

# Commercial Counsel

## 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.

Winter 2009

*"You guys produce results, you produce them quickly, and you keep me informed of developments"*

David W. Preston, Credit Manager, Infra-Metals Co., December 2009

### HAPPY NEW YEAR!

All of us at KMKSC wish all our clients and readers a happy, healthy *and prosperous* 2010.

### THE EASIEST WAY TO RECOVER LOSSES – RECOVER MORE ON YOUR COLLECTIBLE ACCOUNTS

The experienced credit professional knows that it is very easy to put in place procedures that limit losses from uncollectible accounts. A state-of-the-art credit application or contract agreement between the creditor and its customer can assure continual help in softening the devastating effects of uncollectible accounts receivable.

**Do you want proof?** Just in one recent week, our law firm was able to return the following surpluses on recoveries made: A food service client was forwarded a **net** recovery of \$237.57 **more than** the principal amount placed for collection of \$1,528.17; an electrical supply client was provided a **net** return of \$259.78 **more than** the full amount of the claim placed at \$1,952.76; a wholesale paint client was provided a **net** recovery of \$664.38 **more than** the full principal of the account of \$7,414.62; and another food service organization was provided a **net** recovery of \$3,366.95, **more than the principal amount placed** of \$11,879.65.

Can you imagine how welcome those windfalls of excess recovery were to offset against those accounts that were uncollectible and a total loss? **This is the kind of excess recovery that runs through our office constantly**, and is generally the result of the client's utilization of an up-to-the-minute credit application, or contract with a customer, which provides for recovery of interest, collection costs and attorneys' fees and any other incidental damages upon default in payment by the customer which turns into a debtor.

A cutting-edge credit application or customer contract is a **very inexpensive investment**, and **will pay for itself over and over again** with respect to each and every new credit account your organization will open up for a new customer. Call [Steve Kailas](#) or [David Chartier](#) of our office at (414) 962-5110 in the event you want to discuss value, or to order a state-of-the-art credit application. **The cost is nominal and you simply cannot afford to open a new account without one.**

### COURT'S BOOST TO EMPLOYERS' ABILITY TO PROTECT INTERESTS RECOMMENDS REVIEW OF EMPLOYMENT AGREEMENTS

The Wisconsin Supreme Court recently issued a significant ruling that **expands the scope of interests an employer may reasonably protect and argues for reevaluating the format and scope of existing and future non-compete agreements.**

*Star Direct v. Dal Pra* involved a route salesperson for Star Direct who left the company to found his own venture. Serving the same geographic area, although not offering directly competing products, some of Dal Pra's sales were to current or recent former customers of Star Direct (although not customers with whom Dal Pra had had personal contact). Del Pra's contract of employment contained three distinct and separate restrictive clauses.

The Court explicitly confirmed that an **employer can have sufficient interest in preventing solicitation of former customers that had ceased to buy from it within the last year of employment.** Even if Del Pra had never had contact with them during his employment with Star Direct, the Court reasoned that his general knowledge of prices, marketing techniques, margins and other confidential information would provide him with the intelligence needed to undercut his former employer in a way no ordinary competitor could.

In *Star Direct*, the Court held that a business cannot seek to prohibit non-competitive activity which is not materially harmful to a former employer's business interests. Thus, it struck down a clause that prohibited "engaging in substantially similar business." The governing statute holds that if an unreasonable restraint is found the entire "covenant not to compete" is "void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint." Wis. Stat. 103.465. The consensus interpretation of that language had long been that **employment agreements represent a single covenant, comprised of clauses. Thus, if any unreasonable restraint is found, the whole agreement would be void and incapable of legal enforcement.**

However, the *Star Direct* Court deemed "covenant" to refer not to the agreement as a whole, but to each separate clause. Thus, it concluded, the prohibition on



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"engaging in substantially similar business" could be voided while **leaving all other prohibitions enforceable, if the agreement was appropriately drafted.**

Given the widespread former consensus that one void clause would undermine enforceability of the whole agreement, **many current non-compete arrangements may not be worded properly.** The author of the agreement had no reason to draft in a fashion that ensured that individual clauses could be severed. **Therefore, all restrictive employee agreements should be reviewed to see if they are effective post *Star Direct*.** In addition to form and structure, employers with an interest in protecting against solicitation of recent former clients will wish to consider inserting such clauses. Moreover, the decision may impact other aspects of the wider agreement, such as optimal choice of law.

If you have questions about your existing contractual protections or how to word future agreements effectively, contact Sandie Pendleton at (414) 962-5110, [apendleton@kmksc.com](mailto:apendleton@kmksc.com).

***"If you put the federal government in charge of the Sahara Desert, in 5 years there'd be a shortage of sand."***  
**Milton Friedman**

#### **FEDERAL TRADE COMMISSION DELAYS ENFORCEMENT OF "RED FLAG" IDENTITY THEFT RULE**

The Federal Trade Commission (FTC) "Red Flag Rule," which would have required a large number of businesses to adopt identity theft protection and mitigation policies and procedures, was scheduled to come into effect on November 1st. However, at the 11th hour, the FTC delayed enforcement until June 1, 2010.

This delay was in part the result of an October 29th federal court order which concluded that the FTC had only been authorized by Congress to address credit industry transactions and that "merely because an entity or individual is capable of providing credit" does not support it being included within the Rule, even if there is a period of time between provision of goods or services and payment.

Although the court seemingly restricts the range of businesses and transactions that the FTC can reach, caution is necessary. First, one of the starting points for the analysis was the long history of state regulation of lawyers and the particular significance of attorneys'

fiduciary and professional obligations. Second, it is not clear what businesses and practices fall within the scope of the credit industry as conceived by the court. The financial sector is clearly encompassed, but it is too early to tell what other forms of credit the FTC may regulate.

Subject to an appeal, the court's decision effectively forces the FTC to reconsider the number of businesses and types of transactions reached by the Rule. As things stand, it is hard to see the Rule going into effect without significant redefinition of the types of business and transaction that are covered (unless the recent ruling is overturned). In the meantime, Congress is currently considering exempting all small businesses (a threshold of 20 employees has been proposed).

However, **even businesses that eventually do escape coverage may still benefit considerably from following the letter of the Rule.** This is particularly true for clients which, due to the last-minute nature of the delay in implementation, have already put policies and procedures in place. The Rule requires creation of policies and procedures based upon an internal evaluation of the risk of identity theft posed to actual or potential account holders who are offered goods or services on credit. Following such voluntary "best practice" is potentially powerful evidence of good-faith efforts to protect customers (or those of your clients) in to reduce potential legal, client relations and public relations risks.

One important aspect of the Rule is that the **requirements for compliance, and the responsibility for ensuring it, are defined by a contractor's business characteristics, not those of the actual service provider.** Although now excluded from the reach of the Rule, KMKSC is nevertheless a provider of commercial law services to many of our clients. Consequently, our practices are likely relevant to the compliance reviews of some of our clients. Therefore, we are working with those clients that have notified us of individual requirements stemming from the nature of their particular businesses to ensure that our services to them conform to their anticipated regulatory obligations under the Rule. **We believe that this approach supports the particular needs of individual clients as well as providing general reassurance in the run up to June 1, 2010.**

*A Reputation for Success...  
A Tradition of Results.*

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

- November 18 – **"Construction Lien & Bond Claims: Make Them Pay,"** KMKSC Shareholder David S. Chartier, Wisconsin Credit Association ½ Day Workshops, Oshkosh, Oconomowoc & Madison, WI.
- December 3 - **"Procedures for Reducing Delinquent Debt through the Effective and Timely Involvement of Commercial Counsel,"** KMKSC Attorney Phillip H. Lucht, Internal Management Telephone Seminar for Baker Tilley Virchow Krause LLP.