trustee's Burden of Proof – Actually Fraudulent Transfers

To avoid and recover actually fraudulent transfers under section 548 and corresponding state law, the Trustee must prove that the transfers were made "with actual intent to hinder, delay or defraud" creditors.[3] The requisite "actual intent" can be established with circumstantial evidence. Courts typically analyze a non-exclusive list of factors known as "badges of fraud" to determine whether the debtor acted with actual intent. Those badges of fraud include whether:

> (1) the transfer or obligation was to an insider; (2) the debtor retained possession or control of the property transferred; (3) the transfer or obligation was concealed; (4) the debtor was sued or threatened with suit before the transfer was made; (5) the transfer was of substantially all the debtor's assets; (6) the debtor absconded; (7) the debtor removed or concealed assets; (8) the debtor received reasonably equivalent value in exchange for the transfer; (9) the debtor was insolvent or became insolvent when or shortly after the transfer was made; (10) the transfer occurred around the time a substantial debt was incurred; and (11) the debtor transferred the essential assets of the business to a lien holder who then transferred the assets to an insider of the debtor.[4]

1 Some form of the Uniform Fraudulent Transfer Act (the "UFTA") has been adopted by most states. Other states, such as New York, have adopted some form of the Uniform Fraudulent Conveyances Act. They are substantially similar in their treatment of actual and constructively fraudulent transfers, as well as applicable defenses. For the sake of consistency, this article will address only the UFTA in conjunction with the Bankruptcy Code.

2 The term "Bankruptcy Code" refers to Title 11 of the United States Code.

3 11 U.S.C. § 548(a)(1)(A) and, e.g., N.J.S.A. 25:2-25(a) (New Jersey's UFTA actual fraud statute).

4 See, e.g., Tex. Bus. & Comm. Code § 24.005(b) (listing badges of fraud under Texas's Uniform Fraudulent Transfer Act); and In re Actrade

In order to establish a valid claim to avoid an allegedly actually fraudulent transfer, trustees must prove the existence of several badges of fraud, which can be quite difficult. Simply pleading one badge of fraud without other supporting evidence is grounds for the dismissal of the claim.[5]

The Trustee's Burden of Proof – Constructively Fraudulent Transfers

If a trustee is concerned about proving multiple badges of fraud, the trustee may alternatively seek to avoid and recover transfers by proving they were constructively fraudulent. To prove transfers were constructively fraudulent under section 548(a)(1)(B) of the Bankruptcy Code[6], the trustee must establish, in pertinent part, that the debtor:

> (1) transferred its property within two years of the petition date; (2) received less than reasonably equivalent value in exchange; and (3) was (a) insolvent when the transfer was made or became insolvent when the transfer was made, (b) was engaged in a business activity that left or would leave the Debtor with unreasonably small capital, or (c) believed the debtor would incur debts beyond its ability to pay as such debts matured.[7]

More simply put, to avoid and recover constructively fraudulent transfers, the trustee needs to prove that the debtor received (1) less than reasonably equivalent value for the transfer, (2) while the debtor was insolvent or nearly so.

Trustees' Difficulties: Costly and Fact Intensive Burdens

As you might imagine, establishing badges of fraud against a trade creditor or lender, can be extremely difficult. In most cases, the allegedly fraudulent transfers are simply arm's length transactions. As a result, trustees more frequently attempt to avoid and recover transfers under a theory of constructive fraud.

That, however, presents other significant challenges. For instance, the trustee must prove that the payments made by the debtor were for less than reasonably equivalent value. Payments in satisfaction of an antecedent debt are typically for reasonably equivalent value.[8] If a creditor provided goods on credit, and was later paid for those goods, the payment was both commensurate to the market value of the goods provided, and a dollar-for-dollar reduction of a debt owed by the debtor to the vendor. In both instances, the transfer was therefore reasonably equivalent to what the debtor received.

Even if the trustee can show that a transfer was for less than reasonably equivalent value, it must still prove that the debtor was insolvent at the time transfers were made. Courts typically examine avoidance actions on a transfer-by-transfer basis. As a result, the trustee must show that the debtor was insolvent at the time of each transfer. To prove insolvency, a trustee must present evidence of the fair value of the debtor's assets and liabilities at the time of the transfer.[9] The valuation of the debtor's assets should consider not only tangible assets, but intangible assets as well.[10] If the price a likely buyer would be willing to pay for the debtor's total package of assets and liabilities is positive, the debtor is solvent.[11] Presenting evidence of fair value of a going concern often requires expert testimony and can become very costly. Moreover, costs and the difficulty of establishing insolvency typically increase as challenged transfers get farther and farther from the petition date.

Given the trustee's significant evidentiary burdens, most fraudulent transfer defendants have means to leverage an out of court resolution of the trustee's claims. The existence of a Ponzi scheme, however, may eviscerate a defendant's leverage and dramatically reduce the trustee's burdens of proof.

What is a Ponzi Scheme?

The term "Ponzi scheme" actually stems from what originated as a potentially profitable business venture by Charles Ponzi in the 1910s. Ponzi realized that he could use international reply coupons to favorably exchange currency for huge profits in a form of arbitrage. Unfortunately for Ponzi, the implementation of his scheme was impractical on a large scale, and was later thwarted by the United States Post Office after it adjusted exchange rates for the coupons. Despite the impracticability of his venture, Ponzi promised 50% profits in 45 days, or 100% profits in 90 days. While implementing his scheme, however, it became clear that Ponzi would only be able to deliver promised returns with cash from new investors. Eventually, the scheme was discovered, new investments halted and old investors lost what amounts to hundreds of millions of dollars in 2015 dollars.

Today, the term "Ponzi scheme" refers to inherently fraudulent ventures in which the scheme operators promise returns on investment, and use new investor funds to pay guaranteed rates of return to previous investors. Courts typically find the existence of a Ponzi scheme upon a showing of the following four elements: (1) deposits were paid to the debtor by investors; (2) the debtor conducted little or no legitimate business operations as represented to the investors; (3) the purported business operations of the debtor produced little

Financial Technologies, Ltd., 337 B.R. 791, 808-09 (Bankr. S.D.N.Y. 2005) (incorporating badges of fraud into § 548 actual fraud analysis).

5 Actrade Financial, 337 B.R. at 809.

6 Causes of action to avoid constructively fraudulent transfers under the UFTA are substantially similar to section 548(a)(1)(B) of the Bankruptcy Code, but allow trustees to recover transfers made up to four years before the petition date.

7 See 11 U.S.C. § 548(a)(1)(B)(i-ii).

8 Sierra Investments, LLC v. SHC, Inc. (In re SHC, Inc.), 329 B.R. 438, 445-46 (citing Mfrs. Hanover Trust Co., 661 F.2d 979, 991 (2d Cir. 1981) for proposition that "discharging or securing an antecedent debt of substantially equivalent value does not give creditors a basis for a fraudulent conveyance action")); In re Aphton Corp., 423 B.R. 76, 89-90 (Bankr. D. Del. 2010) (noting that "Courts have held that when a transfer is made to pay an antecedent debt, the transfer may not be set aside as constructively fraudulent" and citing the following examples: In re APF Co., 308 B.R. 183 (Bankr.D.Del.2004) (Trustee could not state § 548 constructive fraud claim because "the payments made on the promissory note were made for value, satisfaction of an antecedent debt"); In re Rosen Auto Leasing, Inc., 346 B.R. 798 (8th Cir.BAP2006); In re First Alliance Mortgage Co., 298 B.R. 652 (C.D.Cal.2003); Atlanta Shipping Corp. v. Chemical Bank, 818 F.2d 240, 249 (2d Cir.1987) ("In general, repayment of an antecedent debt constitutes fair consideration unless the transferee is an officer, director or major shareholder of the transfer.").

9 Baldi v. Samuel Son & Co., Ltd., 548 F.3d 579, 583 (7th Cir. 2008).

10 In re EBC I, Inc., 380 B.R. 348, 357-58 (Bankr. D. Del. 2008) (examining good will and intangibles in valuation of internet retailer).

11 Baldi, 548 F.3d at 583.

or no profits or earnings; and (4) the source of payments made by the debtor to investors was from cash paid by new investors.[12] As a result of the structure of the venture, Ponzi schemes are immediately insolvent and used solely to defraud investors for the sake of the Ponzi beneficiary, typically its founder, like Charles Ponzi, Bernie Madoff, and Robert Allen Stanford.

Ponzi Schemes: The Fraud Presumption

A court order finding that a debtor operated a Ponzi scheme can dramatically affect avoidance litigation. The root of every Ponzi scheme is fraud. A debtor operating a Ponzi scheme generally has one goal: fleece investors for as much money as possible. The lack of legitimate business operations evidences the debtor's intent to defraud its investor creditors. Transfers made by the debtor in furtherance of the Ponzi scheme are, therefore, made to hinder, delay, or defraud investors.

Accordingly, when a court rules that a debtor operated a Ponzi scheme, it presumes that every transfer made in furtherance of the scheme was "actually fraudulent."[13] That presumption relieves the trustee of its otherwise burdensome duty of proving badges of fraud specific to each individual transfer in each individual avoidance action.[14] In a Ponzi case with hundreds to thousands of fraudulent transfer actions and potentially millions of transfers, that presumption could save the trustee millions of dollars in legal fees, costs, and expenses.

In many Ponzi scheme cases, like the Madoff and Stanford cases, there is little dispute about the existence of a Ponzi scheme. As a result, the fraud presumption expedites fraudulent transfer litigation, and defendants rarely try whether transfers were made with actual intent to hinder delay or defraud creditors. In other cases, however, creditors may challenge a trustee's claim that the debtor operated a Ponzi scheme. A successful challenge precludes the fraud presumption and holds the trustee to its burdens of proof. Thus, in close cases, creditors are incentivized to challenge whether a Ponzi scheme existed.

Ponzi Schemes: Transferee's Affirmative Defense

If a trustee proves the existence of a Ponzi scheme and the fraud presumption applies, the trustee has satisfied its case in chief to avoid and recover actually fraudulent transfers. As a result, the burden shifts to the defendant to prove its affirmative defenses. In order to defeat the trustee's efforts to claw back the allegedly fraudulent transfers, the defendant must prove that it received the transfers (1) in good faith and (2) for value.[15]

Litigating Good Faith

In many cases, like those in the Stanford bankruptcy case, the trustee will stipulate that the defendant received transfers in good faith. Doing so further isolates issues for trial, expedites the pre-trial process, shortens trial and, as a result, reduces the costs of litigation. In other cases, however, the defendant will have to establish each element of its defense.

The term "good faith" is not defined in the Bankruptcy Code. The majority of courts, however, apply a two part test to determine whether a transferee received a transfer in good faith. As noted by the Fifth Circuit:

> The first question typically posed is whether the transferee had information that put it on inquiry notice that the transferor was insolvent or that the transfer might be made with a fraudulent purpose. While the cases frequently cite either fraud or insolvency, these two elements are consistently identified as the triggers for inquiry notice. The fraud or insolvency predicate is set forth in countless cases....
>
> ... The weight of the authority ... indicates that a court should focus on the circumstances specific to the transfer at issue—that is, whether a transferee reasonably should have known ... of the fraudulent intent underlying the transfer.
>
> Once a transferee has been put on inquiry notice of either the transferor's possible insolvency or of the possibly fraudulent purpose of the transfer, the transferee must satisfy a "diligent investigation" requirement.[16]

Unless there are red flags indicating that the debtor was insolvent or operating a fraudulent scheme at the time of the transfers, most defendants should be able to satisfy the good faith element of their defense under section 548(c) of the Bankruptcy Code.

Litigating Value: The Old Standard

Unlike the term good faith, value is actually defined in the Bankruptcy Code and in the UFTA. Section 548(d) states that "value means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor."[17] As the Fifth Circuit previously noted, Section 548(c):

> provides a means by which the unwitting [transferee] can protect himself. Received property can be retained "to the extent" that the "transferee ... gave value to the debtor." The provision looks at value from the perspective of the transferee: How much did the transferee "give"? The concern here, quite properly, is for the transferee's side of the exchange, not the transferor's gain.[18]

For years, transferees thus had a low burden of proof to

12 See, e.g., In re Pearlman, 440 B.R. 900 (Bankr. M.D. Fla. 2010).

13 Picard v. Estate of Stanley Chais (In re Bernard L. Madoff Investment Securities LLC), 445 B.R. 206, 220 (Bankr. S.D.N.Y. 2011) (acknowledging that courts widely recognize "that the existence of a Ponzi scheme establishes that transfers were made with the intent to hinder, delay and defraud.").

14 Id

15 11 U.S.C. § 548(c).

16 In re American Housing Found., 544 F. Appx. 516, 520 (5th Cir. 2013) (citing Christian Bros. High Sch. Endowment v. Bayou No Leverage Fund, LLC (In re Bayou Grp., LLC) (Bayou IV), 439 B.R. 284, 310–12 (S.D.N.Y.2010)).

17 11 U.S.C. § 548(d)(2)(A).

18 Jimmy Swaggart Ministries v. Hayes, Jr. (In re Hannover Corp.), 310 F.3d 796, 802 (5th Cir. 2002). Defenses under the UFTA are similar to § 548(c).

establish the value prong of their defense. Did they provide something in exchange for the transfer received? If the answer was yes from the transferee's perspective, regardless of its eventual value to the debtor, the transferee satisfied its burden of proof.

That standard dramatically changed this year with the Fifth Circuit's strict interpretation of "value" in The Golf Channel case.[19]

The Golf Channel Decision – Potential Disaster for Trade Creditors

Setting the Stage at the District Court. The Golf Channel decision arose from the Stanford Ponzi scheme receivership. The Stanford trustee, Ralph Janvey, sued The Golf Channel to avoid and recover approximately $5.9 million paid to The Golf Channel over a two year period prior to the bankruptcy case. In exchange for payment, The Golf Channel provided an extensive advertising package to Stanford in conjunction with its coverage of the Stanford St. Jude's Championship PGA Tour golf tournament in Memphis, Tennessee. The parties to the fraudulent transfer suit agreed that The Golf Channel satisfied all of its advertising and coverage obligations. The parties also agreed that $5.9 million was the market value of the services provided by The Golf Channel.

Even so, the trustee argued that the Ponzi presumption applicable in the Stanford case proved that the payments to The Golf Channel were made with the actual intent to hinder, delay, and defraud creditors. According to the Trustee, by advertising the Stanford Ponzi scheme, The Golf Channel actually helped further implement the scheme to the detriment of creditors.

The Golf Channel did not dispute the existence of the Ponzi scheme or the application of the Ponzi presumption of fraud. Instead, The Golf Channel asserted its affirmative defense under section 548(c) and argued that it accepted the payments in good faith and for value. While the trustee agreed that The Golf Channel accepted the funds in good faith, it argued that, as a matter of law, The Golf Channel could not have provided any value because its advertising damaged creditors by extending the life and scope of the Ponzi scheme.

At a hearing on the parties' motions for summary judgment, the District Court reviewed the value provided from The Golf Channel's perspective in accordance with the Jimmy Swaggart standard. According to the District Court, "[The] Golf Channel look[ed] more like an innocent trade creditor than a salesman perpetrating and extending the Stanford Ponzi scheme."[20] As the District Court reasoned, The Golf Channel had no knowledge that Stanford was operating a Ponzi scheme, and provided Stanford with reasonably equivalent value in an arm's length transaction in the ordinary course of its business.[21] The District Court then expressly rejected the trustee's argument that no recipient could provide value to a Ponzi scheme, and noted that if the trustee's "nonsense" position was enforced, he "would have a fraudulent transfer claim against the power company for the electricity Stanford used and against the water company for the [water that was] used" even though they provided value in the form of electricity and water.[22] The trustee was not, however, satisfied by the District Court's analysis and appealed the decision to the Fifth Circuit.

The Fifth Circuit's Decision. On appeal, the Fifth Circuit disagreed with the District Court, rejected its Jimmy Swaggart standard, and ruled against The Golf Channel. In its decision, the Fifth Circuit analyzed the public policy behind the Uniform Fraudulent Transfer Act and noted that the statute's purpose is to "protect creditors against depletion of the debtor's estate." [23]The court found support for its interpretation in comments to the Uniform Fraudulent Transfer Act, which noted that "[c]onsideration having no utility from a creditor's viewpoint does not satisfy the statutory definition" of value.[24] Taking the commentary to heart, the Fifth Circuit then, for the first time, examined the "value" provided by The Golf Channel from the creditors' perspective.

Applying that perspective, the court reasoned:

> While Golf Channel's services may have been quite valuable to the creditors of a legitimate business, they have no value to the creditors of a Ponzi scheme. Ponzi schemes by definition create greater liabilities than assets with each subsequent transaction. Each new investment in the Stanford Ponzi scheme decreased the value of the estate by creating a new liability that the insolvent business could never legitimately repay.[25]

As a result, creditors that legitimately provided goods or services that allowed the Ponzi to continue or to expand could not have, by law, provided value to the debtor from the creditors' perspective.

While the logic of that reasoning is understandable, the effects are severe. Substantially every service provider that was paid by a Ponzi debtor during the four years prior to the petition date would be subject to an indefensible fraudulent transfer suit for every dollar it received. For example, caterers, janitors, office supplies providers, IT service providers, and almost all other trade creditors necessary to maintain even a façade of an operating entity would be exposed to suit for every cent paid to them, regardless of whether those creditors had any knowledge of the Ponzi scheme, and despite the court's acknowledgement that they were paid the market value of the goods and services provided. The enforcement of that reasoning against many trade creditors could precipitate a flood of additional bankruptcy filings as they are forced to disgorge years of earnings.

Conclusion

In summary, trade creditors typically have viable defenses against fraudulent transfer claims filed by bankruptcy trustees. In most cases, trustees will be forced to prove

19 See Janvey v The Golf Channel Inc., 760 F.3d 641 (5th Cir. March 11, 2015).

20 Janvey v. TGC LLC, Case No. 3:11-CV-0294 (N.D. Tex. Nov. 5, 2013) (Docket No. 93).

21 Id.

22 Id.

23 The Golf Channel, 760 F.3d at 644-45.

24 Id. at 645.

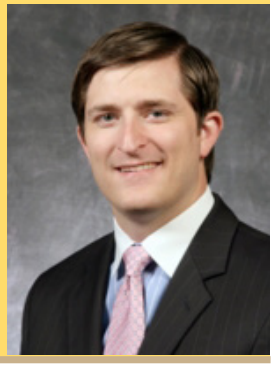
25 Id. at 646.

burdensome elements of their claims on a transfer-by-transfer basis. The costs and time associated with such cases serve as a deterrent to trial and promote settlement. In Ponzi cases, however, trade creditors may face an uphill battle against a stacked deck. Trustee's costly burdens are removed by the Ponzi presumption of fraudulent intent. As a result, defendants are left to litigate only their affirmative defenses. Unfortunately, the Fifth Circuit's decision in The Golf Channel case appears to have eviscerated the good faith and value defense, and exposed trade creditors to liability for all payments received from a Ponzi during the four years prior to the petition date. While the authors agree with the District Court's opinion that such a position is "nonsense," the Fifth Circuit's opinion controls. Trade creditors may, therefore, wish to closely investigate potential clients as the Fifth Circuit implements its "seller beware" reasoning.

About the Authors:

Mr. Coleman is a founding director of Kane Russell Coleman and Logan PC, where he chairs the Insolvency, Bankruptcy and Creditor Rights practice group. His team has represented 38 Creditor Committees in 16 states together with every other facet of credit rights and bankruptcy representation. His firm was recently named among the top 20 mid-sized law firms in the nation by The National Law Journal."

Mr. Kane is an associate attorney at Kane Russell Coleman & Logan PC, where he practices in the firm's nationally recognized Insolvency, Bankruptcy, and Creditor Rights practice group. Mr. Kane was designated as a Rising Star by Thomson Reuters in each of the past two years, a designation given to lawyers under 40 who are viewed by their colleagues as preeminent in their respective practice areas.



CRF Platinum Partner Lineup for 2015

The Credit Research Foundation is very fortunate to receive support from a number of "benefactors." As many of you are aware, the largest group and most substantial of which is our **Platinum Partners**. Their contributions and collaborative and demonstrative efforts across a number of fronts allow the Foundation to conduct and maintain its activities at the level in which you, our members, have become accustomed – and for that, we are again extremely grateful to them.

In 2015, we again say 'thank you' to this unique group as they step forward to enable our programs. We are happy to advise that the fifteen (15) firms listed in alphabetical order directly below will continue as **Platinum Partners** of the Credit Research Foundation.

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NCS
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(While these firms and the services they provide are very familiar to our members, you can learn more about our current Platinum Partners by clicking HERE).

We are equally thrilled to announce the addition of three (3) respected organizations to the **Platinum Partner Program**. These firms have been very interested in supporting CRF at this level for a number of years and are now officially part of the program. Each brings a history of support and quality product/service offerings to the credit and receivable management community, and we are proud to formally welcome and highlight them.

They are:

Credit & Management Systems (CMS): Credit & Management Systems, Inc. (CMS) has been a leading provider of software systems for credit management and accounts receivable collections. They have been a long time and well respected member of CRF, and John Sargent is well known to many in our community.

International Credit and Trade Finance Association (ICTF): As an independent, not-for-profit, member-led association, ICTF will provide CRF members with greater resource capabilities, insight and expertise in international credit and trade finance. We are pleased to welcome Aneta Spilman and her team.

F&D Reports: F&D Reports provides specific credit consulting services and insights on an array of credit and receivable management topics. F&D Reports monitors publicly & privately held companies across a number of industry verticals, and its product and service offerings are highly valued by the community. Kevin Slack and F&D are well known to many of our members.

We thank each of these firms for their support and look forward to highlighting their importance to us as we proceed throughout calendar 2015!

CRF-Sponsored Webinars Continue To Draw Many Viewers

One of the missions of the Credit Research Foundation is to deliver continuing education via multiple means on a variety of topics important to the Credit and A/R community.

During the past several months, CRF has either directly sponsored or made available a host of **complimentary** webinars covering a variety of topics — best practices, payment channel alternatives, shared services — sponsored by our industry partners and other members of the community, attracting large audiences of between 300 and 1000 viewers.

Watch your email for news about more webinars on relevant and trending topics that will be offered **free of charge** in the coming months.

CRF's Financial Training Initiatives Are Multi-dimensional

Education and training are essential programs the Credit Research Foundation provides for its members and the entire credit community. In that regard, CRF is fortunate to have developed what is now a 15-year relationship with Steve Isberg – PhD in Finance and Economics, and an associate professor for the past 27 years at the Merrick School of Business, University of Baltimore. Steve serves as CRF Sr. Research Fellow, designing and instructing three CRFOnline Classroom™ courses on financial analysis — CRF 101: Financial Statement Analysis; CRF 102: Financial Ratio Analysis (newly refreshed with new case studies); and CRF 103: Diagnostic Cash Flow. In addition to his online classroom contributions, he has conducted face-to-face training sessions at CRF member companies, as well as boutique offerings at CRF Forums.

Most recently, Mr. Isberg launched a hybrid online and face-to-face training program for 20 students at a CRF member company. The program involves students taking an online component of training to prepare them for his face-to-face session at the company location. Subsequent to that, the students will finish their program with a final complement of online learning sessions. As with CRFOnline Classroom™ course training, the students who successfully complete this hybrid program will earn a framed CRF Certificate of Professional Development. "It is unique in that it provides an interesting combination of the online and face-to-face experiences making it more personal and valuable to the students of the participating company," Mr. Isberg said.

Mr. Isberg also tailors his face-to-face training to the specific needs of the companies and industry trade groups who seek his educational expertise. His most recent of these training sessions occurred in Memphis, TN in May 2015 for a distiller's national trade group addressing the issue of Cash Flow Analysis. He also conducted one in June in Baltimore, MD before a pharmacy trade group that included a Customer Industry Analysis.

CRF ONLINE COURSE WORK — Steve Isberg, CRF Sr. Research Fellow, works on one of the financial courses that he has developed for CRFOnline Classroom™. In addition to his online courses, he also delivers in-person classroom training, as well as hybrid online and in-person training.

Photo by Tom Diana

Mr. Isberg is also currently busy preparing a presentation to be given at the CRF Forum in Ft. Lauderdale, FL, October 19 – 21, 2015. It is a collaborative research initiative which CRF believes will have a series of outputs significant to CRF members.

Mr. Isberg enjoys the opportunity to design financial training sessions to meet the particular needs of various industries. It helps him to expand his range of knowledge. "It gets me out of the classroom and into the business-to-business environment at the ground level. It provides me some unique views on how business is done on a strategic and day-to-day basis," he said. "The benefit is I can blend my teaching and professional experiences together for a more enriched classroom experience."

Working on educational programs for CRF is something that Mr. Isberg looks forward to, despite his busy university teaching schedule. "This is something I really value," he said. Should a CRF member be interested in such programs or wish to learn more of what can be done to enrich their team's training, Steve can be reached at stevei@crfonline.org.

Long-term success in business has always been about more than just who you know and what you do. It is dependent on what you do with your customers, prospects, suppliers and partners to help them succeed.

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GROWING RELATIONSHIPS THROUGH DATA

Neither a Borrower Nor a Lender be …[1]

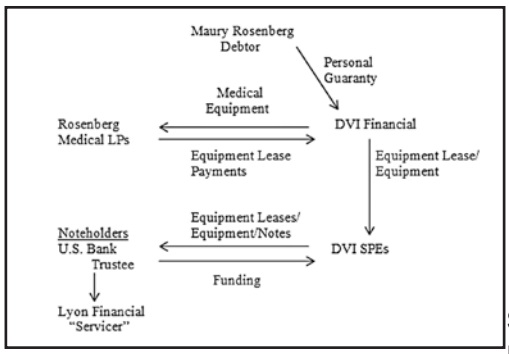
By David H. Conaway, Shumaker, Loop & Kendrick, LLP

1 … for loan oft loses both itself and friend. Polonius to his son Laertes in Shakespeare's Hamlet.

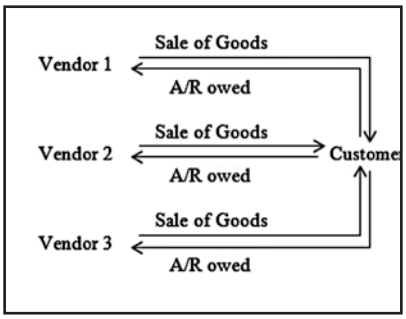
Many lawyers have written articles about a February 27, 2015 U.S. Court of Appeals (11th Circuit) ruling (In re *Maury Rosenberg*) against petitioning creditors of an involuntary Chapter 7 proceeding.

Introduction

Creditors owed over $5 million filed an involuntary bankruptcy petition against Maury Rosenberg, a Philadelphia businessman who ran a group of radiology screening centers. As reported by Law360 (an online publication), not only did Rosenberg get the petition dismissed, he obtained a judgment of over $1 million against the petitioning creditors for costs and attorneys' fees as well as compensatory and punitive damages of $360,000, based on a complaint he filed against U.S. Bank and others for $50 million over the "bad faith" involuntary filing.



Not surprisingly, the articles written cite the *Rosenberg* case as a cautionary tale for creditors contemplating the filing of an involuntary petition under Section 303 of the U.S. Bankruptcy Code. Yet, a deeper dive into the facts of the case indicates it was a flawed filing from the get-go.



Background

The Rosenberg case was based on asset-backed securitization transactions in 2000 gone wrong. Maury Rosenberg's affiliated limited partnerships (the "Rosenberg LPs") entered into equipment leases with DVI Financial Services, Inc. (itself a Chapter 11 debtor), for a $27 million financing of the acquisition of medical equipment. DVI Financial bought the equipment, leased it to the Rosenberg LPs, which made lease payments to DVI. As a security, Rosenberg signed a personal guaranty to DVI.

As part of various asset securitization transactions, DVI Financial transferred the leases and equipment to various DVI SPE's (special purpose entities), who obtained loans from and issued notes to various lenders, for whom the agent was U.S. Bank. Lyon Financial Services, Inc. became the "loan servicer" for U.S. Bank and the noteholders.

In 2003, the Rosenberg LPs defaulted on the equipment leases, Lyon filed suit in state court, and in 2005 the parties restructured the debts. Lyon signed the settlement agreement, not any of the DVI entities. As part of the settlement, Maury Rosenberg issued a superseding $7.7 million guaranty to "the Agent", defined as "Lyon Financial Services, Inc. d/b/a U.S. Bank Portfolio Services as successor servicer for the DVI Entities …."

In 2008, the Rosenberg LPs defaulted on the restructured obligations, and Lyon obtained a judgment against the Rosenberg LPs and on the Guaranty in the amount of $4.7 million.

Later in 2008, Lyon's Director of Operations, **on behalf of the DVI Entities**, signed and filed an involuntary Chapter 7 petition against Maury Rosenberg in Pennsylvania. The petitioning creditors were listed as the DVI entities, whose claims totaled about $5.4 million. The involuntary Chapter 7 petition was transferred to the Southern District of Florida, where Rosenberg was a resident.

Lyon's Director of Operations signed and filed the involuntary petition in name of the DVI entities, without the DVI Entities' knowledge and without obtaining their authorization for the filing.

In 2009, the Bankruptcy Court granted Maury Rosenberg's motion to dismiss the involuntary petition because, among other reasons:

- The DVI Entities were not creditors of Rosenberg … the guaranty was in favor of Lyon.
- The DVI Entities were not "real parties in interest", rather they were "pass through" entities to facilitate the asset securitization transactions.
- A demand for payment was not made on Rosenberg.

Initially, Rosenberg won trial verdicts of $1.1 million for costs and attorneys' fees, and for compensatory and punitive damages in the amount of $6.1 million. The trial judge later reduced the $6.1 million award to $360,000. As for the $1.1 million of costs and attorneys' fees, the 11th Circuit generally upheld the award of attorneys' fees but remanded the case to District Court (still pending) with the implication being the amount of the reward could be reduced.

Takeaways and remaining questions

- This case is not about the inherent risk of three creditors filing an involuntary petition. Rather, it illustrates how asset based securitization transactions can obscure who owns the claims against a debtor and thus who has the right and authority to file an involuntary petition.

  Consider a "normal" vendor-customer transaction.

  When creditors are suppliers to a customer, there is normally little risk of a dismissal of an involuntary filing on the basis that such creditors do not have authority to file the petition, which was the case in the Rosenberg dismissal. In any Section 303 involuntary petition, creditors must establish that (1) 3 or more creditors have claims against the debtor in the aggregate over $15,325 (in 2015), (2) the claims are not contingent as to liability, (3) the claims are not subject to a bona fide dispute, and (4) the target debtor is not paying its debts generally as they come due.

  Some of the unresolved issues in the case include:

- What will Rosenberg ultimately recover on the attorneys' fee claim? How much has he spent in legal fees since 2003?
- How much has U.S. Bank, et al recovered on the original $27 million financing?
- How much has U.S. Bank spent on legal fees?

Despite the Rosenberg ruling, an involuntary petition remains a viable remedy for creditors in appropriate circumstances. With all legal action, an involuntary petition should be pursued carefully, in compliance with the clear requirements of Section 303, and with a sound strategy for recovery for unsecured creditors.

We hope you found this useful and informative. Please contact us if you have any questions about this, or any other matter.

David H. Conaway's *principal areas of practice are bankruptcy (primarily Chapter 11 proceedings), non-bankruptcy insolvencies or restructurings, workouts, commercial transactions, and international transactions, disputes and insolvencies.*

dconaway@slk-law.com

Vendor Forum of the Remittance Coalition to Meet at the CRF Forum & EXPO in Seattle in August

The **Remittance Coalition** is a volunteer, industry-driven coalition of more than 350 individuals dedicated to enhancing the process of B2B transactions to make them more automated and efficient. In late 2013, the **Vendor Forum** was created as a workgroup of the Coalition to help members partner with software vendors to encourage the adoption of standards related to remittance and payments processing.

The goal of the Forum is to provide a venue in which AR & AP solution providers can:

- Learn about the benefits of adopting key standards (existing & emerging) that facilitate use of e-payments, e-remittance information exchange & straight-through-processing (STP)
- Strategize on how to mitigate barriers to adoption of these standards
- Identify ways to improve interoperability among existing services & systems offered by these vendors
- Support efforts to reduce the variation in how standards are implemented in order to enable STP

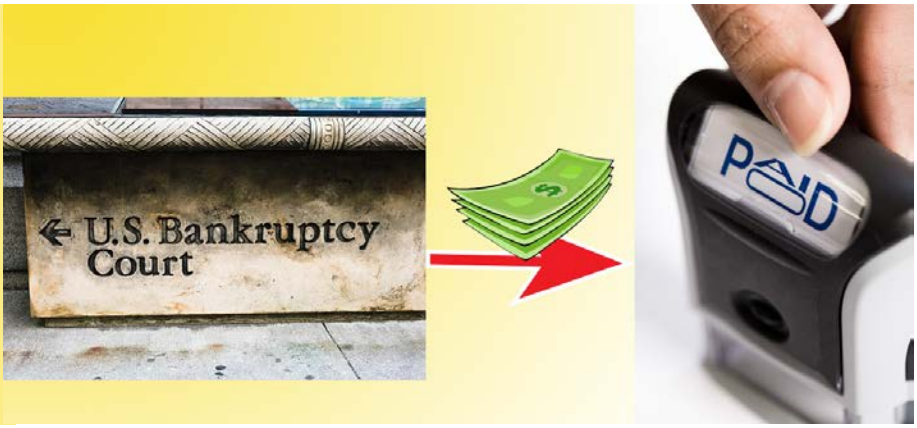
Forum at the Forum - The Vendor Forum, a subgroup of the Remittance Coalition, meeting at the CRF Forum & EXPO in Denver, August 2014. The Vendor Forum will meet again at the CRF Forum & EXPO in Seattle, Aug. 10-12, 2015. *Photo by Tom Diana*

The Vendor Forum meets at least three times per year, including an in-person meeting that takes place in conjunction with CRF's August Forum & EXPO. In addition, a Subcommittee of the Vendor Forum has been formed to focus on issues related to AP & AR in order to discern the drivers and incentives of payment standards adoption.

For more information on the Remittance Coalition or Vendor Forum, please contact Katy Jacob at the Federal Reserve Bank of Minneapolis: remittance.coalition.smb@mpls.frb.org or 612-204-6550.

Protecting Your Interests When a Debtor Is Heading Into Bankruptcy

by Edward E. Neiger
&
Alex Govze



You start hearing rumors that your customer is in financial trouble and may be heading toward bankruptcy. You want to continue working with the customer but you also need to minimize your potential exposure. Certain steps should be taken both before and after a bankruptcy filing in order limit your exposure to bankruptcy claims and to maximize your recovery on claims against the Debtor while balancing the business relationship with the debtor.[1]

Getting Paid On Outstanding Debts After A Bankruptcy Filing

Upon the debtor's filing of a bankruptcy petition, an "automatic stay" arises pursuant to which creditors are not allowed to take action to collect on outstanding debts.[2] Violation of the automatic stay can result in liability, including for actual damages, attorney's fees and in some situations punitive damages.[3] The automatic stay can be lifted by the bankruptcy court if there is appropriate cause under the circumstances of the case.[4]

In order to maximize the likelihood of getting paid on outstanding debts, an appropriate claim must be filed in the debtor's bankruptcy. Claims are paid based on the assets of the estate relative to total debts with certain types of claims getting paid ahead of others.[5]

-Reclamation Claims- If you deliver goods to an insolvent debtor who received them within 45 days before the bankruptcy filing and do not receive payment, you may send a written demand for the return of the goods.[6] The demand, also known as a "reclamation claim," must be made within 45 days of the debtor's receipt of the goods or, if the 45-day period expires after the bankruptcy filing date, the demand must be made within 20 days of the bankruptcy filing date.[7] Reclamation claims are only effective for goods that are in the debtor's possession and are subject to the rights of secured creditors.

-503(b)(9) Claims- If you deliver goods to a debtor in the ordinary course of business and the debtor receives them within 20 days before the date of the bankruptcy filing and you do not receive payment, you may be entitled to a priority claim from the bankruptcy estate.[8] Filing an appropriate claim in a timely manner is crucial to ensuring appropriate treatment of the debt.

-Assumed Contracts- Prepetition debts can be paid in full if you have a contract with the debtor which the debtor chooses to "assume"[9], or in other words chooses to continue receiving the benefit of the contract. In order to be assumed the contract must have obligations owing by both parties to the contract.[10] The debtor must satisfy any outstanding debts under the contract to assume, thus creditors to such assumed contracts must get paid in full for any debts arising under the contract.[11]

-Critical Vendor- If you are deemed to be an essential supplier to a debtor's operations, a court may issue a critical vendor order permitting a debtor to make post-petition payments on account of pre-petition debts.[12] In order to receive payment under a critical vendor order, vendors typically have to agree to continue supplying goods to the debtor post-petition.[13] Negotiating terms going forward can help maximize the amount paid pursuant to a critical vendor order.

-Serving On A Creditors Committee- In a Chapter 11 case, a committee of unsecured creditors is often formed by the United States Trustee to help protect the rights of all

1 This article is intended to bring to light some of the more common issues facing unsecured creditors when a debtor files for bankruptcy. This article is provided for informational purposes only and does not constitute legal advice or a legal opinion. The publication of this article is not intended to create, and the receipt of the same does not constitute, an attorney-client relationship. You should not act or rely upon any information in this article without first seeking the advice of an attorney.

2 11 U.S.C. § 362(a).

3 11 U.S.C § 362(k).

4 11 U.S.C. § 362(d); In re Siciliano, 167 B.R. 999, 1009-1010 (Bankr. E.D. Pa. 1994).

5 See 11 U.S.C. § 507.

6 11 U.S.C. § 546(c).

7 Id.

8 11 U.S.C. § 503(b)(9).

9 11 U.S.C. § 365.

10 Matters of Crippin, 877 F.2d 594, 596 (1989) ("Contract is executory for bankruptcy purposes where the 'obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure to complete performance would be a material breach excusing the performance of the other."); quoting In re Chicago, Rock Island & Pacific R. Co., 604 F.2d 1002, 1004 (7th Cir. 1979); Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn.L.Rev. 439, 456 (1973).

11 11 U.S.C. § 365(b); In re Pacific Exp., Inc., 780 F.2d 1482, 1486 (9th Cir. 1986); In re Valley View Shopping Center, L.P., 260 B.R. 10, 24 (Bankr. D.Kan. 2001).

12 See In re Kmart Corp., 359 F.3d 866 (7th Cir. 2004); In re Startec Global Communications Corp., 300 B.R. 244 (D.Md. 2003)

13 See Giuliano v. Almond Investment Company (In re Carolina Fluid Handling Intermediate Holding Corp.), 467 B.R. 743, 755-56 (D.Del. 2012).

unsecured creditors.[14] The creditors committee typically consists of the largest unsecured claim holders.[15] The creditors committee serves several functions including investigating the debtor's financial condition, review of the debtor's business affairs, and participation in the formation of the debtor's bankruptcy plan.[16] Serving on a creditors committee can help ensure that unsecured creditors are treated fairly and can help maximize recovery to unsecured creditors.

Limiting Preference Exposure

Although potential preference exposure often times is ignored prior to a bankruptcy filing, this is the time when steps to minimize exposure can be most effective. Any payment received from an insolvent debtor on account of a pre-existing debt during the 90 days prior to the bankruptcy petition date could be recovered for the benefit of the debtor's bankruptcy estate.[17] Several steps can be taken to minimize preference exposure.

-Require payment in advance- If payments are made in advance, they are not on account of antecedent debt, and as a result, the trustee will not be able to satisfy this element of its claim.[18]

-Require COD terms- If the parties agree to contemporaneously exchange goods and/or services for payment and they in fact do contemporaneously exchange goods and/or services for payment, the payment will be protected by the "contemporaneous exchange for new value defense."[19] The main component of this defense is that the parties intend to have a contemporaneous exchange.[20] The exchange must also be made substantially contemporaneously, however courts have allowed some gap between payment and goods/services being provided where there is a justified delay based on the facts of the case.[21]

-Continue performing as before- While there may be a temptation to apply pressure to collect on any outstanding invoices, the upside of not doing this and allowing the debtor to continue paying as it has historically is that it may give rise to an ordinary course of business defense with regard to the payments that you do receive.[22] Payments made in conformity with the parties' historical practices and on account of debts incurred in conformity with the parties' historical practices can qualify for the ordinary course of business defense.[23] Several factors are looked at in assessing this defense, including the length of time the parties were engaged in the transactions at issue, whether the amount or form of tender differed from past practices, whether the debtor or creditor engaged in any unusual collection or payment activity and whether the creditor took advantage of the debtor's deteriorating financial condition[24] but the timing of payment is often times the most important factor.[25] It is important to note that changing terms or taking other action to fall into one of the other defenses described herein may have a negative impact on a potential ordinary course of business defense, thus careful consideration and consulting with an attorney may be required to obtain best results.

Continuing To Work With A Debtor Post-Petition

If a debtor continues operating after a bankruptcy filing it will likely want to continue buying goods and/or services from creditors it worked with pre-petition. Goods and services provided to a debtor in bankruptcy are typically considered an administrative expense, as long as they are actual and necessary to preserving the estate.[26] Administrative expenses are given high priority when claims against the estate are paid.[27] Diligence should be exercised to increase the likelihood of getting paid for goods and services provided to a debtor post-petition including filing appropriate claims and monitoring the debtor's financial condition.

Conclusion

An appropriate course of action should be laid out as early as possible to help minimize potential preference exposure and to maximize recovery on outstanding debts when dealing with a debtor that may be headed to bankruptcy. The specific course of action will of course depend on the unique facts of each debtor-creditor relationship, but in all instances proactivity, diligence and prudent legal advice should be applied to obtain best results.

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14 11 U.S.C. § 1102(a).
15 11 U.S.C. § 1102(b)(1).
16 11 U.S.C. § 1103.
17 See 11 U.S.C. § 547(b).
18 11 U.S.C. § 547(b)(2).
19 11 U.S.C. § 547(c)(1); Matter of Anderson-Smith & Assoc., Inc., 188 B.R. 679, 687 (Bankr. N.D.Ala. 1995); Creditors' Committee v. Spada (In re Spada), 903 F.2d 971, 974-75 (3rd Cir. 1990).
20 Matter of Prescott, 805 F.2d 719, 727-28 (7th Cir. 1986) citing In re Wadsworth Building Components, 711 F.2d 122, 124 (9th Cir. 1983); In re Chemical Separations Corp., 38 B.R. 890, 897 (Bankr. E.D.Tenn. 1984).
21 See Dorholt v. Linquist (In re Dorholt, Inc.), 239 B.R. 521 (B.A.P. 8th Cir. 1999) (Eighth Circuit B.A.P. held that security interest in personal property perfected 16 days after transfer of the interest is substantially contemporaneous.); Miller v. Bodek & Rhodes, Inc. et al. (In re Adelphia Automatic Sprinkler Co.), 184 B.R. 224, 227-28 (E.D. Pa. 1995) (25 day delay between check being honored and lease extension signing did not preclude contemporaneous exchange defense).
22 11 U.S.C. § 547(c)(2).
23 Id.
24 Sulmeyer v. Pacific Suzuki (In re Grand Chevrolet, Inc.), 25 F.3d 728, 733 (9th Cir. 1994); In re Richardson, 94 B.R. 56, 60 (E.D. Pa. 1988).
25 Concast Canada, Inc. v. Laclede Steel Co. (In re Laclede Steel Co.), 271 B.R. 127, 132 (8th Cir. B.A.P. 2002)
26 11 U.S.C. § 503(b)(1);
27 11 U.S.C. 507(a)(2).

U.S. Macro Outlook: The Slowdown Is Over

Preconditions will soon be in place for the Fed to begin raising short-term rates.

Analysis By Mark Zandi
Moody's Analytics

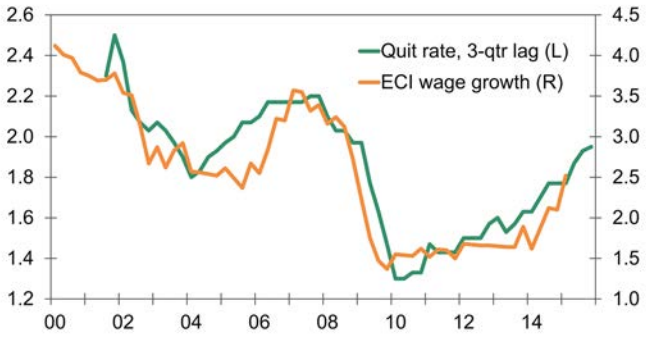
It has been a tough start to the year for the U.S. economy. Real GDP appears to have declined in the first quarter (after revisions), and job growth has slowed.

However, the slowdown is over. Ill effects of the unusually tough winter have faded. So, too, will the fallout from the West Coast port strike and the nosedive of oil prices on the energy industry. The economic sting from the stronger value of the U.S. dollar and soft global economy will take longer to shake off, but this also should soon be less painful.

Despite the slowdown, the job market continues to tighten. Unemployment and underemployment are substantial, with slack at just over 1% of the labor force. But even at the recently slower pace of job growth this slack will be absorbed by fall 2016. And job growth is expected to pick up in coming months.

The tightening job market is finally prompting stronger gains in labor compensation. There had been an increasingly perplexing gap between the apparent strength of the job market and pedestrian wage growth. That gap mostly closed in the first quarter with the strong gain in compensation as measured by the comprehensive employment cost index.

Wage Growth Gets Back on Track



Sources: BLS, Moody's Analytics

Wage gains should pick up further as the economy approaches full employment.

Stronger wage growth and recently firmer oil prices have diluted worries about disinflation and even outright deflation. Quickly rising rents, given low and falling rental vacancy rates, are also putting upward pressure on inflation. Core inflation is still uncomfortably low, but it is stable and expected to pick up later this year.

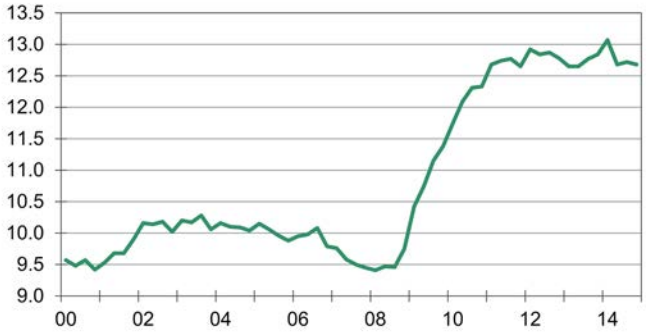
Fed normalization

All the preconditions will soon be in place for the Federal Reserve to begin raising short-term interest rates. This has been a long time coming. The federal funds rate has been pinned effectively near zero since soon after the recession hit in full force at the end of 2008.

While it is a bit of a parlor game among financial market participants to peg the precise date of the first Fed rate hike—the macroeconomic implications of whether this happens this summer, this fall or even late this year isn't particularly important—the most likely timing is with the September Federal Open Market Committee meeting. There ought to be little ambiguity by then that the economy will soon be back to full employment and core inflation back to the Fed's 2% target.

Banks Have Substantially Increased Capital

Commercial banks Tier 1 capital ratio



Sources: FDIC, Moody's Analytics

The rate hikes will likely be slow, at first. Raising short-term rates, with the current surfeit of bank reserves created by its previous quantitative easing efforts, could prove tricky. The Fed has different tools to do this, such as the interest rates on reserves, term deposits, and reverse repurchase agreements, but it has only practiced using them. It will want to make sure all is working well, and also see how financial markets and the economy respond, before raising rates more quickly.

Equilibrium funds rate

Just where the federal funds rate should ultimately end up is the subject of substantial and important debate. The equilibrium funds rate—that rate consistent with the economy operating at full employment and inflation at target—is estimated to be near 3.5%. This equals the sum of 2% inflation and a real funds rate of 1.5%.

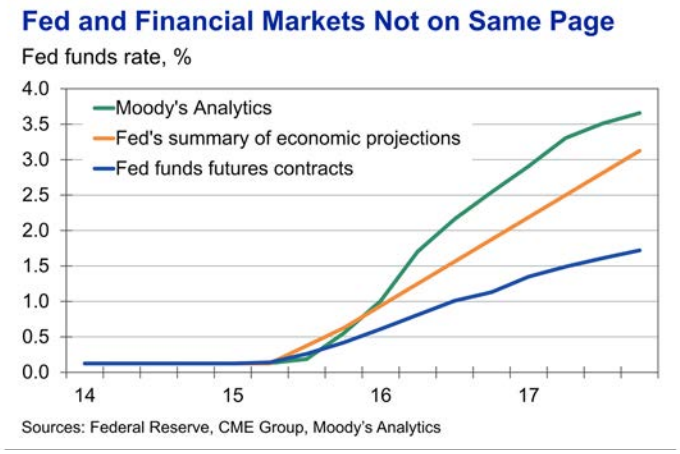
This is lower than the 4% equilibrium funds rate thought to prevail prior to the recession. The inflation target is the same, but the equilibrium real funds rate is lower as the economy's potential growth rate has downshifted. This is principally because of the long-anticipated slowing in labor force growth resulting from the aging of the large baby boom generation into retirement.

The equilibrium real funds rate is also lower as a result of the higher capital levels that financial institutions are required to hold post-crisis.

Systemically important financial institutions had to almost double their capitalizations to ensure they will not be too-big-to-fail problems in the next crisis. But if institutions have to hold more capital, which is a cost to them, they require lower funding costs to get the return necessary if they are to provide the amount of credit needed to finance a healthy economy. Their cost of funds is closely linked to short-term rates and thus the funds rate.

Who's wrong?

How fast policymakers should increase the funds rate from zero to its equilibrium is even more hotly debated. Based on the median expectation of FOMC members, published in their report to Congress, the funds rate is expected to rise to near 3% by the end of their horizon in late 2017. The Moody's Analytics forecast is for the funds rate to be back near its 3.5% equilibrium by then.



Financial market participants have a very different view. The funds rate in late 2017 that is implied in futures for fed funds is barely 1.5%. Investors seemingly believe the economy will grow too slowly and inflation remain too low for the Fed to normalize interest rates as quickly as policymakers think.

Someone is wrong, and if it is the markets, there could be a significant adjustment in long-term interest rates, credit spreads, stock prices, and currency and commodity markets—something akin to the "taper tantrum" that occurred in late 2013 when then-Fed Chairman Ben Bernanke prepared markets for the ending of quantitative easing. The spike in long-term rates at the time hurt the U.S. housing recovery and contributed to the subsequent weakening in growth in those emerging economies dependent on capital inflows.

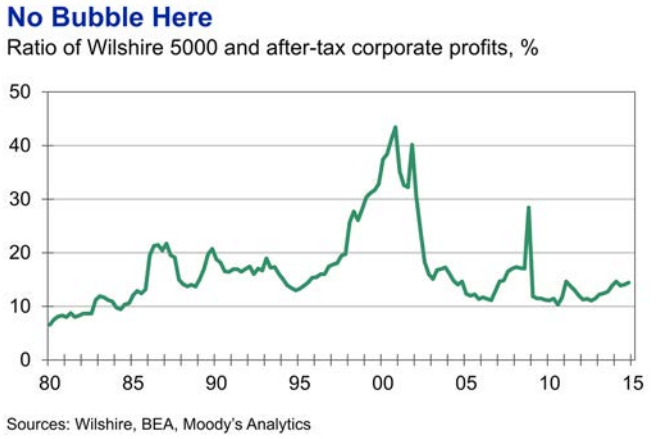
This go-round, the anticipated volatility in financial markets is expected to do less economic damage. The U.S. job market is stronger and emerging market currencies are much lower vis-à-vis the U.S. dollar. But this is arguably the most significant threat to the outlook for stronger U.S. growth this year and next.

Bubble trouble?

The pace of future Fed rate hikes also depends on whether bubbles develop in asset markets. Fed Chair Janet Yellen recently called out high stock market valuations as a potential source of concern. Others are worried about capitalization rates in commercial real estate markets, quickly rising housing prices in various U.S. cities, and thin credit spreads in the bond market.

While a vigilant lookout for asset bubbles is certainly called for given the increase in asset prices, this is far from a macroeconomic threat sufficient to prompt the Fed to increase rates more quickly. Indeed, the higher asset prices are in large part by the Fed's design. Higher asset prices are a key channel through which quantitative easing lifts the economy, as they support stronger consumer spending via the wealth effect and more investment because of a lower cost of capital to businesses.

Moreover, while assets arguably appear richly valued, they don't appear speculative. Traditional measures of valuation in the stock market, such as price-earnings multiples, are only on the high side of fair value.



Credit spreads in both the investment grade and high-yield corporate bond market seem in line with historical experience. Nationwide, house prices are very consistent with household incomes and rents. Commercial real estate looks pricey, but mostly in global gateway cities where global investors are very active and at least partially motivated by a wish to put their capital in a safe place.

The runup in asset values has for the most part not been fueled by increased leverage. Margin debt used to purchase stocks is a bit high, but single-family mortgage debt continues to decline, and loan- to-value ratios on commercial real estate mortgages remain modest. The banking system could also digest much higher loss rates than in times past given its much higher capitalization and liquidity. It is hard to construct a scenario where asset prices

fall sharply enough to take out the financial system and thus the broader economy.

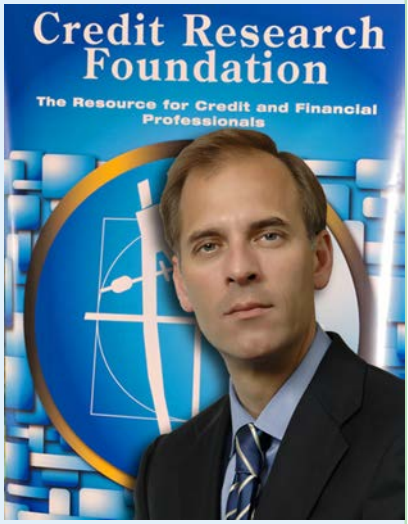
Monetary authorities will continue to use jawboning and macroprudential tools to poke any nascent bubbles, but worries over asset bubbles are unlikely to significantly affect their thinking on the timing and trajectory of future rate hikes.

On script

If anything derails the Fed from normalizing rates in a timely way, it will likely emanate from overseas. There are numerous geopolitical threats that could become realities at any time, undermining confidence and thus growth. Russian belligerence immediately comes to mind, or ISIS- driven terrorism, or even a boiling over of tensions related to Iran's nuclear program and forays against Sunni Arabs across the Middle East.

Renewed appreciation in the value of the U.S. dollar might also impact the conduct of U.S. monetary policy. The surge in the dollar to date is already a heavy weight on U.S. trade and growth, and it could be too much to bear if the dollar appreciates much more any time soon.

Having said this, it would take a lot to significantly alter the Fed's normalization script.



__Mark M. Zandi__ is chief economist of Moody's Analytics, where he directs economic research. Moody's Analytics, a subsidiary of Moody's Corp., is a leading provider of economic research, data and analytical tools.

Dr. Zandi is a co-founder of Economy.com, which Moody's purchased in 2005.

Dr. Zandi conducts regular briefings on the economy for corporate boards, trade associations, and policymakers at all levels. He is often quoted in national and global publications and interviewed by major news media outlets, and is a frequent guest on CNBC, NPR, CNN, Meet the Press, and various other national networks and news programs.

Platinum Partner Perpectives

This section highlights newsworthy events and corporate announcements from CRF's Platinum Partners

GAIN (Gift Associates Interchange Network), a credit group managed by ABC-Amega, recently announced a new branding campaign.

Earlier this month, the GAIN board and steering committee participated in a meeting with members of ABC-Amega's Executive, Credit Services and Marketing teams to review and discuss the group's exciting rebranding initiative. After receiving full support from GAIN leadership, ABC-Amega introduced a new GAIN logo to the group's membership yesterday. The new logo is the first step in the rebranding campaign for GAIN.

In the coming weeks, this new logo will be incorporated onto all of GAIN's marketing materials, including the GAIN website.

Red is the color of fire and is associated with energy, strength, power, determination as well as passion, desire and love. It can stimulate people to make quick decisions; and it is commonly associated with promoting energy drinks, games, cars and items related to physical activity.

Orange combines the energy of red and the happiness of yellow. It represents enthusiasm, happiness, creativity, determination, attraction, success, encouragement and stimulation. Orange is very effective for promoting food products and toys.

The Gift Associates Interchange Network (GAIN) is a member-driven association of more than 200 credit professionals in the giftware, greeting card, home décor, specialty foods, toys and related industries.
GAIN is serviced by ABC-Amega, who has been managing credit interchange groups for over 40 years.

GAIN's objective is to maintain a robust network of forward thinking companies in the giftware and related industries for the purpose of providing credit data, sharing ideas, and offering education to support informed decision-making while avoiding credit risks.

For more information about GAIN, please visit www.gaingroup.com or contact ABC-Amega's Credit Services team at 1-844-GoAmega (462-6342).

NCS is pleased to announce that it has been selected as one of Northeast Ohio's Top Workplaces.

The Top Workplaces are determined based solely on employee feedback. The employee survey is conducted by WorkplaceDynamics, LLC, a leading research firm on organizational health and employee engagement. WorkplaceDynamics conducts regional Top Workplaces programs with 45 major publishing partners across the United States. Over the past year, more than 6,000 organizations and 1 in every 88 employees in the U.S. have turned to WorkplaceDynamics to better understand what's on the minds of their employees. Through its workplace improvement offerings, WorkplaceDynamics provides solutions, training and tools to help clients improve their workplace.

"Celebrating 45 years – NCS is a 2nd generation family business that assists credit professionals to minimize risk, reduce DSO, improve cash flow, and improve working capital, by taking advantage of secured transactions. It is important that our employees know they are valued and are our greatest asset. With the urgent and exciting deadline driven work we do, NCS attracts top talent who are passionate, dedicated and conscientious. We are committed to creating an environment where they are able to perform at their very best" says NCS president Mary B. Cowan.

"This recognition is a testament to our dedicated staff, who are committed to the endless quest of excellence," says Cowan.

The Cleveland Plain Dealer published the complete list of Top Workplaces on June 21, 2015. For more information about the Top Workplaces lists and WorkplaceDynamics, please visit www.topworkplaces.com and www.workplacedynamics.com.

For further information, please contact NCS at: 800-826-5256 or email at: ncssales@ncscredit.com.

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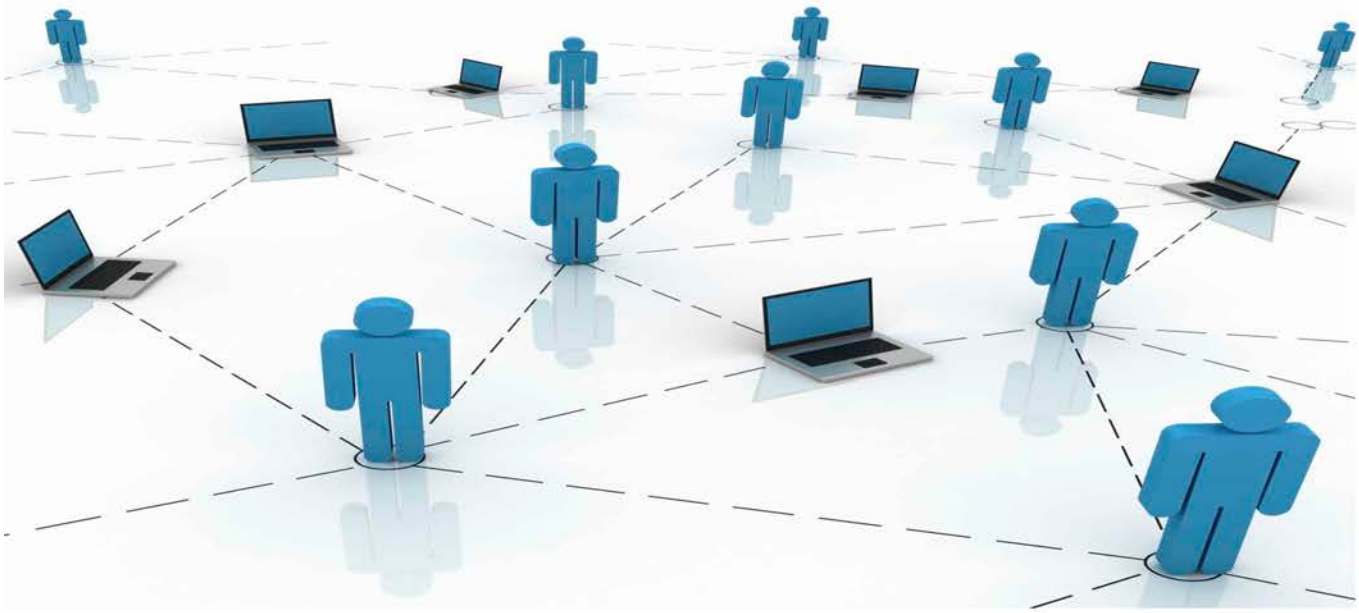

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Convincing The Principal To Furnish A Personal Guaranty: Sell The Point That The Personal Guaranty May Not Create Preference Liability For The Principal

Scott Blakeley, Esq.

For the supplier, credit scoring can be a key metric for measuring an applicant's ability to honor terms. Where that corporate applicant who is a small to medium sized business does not score out, suppliers often request the principal of the business to furnish a personal guaranty (PG) to reduce the credit risk. But convincing the principal to furnish the guaranty is a challenge for the credit team, especially when the product or service they provide can be easily replaced. A court of appeals may have added a selling point to the credit team to convince the principal to furnish a PG; by doing so, the principal does not include his or her preference risk based on a PG. This Circuit Court's decision is important for the credit team in negotiations to obtain a PG because it held that a corporate insider who personally guaranteed his corporation's debt is absolved of preference liability where he waived his indemnification rights such that he was no longer a creditor of the corporation.

Personal Guaranty

The PG provides a second pocket to look to in the event the corporate customer fails to pay the invoices. In a supplier setting, the guarantor, as the case with the Court of Appeals decision, is commonly the owner or president of the customer, agrees in writing that if the vendor sells the corporate debtor on credit, the guarantor will guarantee the payment. This promise to pay by the guarantor is an inducement for the vendor to sell the debtor on open account and the guaranty creates a contract of secondary liability.

A PG must be in writing. The guaranty should clearly state that the guarantor is personally guarantying the debt of the corporate customer (identified by full legal name as well as any fictitious business name(s)). The guaranty should also include, under the signature block line, the individual guarantor's social security number and home address. The creditor should also consider requiring the guarantor to notarize the guaranty.

Preference Liability

The Bankruptcy Code vests a trustee with far-reaching powers to avoid payments to suppliers and other creditors within 90 days prior to the bankruptcy filing, or within the previous one-year period for insiders as is the case here. A preference is defined expansively to include nearly every payment by an insolvent debtor 90 days prior to bankruptcy. The purposes of the preference laws are two-fold: (1) unsecured creditors are discouraged from racing to the courthouse to dismember a debtor, thereby hastening its slide into bankruptcy; (2) a debtor is deterred from preferring certain creditors by requiring an unsecured creditor that receives a greater percentage payment than in a Chapter 7. The aim is that all similar creditors receive an equal distribution of a debtor's assets.

Court of Appeals Ruling

This case saw the Ninth Circuit Court of Appeals discuss this hitherto unresolved issue of bankruptcy law: whether a corporate insider who personally guaranteed his corporation's debt is absolved of preference liability to which he might otherwise have been subjected where he waived his indemnification rights against the corporation.

Adamson Apparel, Inc., a clothing manufacturer, took out a loan from CIT. Adamson's president and CEO personally guaranteed the debt. The guaranty agreement waived that right of the guarantor to have his company reimburse him for any amount that he was obligated to pay on the corporation's behalf to settle with CIT. The company paid almost $5 million in partial satisfaction of the debt, then filed for bankruptcy and the CEO paid the balance of over $3.5 million from his personal funds.

The creditors' committee filed a preference action against the CEO, in his capacity as guarantor, to recover the $5 million paid by the company, arguing that the CEO was a corporate insider who received a preference because he had guaranteed the debt from CIT. However, the CEO previously had waived his right to any indemnification for the funds he had provided.

The Ninth Circuit held that, having waived his right of indemnification, the CEO had no claim against the company and thus could not be considered a creditor. The key point under discussion was that the waiver was not a sham waiver of indemnification; the CEO never filed a proof of claim in the bankruptcy case.

Negotiating the Personal Guaranty

The credit team appreciates that to obtain a PG may be as much a negotiation with its sales team and management as with the insider. But the Ninth Circuit Court of Appeals ruling provides the credit team with another negotiating point with the insider. In order to induce insider to sign a PG, the credit team may advise principal that he/she is not opening the door to insider preference risk, provided there is a waiver of indemnification rights from the corporation.

About the Author ...

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Attorney Scott Blakeley

Telecommuting's Role in Sustaining Operations During Severe Weather

CRF Survey Results

Views & Experiences of Several Companies

CRF Survey Results - Telecommuting's Role In A/R Operations During Severe Weather

In February of 2013, CRF conducted a survey on the extent to which survey respondents allowed telecommuting options for some or all of their employees engaged in credit operations. The results were published in the 2013Q1 edition of the *CRF News*. It found that slightly more than a third of those responding had implemented the necessary policies and/or technological components to allow some of their credit personnel to telecommute.

There are a variety of circumstances under which the telecommuting option is exercised in companies. Some use it to continue operations when adverse weather events, natural disasters or other conditions disrupt the ability of employees to report to work locations. Some companies also offer selected employees the option of telecommuting one or more days per week, or when personal or family circumstances require an employee to remain close to home, such as when caring for a sick child.

Adverse Weather

The winter of 2014-15 was a harsh one for a large section of the country, especially in portions of the mid-Atlantic and northeast regions. Some areas experienced several severe winter storms that limited the ability of employees to travel to their work locations. Most notably, the Boston area experienced several weeks where successive large snowstorms closed down roads and even public transit, making getting to work impossible for many employees.

In view of this situation, CRF conducted a follow-up survey in April and May 2015, to determine the extent to which severe weather impacted the use of and attitudes toward telecommuting in the business credit community.

CRF Survey Says:

Survey respondents indicated that a majority of them (76%) experienced one or more instances of workers being hindered in their ability to show up for work because of bad weather in the winter of 2014-15.

Of those who indicated they experienced bad weather during the 2014-2015 winter, 77% allowed telecommuting and 23% did NOT. So the majority experiencing bad weather last winter do have a telecommuting option for at least some of their employees.

Even for survey respondents that didn't indicate they experienced severe weather during the 2014-15 winter, a majority of those (54%) said they allow telecommuting. It's interesting to note that this is above the overall level of one-third of companies that allowed telecommuting in the 2013 CRF Study. So it appears, at least from the CRF Surveys, that telecommuting has become more widely implemented over the past two years.

Bad Weather's Affect on Attitudes Toward Telecommuting

Did the severe weather have an impact on telecommuting attitudes among companies that do not have a telecommuting option or didn't allow it during the winter of 2014-15? To measure these attitudes, CRF asked the following question: "Has the bad weather of the winter of 2014-15 caused you to be more inclined to implement telecommuting options for some or all of your employees?" More than a one-third of survey respondents (36%) indicated they were more inclined to implement a future telecommuting option in their operations as a result of the winter of 2014-15. This is another indication that telecommuting could continue its rise in popularity in the future.

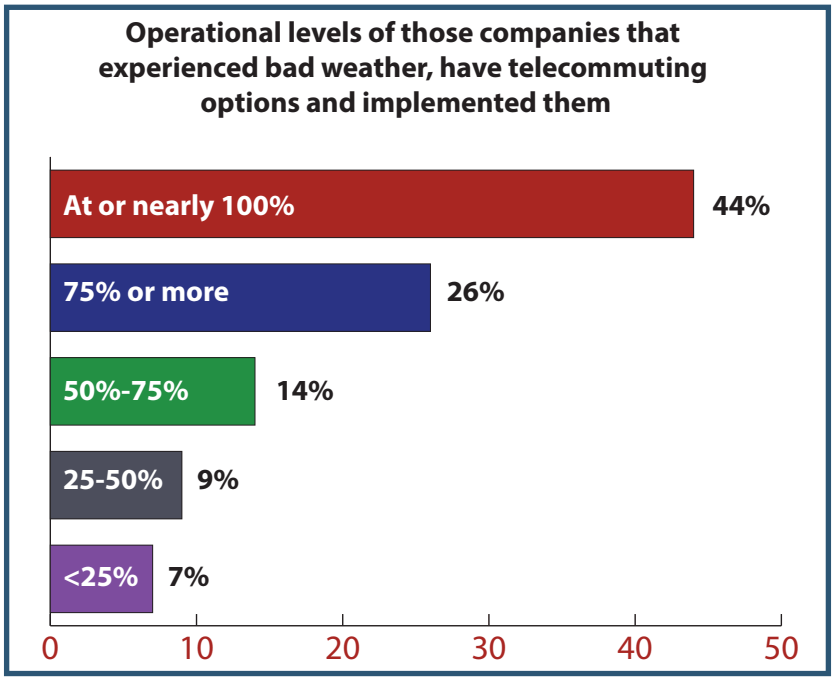
Benefits of Telecommuting During Bad Weather

For those companies that experienced bad weather and implemented telecommuting, the CRF Survey wanted to find out the positive affect on operations. The chart shows levels of operations those companies were able to achieve when faced with bad weather that diminished their employees' ability to travel to their work locations.

As the chart shows, 44% indicated they were able to operate at or near 100% as a result of telecommuting. This was followed by 26% who reported they were able to attain 75% or more of operational strength as a result of telecommuting. The chart shows a decreasing proportion of respondents as the operational strength categories go down. Only 7% of respondents indicated they achieved less than 25% operational strength when employees were allowed to telecommute.

Future Implications

Two CRF Surveys on telecommuting for Credit and A/R operations - one in 2013 and one in 2015 - indicate an increasing reliance on it. The 2015 CRF Survey was focused primarily on telecommuting's role during severe weather events. The results indicated that a majority of respondents who implemented telecommuting during bad weather were able to keep a good portion of their operations going despite some employees not being able to make it to their office. Also, the bad weather in the winter of 2014-15 influenced many to be more inclined to implement telecommuting in the future. So it appears, at least from CRF Survey responses, that telecommuting is on the rise for credit professionals and is helping to keep credit and A/R departments operating sufficiently during severe weather events.



Telecommuting from the Credit Practitioners Viewpoint–

By Tom Diana

As successive CRF Surveys on the topic have suggested, telecommuting has gained traction among credit teams in the last several years. Surveys may show general trends, but not the details and nuances involved in these issues. Therefore, the *CRF News* interviewed several credit professionals to get their viewpoint on telecommuting's implementation and impact on their credit operations.

Implemented Under Certain Circumstances

Jim Hennessy, Sr. Director of Credit for S.C. Johnson & Sons Inc. said he has the flexibility to let exempt employees telecommute. He allows it when the company announces an office closure because of bad weather, or if an individual employee has a problem getting to the office. "If someone can't get to the office for some reason, I have the ability to allow them to work from home." He pointed out however that this occurs at his discretion and is not a "benefit." "It's less about providing a regular program and more about dealing with special circumstances."

Bad Weather Is Biggest Trigger

Bad weather is the most often cited trigger for implementing telecommuting among the interviewees. Ellen Beers, Credit Manger of Western State Envelopes said, "The only time I've telecommuted is over the last two winters, which have been severe."

Some interviewees have noticed bad weather incidents increasing over the past few years. "We've used telecommuting more during the last two years," said Diane Patterson, Credit and Collections Manager at Thermo Fisher Scientific Asheville LLC. Of course the incidents of bad weather vary depending upon the region.

While snowstorms are the most often reported bad weather events, other parts of the country struggle with different types of bad weather. Kevin Brashear, Director of A/R for ThyssenKrupp Elevator noted his operations in the Dallas area have experienced some ice storms. One recent ice storm caused almost 20 employees to be out for 1-2 days.

John Fahey, Director of Credit for Edward Don & Co. noted that his staff is decentralized in offices in several states. Two years ago he had staff in Ft. Lauderdale affected by a hurricane, snowstorms in Philadelphia and ice storms in Dallas.

Safety of Employees

Bad weather can result in hazardous travel conditions for employees, which has prompted some companies to implement a telecommuting option as a way to help ensure the safety of their employees. Anna Mantel, Senior Manager, Trade Risk for A. Shulman pointed to her company's commitment to employee safety. "Safety of our associates is a primary concern, and when extreme weather conditions exist, Shulman empowers associates to use their best judgment concerning delayed start times and early departure or working remotely, subject to keeping their manager informed and ensuring a seamless impact on customers."

Critical Functions Uninterrupted

The most important function cited by interviewees that must be carried out, no matter what the weather, is releasing orders. Kurt Albright, Director of Credit and Collections, Uline Shipping Supplies, said that even if bad weather prevents his credit analysts from getting to their office, they could work from home and access the company network to "release orders and communicate with customers."

Echoing the need to release orders without interruption was Ms. Patterson, who offered, "If they (credit analysts) can get orders released the warehouse can still keep shipping. The big thing for us is getting orders released first thing in the morning," she said.

Laptops Essential

In addition to the Internet, which facilitates remote access to company networks, the most often cited required technology by interviewees was the laptop. Mr. Albright pointed out that his employees eligible for telecommuting have laptops that are equipped with batteries that can last 4-5 hours. This allows them to work for that period even during power outages. "We decided to make the investment in laptops for the whole team," he said. "If you have a bad event, it can put a damper on your operations."

Non-weather Reasons

There are reasons other than severe weather cited by interviewees for allowing telecommuting. Mr. Fahey noted that he allows limited telecommuting for certain of his staff with long commutes to avoid the crush of holiday traffic. He also allows telecommuting for certain staff during periods of intense work that is best done without office distractions. "At budget time they often need to work uninterrupted," he said.

Other interviewees pointed to allowing employees to work from home for personal and family exigencies, such as a sick child or keeping a doctor appointment.

Mr. Fahey also pointed to a new flextime program launching in the summer of 2015 for some employees. The program involves working longer hours Monday – Thursday so they can work a half-day from home every other Friday. The program is staggered so that half the eligible employees work half-day Fridays one week, and the other half the next week. "It (telecommuting) provides us with flexibility and it keeps our employees happy."

Telecommunications Drawback

There are some limitations facing employees who are telecommuting, based on their company's network capabilities. Ms. Beers noted that when she telecommutes, "I don't have access to everything I would at the office."

Mr. Brashear said, "Outside of the office, we don't have any way to monitor phone activity."

A Benefit to the Company

For many companies, when implemented and managed correctly, telecommuting produces positive results. "I think it's great because even with a bad week (of severe weather) you're getting something done," said Ms. Patterson. "We can get a lot done with email now."

Mr. Brashear noted that for him, telecommuting while traveling allows him to maintain office functions. "I've been out of town for three weeks, but I've been able to stay up to date."

When employees are able disciplined enough to work well at home, telecommuting can provide a seamless flow of operations. "It works well," said Mr. Fahey. "I know I have a good dedicated team in place and they're going to get the job done."

Workplaces that allow telecommuting for bad weather and personal reasons, such as tending to a sick child, may be viewed more positively by employees. Ms. Mantel noted that after her company completes its intensive acquisition and integration activity, it will be able to devote more time to the telecommuting issue. "We may find virtual office options a factor in talent retention," she said.

Telecommuting's Future

CRF Survey results have indicated a growing trend in the implementation of telecommuting in credit operations. Advances in technology, greater acceptances by management staff and positive results from its use, all point to a growing adoption of telecommuting. Future CRF Surveys on this issue will be launched to determine if this trend continues or if it has already reached its pinnacle.

Please welcome the following members to CRF who have joined or rejoined since the publication of 2015 Q1 *CRF News*

Company	Member of Record
AutoNation	Kelly Melton
Best Buy Co Inc	Norma Thomes
CIVCO Medical Solutions	Kimberly Steinke
Core-Mark International Inc	Donald Gunn
CST Co	Palmer (Pete) Roth
Diebold	Brenda Jalowiec
Emser Tile LLC	Barry Dambrowski
Henkels & McCoy Inc	Ray Carlisi
Insight Enterprises Inc	Cameo Peralta
Livingston International	Ada De Michele
LKQ Corporation	Jan Quigg
NorthStar Group Services Inc	D'wana Smith
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For detailed information about these courses and to register, click on the titles of each course below:

Basic Financial Statements - provides participants with an understanding of financial statement structure and the relationships between business activity, accounting transactions, and financial reporting.

Financial Ratio Analysis - provides participants with an understanding of the different types of financial ratios. This is the companion to CRF 101: Basic Financial Statements. Students will learn what makes up financial ratios and what they convey about the current financial status and financial direction of companies as revealed in their financial statements.

Diagnostic Cash Flow - Intermediate and advanced methods of cash flow and financial ratio analysis in a variety of industry settings. Students should have a basic understanding of accounting and/or have successfully completed CRF 101.

Receivable Management - is intended for credit team members looking to enhance their level of knowledge in credit management, provides an insight into the key components of formulating a strategy designed to enhance efficiencies in managing a business receivable portfolio.

Principles and Methods of Collections - provides the students with an understanding and insight into the importance of their roles in the management of Accounts Receivables - designed for those new to credit or a refresher for seasoned professionals.

Preparing for Bankruptcies and Customer Insolvencies - provides students a comprehensive overview of how to prepare for, and best position your company when customers become financially insolvent or enter into bankruptcy.

Legal Essentials in Business Credit - provides students an overview of the fundamental elements in the field of receivable management and the basic legal issues and requirements pertaining to them.

Unclaimed Property Law Compliance for A/R Management - students will learn the basic information required to properly account for unclaimed property within your company and how to prepare for any state audits of your company's unclaimed property.

Managing Sales Tax Exemption Certificates - provides the basic information needed to prepare a company to properly file and maintain sales tax exemption certificates and to prepare to successfully defend against any state sales tax audits.

Mechanic's Liens - A National Perspective - offers students a comprehensive overview of how to preserve a business's credit position in building projects through the exercise of the lien process for private sector projects and the bonding process in public sector projects.

Doing Business with the Federal Government - is designed to help those who are seeking to or currently doing business with the federal government to get paid for the delivery of their goods and services on a timely basis.

Defending Preferences in Bankruptcy - This course will also provide the precise definition of a preference payment and what practical measures can be taken to reduce your company's exposure to preference actions and how to reduce financial losses due to correctly filed preference actions by a bankrupted customer's estate.

Secured Transaction - offers a comprehensive overview of how to successfully reduce the risk of selling on open credit terms by securing transactions through UCC filings, explaining the legal and regulatory structures that control the filing of secured transactions in the United States - Article 9 of the Uniform Commercial Code (UCC) and the Personal Property Security Act (PPSA) of Canada.

Deduction Management Fundamentals - teaches how deductions impact company finances, how they occur and how to reduce those claimed by customers and third-party auditors, as well as minimize their future occurrence.

Advanced Deduction Management - builds upon the Deductions Management Fundamentals course with a perspective of managing and evaluating the deduction management process to make it more effective and streamlined.


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