

# Commercial Counsel

## IS YOUR COMPANY PREPARED TO CAPITALIZE ON AN ECONOMIC UPTURN?

A National Association for Business Economics survey recently concluded that demand is stabilizing, but that a majority of respondents felt that **the worst financial period was still to come**, and predicted declining profits or increasing losses.

In reality, recessions are a bit like the end of a northern winter, hints of a thaw followed by periods of renewed chill. Generally, it takes hindsight to determine when the real upturn began. However, it is time to focus on being in the best possible position to capitalize on an upturn.

**The winners in past recoveries have been those businesses that have ensured that their working capital is in the strongest possible position.** Recovery requires ramping up activity, both in terms of production and marketing, and being able to price both profitably and competitively in order to capture increased sales and market share at the expense of less prepared competitors.

**What can your business do now to position itself to be one of the winners?** At this point of the economic cycle, the focus should be on ensuring that you are not financing the recovery of others. This requires a hard look at how your credit and delinquent accounts packages are performing and the length of time your company is financing the debts of others. An unpaid receivable ties up money that could be reducing your financing costs now and be available to support an aggressive move to take advantage of the upturn.

Worse, the businesses currently in real distress are only now entering the period when insolvency is likely to peak. **Worn down by a long period of soft demand, and facing a more conservative commercial financing market, many companies typically fail after, not before, the recovery begins.** If your accounts receivable contain such companies, their failure will deny your company the valuable money that your business should be using to reduce its costs and to position itself for the future. Now is the time to be aggressive in putting the interests of your own bottom line first.

Consider a review of credit agreements and accounts receivables liquidation policies and practices. **Doing so now could have a profound impact on your business prospects in the years ahead.**

## General Discussion Relating to Business Legal Issues

The information contained herein is not provided as legal advice. Legal advice should be sought as to any factual and legal issue.

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Call **Matthew Gerdisch** or **Steve Kailas** at 414.962.5110 for an audit of your credit and collection procedure to enhance the prospects of your business.

## KMKSC ATTORNEY NAMED AN "UP AND COMING LAWYER FOR 2009" BY THE WISCONSIN LAW JOURNAL

Bill Fischer of KMKSC's Complex Litigation Practice was described as being on the "fast track to making a significant impact on the legal profession." The award is given to "attorneys that are doing great things, but have only been practicing for 10 years or less." Congratulations, Bill!

## KUDOS FROM CLIENTS

We are equally thrilled by recent client accolades:

*FROM: BRIAN CHOLKA, COO, DILLETT MECHANICAL SERVICE, INC. TO DAVID CHARTIER, MAY 1, 2009:*

**"David, Just wanted to drop you a quick e-mail to express my appreciation for how you and Michael [Stueland] handle business with us-I'm very happy with how things are going--KMK is a class operation!"**

*FROM: RAY RYTILAHTI, CORPORATE DIRECTOR OF CREDIT, REINHART FOODSERVICE L.L.C., JULY 22, 2009:*

**"Wow, what a surprise to receive a payment from a bankruptcy ... We had moved the account to bad debt in early 2008, not expecting a payment. ... please extend a special thanks to [Russell Mikow] on a job well done!"**

Our thanks for permission to share these comments.

## LIQUIDATED INTERNATIONAL DEBT

KMKSC has recently been particularly active in the international debt recovery arena. The following are some examples of timely transatlantic debt liquidation:

**US debtor, UK creditor:** A US software applications distributor contracted to mass produce CD ROMs for an English software vendor to facilitate remote installation of its software products. The product was shipped overseas and accepted without complaint, however no payment followed. KMKSC intervened and persuaded the debtor to settle all outstanding invoices in full.

**UK debtor, US creditor:** A US producer of television content contracted with our British client to conduct healthcare focus groups. Despite no



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complaints about the conduct or quality of the research, the US company refused to pay for almost a year. The UK creditor turned to KMKSC as the only US law firm accredited by the UK Credit Service Agency, the self-regulatory body of the credit industry in that country. KMKSC secured judgment in Colorado and, after post-judgment follow-up, secured full payment.

**US creditor, Icelandic debtor:** A food distribution client also manages product price promotions for manufacturers. Retailers bill our client for the amount of sales promotional discounts. The client reimburses each retailer and invoices the producer on a combined periodic basis. Our client represented an Icelandic beverage maker, successfully placing and promoting sales. However, the Icelandic manufacturer failed to reimburse the promotional costs as agreed. KMKSC intervened, and secured payment in full within weeks.

#### **LESSONS FROM A KMKSC TRIAL SUCCESS: A REAL ESTATE DEVELOPMENT DEAL GONE BAD**

Alexander "Sandie" Pendleton and Bill Fischer tried the case in Waukesha, Wisconsin last December. Expected to last for two weeks, the defendants capitulated to KMKSC's demands after just the third day of trial.

The case involved a complicated feud between family members who had jointly invested in a multi-million dollar property with additional development potential.

After several years of unsuccessfully attempting to market the property, the two sides developed diametrically opposed views as to what should be done with it. KMKSC's clients wanted to either sell the property at its highest and best developable value, or to divide it equitably between the parties. The other side of the family wanted to maintain "the status quo" (*i.e.*, keep the property marginally developed), or to force KMKSC's clients to sell their interest to them at a dramatically-reduced "undeveloped" price.

KMKSC was retained after two other law firms had failed to bring closure. After a final, unsuccessful, attempt to resolve the matter out-of-court, KMKSC moved aggressively, succeeding in getting the matter filed and tried within 12 months (an unusually short time period for this type of case in Waukesha County).

Notwithstanding the success of the lawsuit, perhaps the most significant achievement was that Attorney Pendleton was able to ensure that victory was not just the end of the dispute, but also a start toward rebuilding the once close relationships between the family members.

Lessons from this case:

(1) **Think twice before going into any business or real estate deal without clearly and explicitly addressing the possibility a dispute may arise**, however unlikely it seems—particularly those which involve family or friends. *No one enters a business arrangement expecting to end up at loggerheads with their partner and in court, yet this happens.*

(2) **Call Sandie Pendleton, discuss your objectives, and have your agreement reflected in a professionally worded contract, free of ambiguity, before the parties commit to the enterprise.** This should clearly memorialize the intent of the parties, minimizing the chance that disputes will arise, and set out clear exit and dispute resolution mechanisms. **The cost of doing so is minimal in relation to the financial and emotional costs that we all-too-often see where parties have trusted to friendship alone.**

(3) **If a business or real estate deal has gone sour, or threatens to do so, call us; we can help.**

#### **KMKSC JOINS THE WISCONSIN BANKERS ASSOCIATION**

KMKSC is delighted to announce that it has accepted an invitation to join the Wisconsin Bankers Association. Founded in 1892, the Association is the state's largest financial industry trade association, representing 300 commercial banks and savings institutions.

Membership will increase our participation in the issues and opportunities of concern to the Wisconsin banking community, and so enhance our ability to serve our existing clients and their interests. KMKSC is an existing member of the Wisconsin Mortgage Bankers Association



#### **LATEST SPEECHES AND PRESENTATIONS BY KMKSC ATTORNEYS**

- July, 24, 2009 - "**Learning from the Debt Crisis: Improvements in the Residential Mortgage Foreclosure and Loss Mitigation Process**" KMKSC attorney Marie M. Flannery, American Legal & Financial Network 7th Annual Conference, Santa Ana Pueblo, New Mexico.

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