



Voidable Preference Actions

by Duane Lee, CCE, Regional Credit Manager, SOS Staffing

I can remember many years ago sitting in front of our old black and white television watching Perry Mason prosecute the guilty, free the innocent and solve crimes. I think it was during these old TV shows that I first learned the principal of the “presumption of innocence.” This concept is that the accused has a legal right in trials to be considered innocent until proven guilty. The burden of proof is on the prosecution to collect and present enough compelling evidence to show beyond a reasonable doubt that the accused is guilty.

As I have grown older, more experienced and perhaps more cynical, I have found that at times you are presumed to be guilty until you can prove you are innocent. This is how I feel whenever I am faced with a Voidable Preference action by a bankruptcy trustee.

Preference laws were established to stop injustices and abuses due to collusion between a debtor and creditor. At times, one or more creditors have been given preference over other creditors of the same class. A “preference” is a payment or business transaction entered into within the 90 day “preference window” prior to a bankruptcy. The creditors committee will routinely have a trustee or lawyer sue for return of all payments made to creditors during the 90-day preference window. Any payment made by the debtor during this time period is assumed to be a preferential transfer and subject to repayment. Although the 90 day period is arbitrary, the courts have put forth that the company was insolvent and essentially bankrupt 90 days prior to their filing. If you received payment during that period, you are presumed guilty of preferential treatment and must prove your innocence.

As the Director of Credit for SOS Staffing Services, I receive notice of a new preference action 2 or 3 times each year. Being served with such a notice reminds me of watching my uncle ride Brahma Bulls in the rodeo. He would desperately try to hold on for his 8 second ride. More times than not, he was thrown into the air only to land painfully in the dirt of the arena. As if his unceremonious unseating wasn’t

enough, at times the bull would turn on him and try to stomp on him or gore him with its horns. I compare this to working with a customer that is in financial difficulty. You struggle to coax payments out of him and get your account paid. Many times lately I feel like I have been bucked off and landed painfully when I am notified they have filed for bankruptcy protection. You tally up the amount that your customer still owes, knowing you will probably never collect it all. Then the bull turns on you and you are served with a preference action demanding repayment of all money you coaxed out of the customer prior to their filing. Many times this money exceeds the amount you lose in the bankruptcy thus multiplying your injury.

As a professional credit manager, you must take heart. Even though the trustee has pronounced you guilty of preferential treatment, there are defenses you can use to prove your innocence. If the total claimed is greater than \$5000, defending against a preference action can be complex and legal counsel should be sought. It is essential that documentation be gathered showing all payments received and services rendered before the bankruptcy filing. I find that a year’s history of all transactions is a minimum for a proper defense. The most common defenses against preference are Contemporaneous Exchange (often called New Value defense) and Ordinary Course of Business. Details of these two defenses are beyond the scope of this article but there are many sources of help through NACM. I close with this advice – always defend your company against a Voidable Preference action. Trustees routinely settle such actions for a fraction of the original amount, but you must be prepared to “prove your innocence.”

Now, go out and enjoy the ride but watch out for those horns.

IN THIS *Issue*

PAGE ONE

Voidable Preference Actions

PAGE TWO

Searching For New Employees

Enhance Your Credit Management Skills

PAGE THREE

NACM Fall Outing

PAGE FOUR

Western Region Credit Conference

PAGE FIVE

August Calendar

Lending—A Hot Topic

PAGE SIX

ICEL August Luncheon

NACM BCS Board of Directors

SEARCHING FOR NEW EMPLOYEES

by Scott W. Lee, JD, CCE, Vice President & Secretary, NACM BCS

Usually, we write something about credit. But here is a law that slipped through the Utah legislature at the end of this past session without any fanfare. It's not a big deal unless you get caught. It's a lot like a radar trap on your 25 mph home road where you routinely travel 27 mph. You should alert your human resources department or whoever does your hiring or screening if you have 15 or more employees. It's a low number and probably affects most of us.

The legislature enacted H.B 206 which you can find as Utah Code 34-46-101 through 302, entitled "Employment Selection Procedures Act." Here is a link to make it easier: le.utah.gov/~code/TITLE34/34_46.htm. And here is the re-cap:

Utah employers with 15 or more employees are required to maintain a specific policy regarding the retention, disposition, access, and confidentiality of the information provided to the employer by a job applicant. The policy must be provided to the applicant for review before the applicant is required to provide information as part of the initial selection process if the applicant requests it. The information provided by a job applicant may not be retained by the employer for a period longer than two (2) years from the date it was provided if the applicant was not hired.

Generally, employers may not request the social security numbers, driver license number or date of birth of an applicant before the applicant is offered a job. There are some exceptions such as at a stage in the hiring process where you might need to check the applicant's driving history, credit or criminal history. Make sure your reasons are stated in your written policy, the point in the process when such requests are appropriate, and that you apply the process to all applicants uniformly.

You are prohibited, with some exceptions, from providing or transmitting the information on an applicant to a party outside the employer. You should not use the information improperly within the company either. The statute specifically lists improper uses such as marketing, profiling, or reselling of the information. You can transmit the information to a government agency to determine eligibility for certain service and benefits or as otherwise required by law. A proper use of the information after hiring an applicant might be in conjunction with performance reviews or possible promotions.

The statute gives the Utah Labor Commission's Division of Antidiscrimination and Labor ("Division") the right to enter your premises and review your written policy and records. The Division can conduct an investigation, conduct adjudicative proceedings and fine you for violations of the Act.

Enhance Your Credit Management Skills

by Georgette Bevan, CCE, Director of Education, NACM BCS

Credit Management is a demanding and rapidly changing field! The quality and effectiveness of tomorrow's business credit manager depends on today's training and education.

NACM provides educational programs for today's credit professional. A series of college-equivalent courses, many taught at Salt Lake Community College, are designed to improve and enhance your skills and knowledge in the field of business credit management.

- Basic Financial Accounting
- Financial Statement Analysis I
- Business Credit Principles
- Business Law
- Credit Law
- Financial Statement Analysis II

Reach beyond your present knowledge and skills to anticipate tomorrow's demands. Going back to school can be a frightening thought! The truth is there are more non-traditional students (older students who work full-time) than ever! Dedicating one evening a week to improve your business credit abilities can dramatically improve your job performance and your future. **What are you waiting for?**

These classes also prepare you for NACM Professional Designations

Classes begin the week of August 26, 2009

Class schedule available at www.nacmint.com.

Scholarships available – contact Georgette Bevan @ 801-433-6116 or GBevan@nacmint.com.

Friday, September 18, 2009

NACM Fall Festivities For All Members

Old Mill Golf Course

6080 So. Wasatch Blvd., SLC, UT

- **Golf Tournament**
- **Buffet Dinner**
- **BINGO**
- **Prize Money**



Outrageous FUN for everyone!
Golf, Dinner, Bingo, Prizes, \$\$\$\$\$

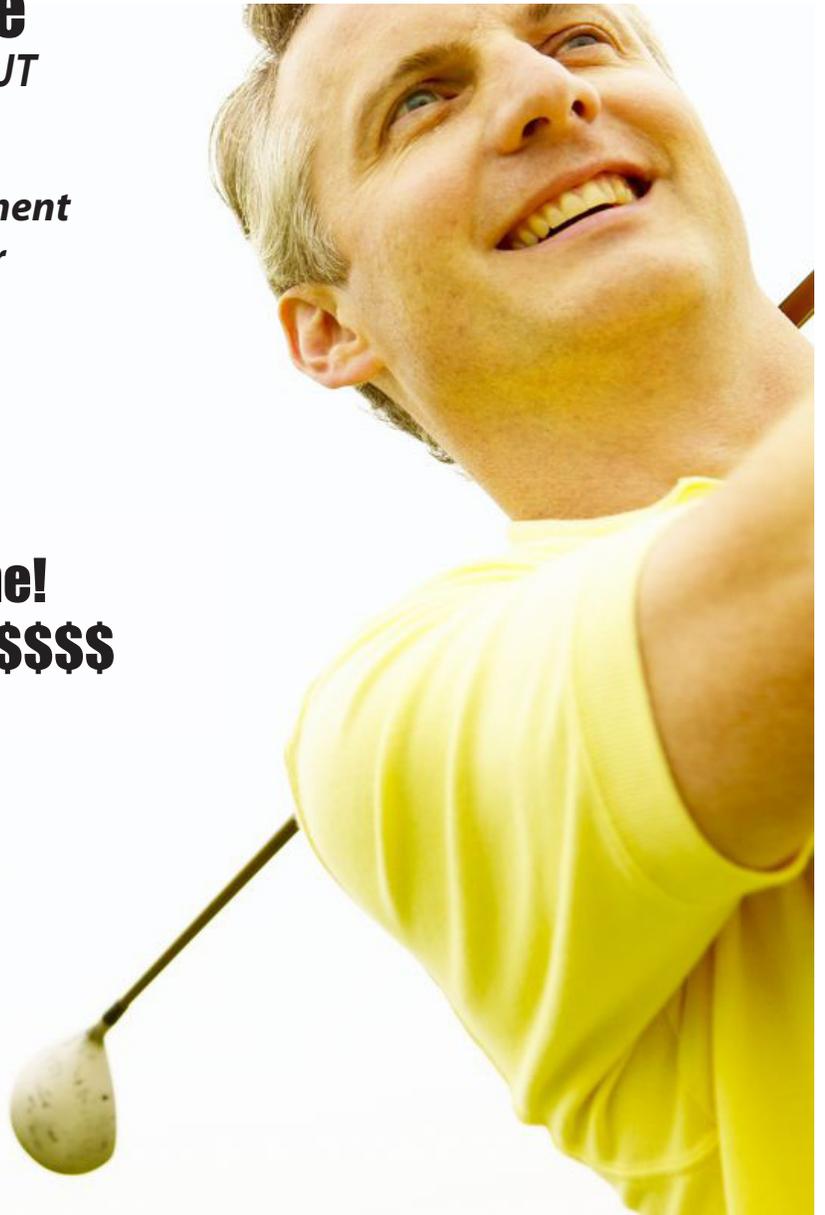
Golf Tournament

1st Tee Time: TBA, approximately 11 a.m.
You don't have to golf, just come to the party

Social Hour: 5:30 p.m.

Dinner: 6 p.m.

Contact Georgette Bevan, CCE, to sign up:
(801) 484-1891, Phone 801-433-6116, or email
GBevan@nacmint.com



Register Today



Western Region Credit Conference October 14-16, 2009

Las Vegas

Golden Nugget (\$49 room rate, Wed and Thurs)

Early Bird *Full Conference Pricing \$495 expires August 14, 2009



*Full Conference pricing includes Opening and Closing General Sessions, All breakout sessions, Program Material, Opening Expo Reception, Continental Breakfast Thur & Fri, Lunch Thur & Fri and afternoon breaks and the Motown Madness Dinner Event.

CONFERENCE SESSIONS

- Credit & Collections: The Basics
- Elements of a Good Credit Sale
- Dialing for Dollars
- Using Customer Supplied and Commercial Sources to Establish Credit Limits- Super Session
- How To Read All These Bankruptcy/Legal Notices
- What You Need to Know On Your Credit Application and Why
- Digital Security 101
- Cutting the Costs of Poor Writing
- Negotiation Techniques
- How to Read & Interpret a Financial Statement
- Online Internet Weapons
- Dealing with Delinquent Accounts
- Linking Strategies to Budgets
- Maximizing Your Leadership Potential
- Marketing the Credit Management Position In Today's Economic Climate
- The Future of Credit
- Bringing The Value Of The Credit Department To The Forefront In A Competitive Business Environment
- Facts About the Red Flags & Facta Laws



This has been one of the toughest years in the history of credit. Take time to sharpen your weapons, strengthen your shields and spar with the best in the credit field at the Credit Warriors Western Region Credit Conference.

Do whatever you can to go. The wealth of information is unreal. You can learn so much in such a short amount of time.

for complete information: <http://wrcc.biz/>

Golden Nugget - \$49.00 Room Rate! Call 1-800-634-3454 and identify yourself as being with the Western Region Credit Conference

South Tower \$49 Wed & Thur \$99 Fri & Sat, North Tower \$79 Wed & Thur \$129 Fri & Sat, One-Bedroom Crown Suite \$149 Wed-Thur \$199 Fri & Sat
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Code

Industry Credit Groups
Other events

August, 2009

Looking Ahead

Aug 26	Fall Semester begins
Sep 18	NACM Member Golf Outing, Old Mill Golf Course
Oct 7	Credit Boot Camp at NACM Training Office
Oct 14-16	Western Region Credit Conference Las Vegas, NV
Sept 21	Application Deadline for Professional Design. Exam (Nov 9 Exam)

Sat. / Sun.	Monday	Tuesday	Wednesday	Thursday	Friday
1/2	3	4	5	6 Hardware & Lumber	7 Steel & Welders
8/9	10 Floor Covering	11 Food & Restaurant	12 SLC Contractors	13 ICEL LUNCHEON- RED LION HOTEL 11:45 A.M.	14 Concrete, Paving, Excavating & Waterworks
15/16	17 Masonry, Landsc	18 Printing Ind. of Utah Heating & Plumbing Automotive & Truck Suppliers Roofers & Siding	19 Advertisers, Media Ut. County Contr. Nat'l Dist. Credit Professionals	20 Industrial Supply Electrical	21 Diesel Engines Ogden Contractors
22/23	24	25 Equipment Dealers	26 General Services Window/Doors Consolidated Regional Quarterly	27 General Contractors	28
29/30	31	28	29	30	31

Bank Lending—A Hot Topic

by Jolene Moses, NACM BCS

Because I work with the banking industry and attend financially related meetings, I've learned that efforts to stabilize the economy and increase bank lending are HOT topics.

Financial institutions are lending money but tightening up on their lending guidelines to insure maximum return and minimize risk. Sound familiar—Credit Basics 101. They are finally doing due diligence before lending, including thorough credit checks, and making sure applicants qualify followed by ensuring that all paperwork is complete and accurate.

Looking at different types of lending shows that business loans are available, but somewhat limited. The SBA is attempting to help banks in this area by becoming more creative. Some of the new programs like the Patriot Express Program, the simplified loan application and the expedited processed loan have been put into place. More websites and personal assistance (SCORE) are available to assist qualified applicants. This has helped drive our local and national economy. Construction loans are still tough to get at this time. Consumer loans on automobiles are available as are mortgage loans and refinancing for those who qualify under the new guidelines.

Perhaps this is and will continue to be a constant reminder that no matter how much policy and management change, the basics and due diligence are there for a reason.

ICEL August Luncheon

“In The Trenches” August 13, Red Lion Hotel, 11:45-1:15 p.m.

Red Lion Hotel, 151 West 600 South, SLC, UT

Cost: \$16, Contact Georgette Bevan, CCE, 801-433-6116 or GBevan@nacmint.com

Experienced credit managers share tales of credit battles fought & won

**Speakers: Janae Jeffs, CCE, Muir Enterprises
Penny Williams, Midwest Floor Coverings**

ICEL’S annual “In the Trenches” meeting is consistently one of the highest rated meetings of the year! Janae and Penny will share every day solutions to every day problems and you will hear situations and examples of how to cope with the challenge of being a credit manager in today’s economic climate.

We hope you’ll join us!



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