



# ACC SOUTHERN CALIFORNIA IN HOUSE COUNSEL CONFERENCE

---

**January 25, 2023**  
**Anaheim, California**

sponsored by:

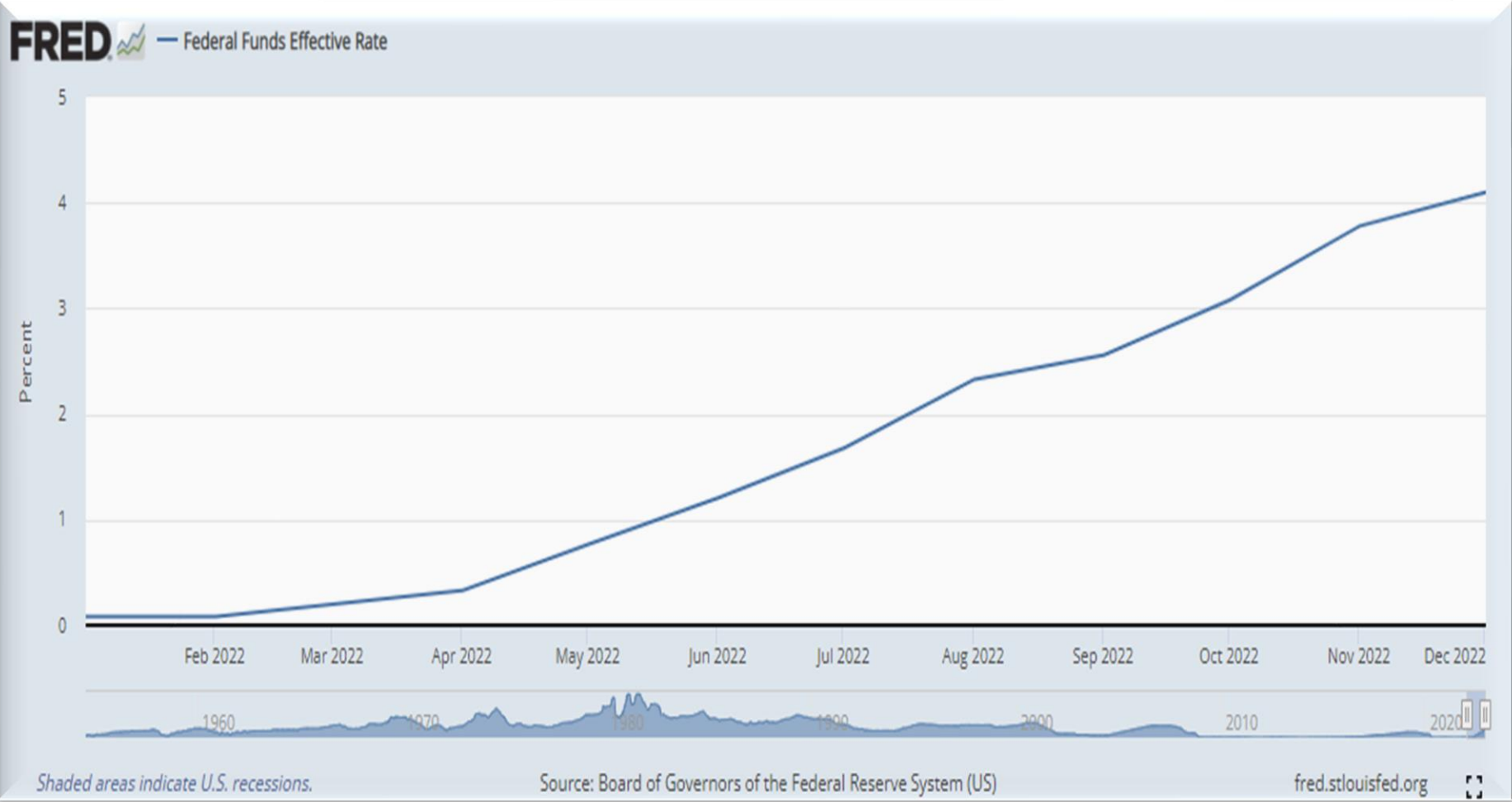


# Today's Agenda

---

- ❑ **Why are vendor disputes are on the rise?**
- ❑ **Advice for the customer: how to identify problematic contracts and renegotiate them**
- ❑ **Intermission: vendor disputes due to hacking**
- ❑ **Advice for the vendor: how to enforce agreements with customers and keep accounts current**
- ❑ **Theme: benefits of investing resources in these areas**

# Interest Rates Have Increased



# Inflation Has Accelerated

12-month percentage change, Consumer Price Index, selected categories, not seasonally adjusted

- All items
- Food at home
- Energy
- Electricity
- All items less food and energy
- Apparel
- Medical care commodities
- Shelter
- Education and communication
- Food
- Food away from home
- Gasoline (all types)
- Natural gas (piped)
- Commodities less food and energy com...
- New vehicles
- Services less energy services
- Medical care services



Hover over chart to view data.  
 Note: Shaded area represents recession, as determined by the National Bureau of Economic Research.  
 Source: U.S. Bureau of Labor Statistics.



# Effect on Companies

---



More difficult to obtain money to pay vendors



More difficult for customers to remain current on bills

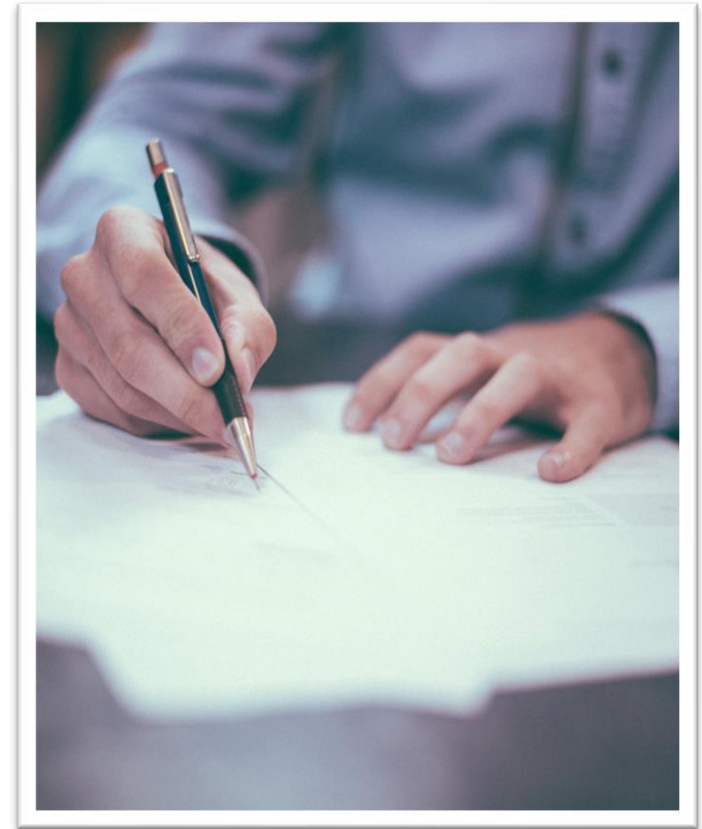


Result: Increased disputes between vendors and customers

# Advice For The Customer: Maximizing Value From Vendor Contracts

# Negotiating the Contract: Key Provisions for Customers

- ❑ **Suspension right: customer is allowed to suspend the contracts and/or payment [incorporate]**
- ❑ **Setoff clause: customer may deduct damages due vendor's breach of contract from future payments**
- ❑ **Dispute resolution process for invoices [customer friendly clause]**
- ❑ **Clauses that allow price increases due to market conditions [try to avoid]**
- ❑ **Attorneys' fees/interest clauses [try to avoid]**



# Identifying Contracts to Renegotiate

---

- ❑ Ask businesspeople to identify contracts where the vendor is underperforming or not meeting contract terms (many ways to do this)
  - ❑ Businesspeople may not realize that a contract can be modified. Example:  
term language in a contract
- ❑ Encourage businesspeople to document instances of contractual nonperformance or dissatisfaction with the performance of vendors
- ❑ Encourage businesspeople to review responses to RFPs and compare a current vendor's performance to alternatives
- ❑ Identify contracts highest in dollar value or essential to the organization's function
- ❑ Identify contracts that create organizational risk such as confidential information sharing
- ❑ **Added benefit: the legal department can add substantial value as opposed to being a cost center**



# How to Initiate Renegotiation Discussions

---

- ❑ Reference documentation of earlier issues with performance
- ❑ Identify market conditions beyond your control
- ❑ Reference competitor pricing
- ❑ Obtain new proposals from competitors targeting next renewal date
- ❑ Emphasize possible upgrades to the contract and use the discussion to also propose modifications
- ❑ Reference organizational changes such a new director of procurement or closing a new funding round
- ❑ Refuse to approve new orders until modification is granted
- ❑ Cite an internal legal review and bringing contractual language in line with current organizational standards
- ❑ Identify egregious contractual terms and make additional suggestions during the discussions

# Intermission: Vendor Disputes Involving Bad Actors

# Hypothetical

---

Vendor provides IT services to Customer and bills Customer monthly. Payment is due on the 30<sup>th</sup> of each month. Four days before payment is due, Customer gets an email from the account manager at Vendor stating that Vendor has changed banks and that all payments must now be made using the attached wire information. The email warns that wires made to the old bank account may not be received by Vendor, so it is important to update the wire information immediately. The email concludes by stating that Customer should call with any questions.

Customer does not call and wires \$500,000 using the new wire information. It turns out that a hacker infiltrated email accounts at Vendor and sent out wire information for a bank account controlled by the hacker.

A few days later, Vendor sends the Customer an overdue payment notice. The Parties figure out what happened. Vendor wants to get paid, but Customer does not want to pay twice. How should a court rule?

# Last Chance to Avoid Test

*Jetcrete N. Am. LP v. Austin Truck & Equip., Ltd.*, 484 F. Supp. 3d 915, 920 (D. Nev. 2020) (“The hack of [vendor’s] email account created the scenario for the loss. But [customer] was in the best position to prevent the loss by . . . verifying the wiring instructions by phone. Thus, . . . [customer] should suffer the loss.”)

*Arrow Truck Sales, Inc. v. Top Quality Truck & Equip., Inc.*, 2015 WL 4936272, at \*5 (M.D. Fla. Aug. 18, 2015) (“[T]he party who was in the best position to prevent the forgery by exercising reasonable care suffers the loss.”)

*Beau Townsend Ford Lincoln, Inc. v. Don Hinds Ford, Inc.*, 759 F. App'x 348, 359 (6th Cir. 2018) (“To decide this case, the factfinder must determine which party was in the best position to prevent the fraud.”)

Under this test, the facts are more streamlined and the vendor has a higher chance of prevailing on summary judgment

# Alternative Test: General Fault Analysis

*Meritdiam, Inc. v. Facets Fine Jewelry, LLC*, No. CV-14-07041-MWF (CWx), 2015 WL 12660377, \*6 (C.D. Cal. Apr. 27, 2015) (“[L]iability will likely lie with the party the jury determines was most greatly at fault in causing the payment to be misdirected.”)

*Prosper Florida., Inc. v. Spicy World of USA, Inc.*, 649 S.W.3d 661, 672 (Tex. App. 2022) (“[T]he correct rule is that any loss resulting from fraudulently misdirected payments should be placed on whichever party to the contract the factfinder finds to be most at fault for the misdirection.”)

This test is more fact intensive and a trial must occur unless the facts are extremely one-sided

# How to Avoid This Situation

## Vendor Side

Repeatedly notify customers that wire information cannot be changed via email; it can only be changed by phone

## Customer Side

Call to verify any changes in wire information

Carefully review any written correspondence with new wiring instructions

## Both Sides

Contractual language eliminating liability for misdirected wires

# Advice For The Vendor: Improving Collections

# Negotiating the Contract: Key Provisions for Vendors

- ❑ **Suspension right:** customer is allowed to suspend the contracts and/or payment [eliminate]
- ❑ **Setoff clause:** customer may deduct damages due vendor's breach of contract from future payments [eliminate]
- ❑ **Dispute resolution process for invoices** [vendor friendly; usually requires payment and then an obligation to resolve the dispute in good faith]
- ❑ **Clauses that allow price increases due to market conditions** [try to include]
- ❑ **Attorneys' fees/interest clauses** [try to include and explicitly state that outside counsel fees on pre-litigation work are covered]





# Avoid Boilerplate Arbitration Clauses

---

- ❑ Arbitration clauses are traditionally discussed in context of consumer claims
- ❑ But a well-drafted arbitration clause can be plaintiff-friendly for vendors attempting to collect on contracts and reduce risk
- ❑ Discussion of advantages and disadvantages of arbitration
- ❑ How can you get the best of both possible worlds?
- ❑ Detailed arbitration clauses that impose restrictions on the scope and timing of the arbitration

# Contractual Limitations on Scope of Arbitration

- Number of depositions
- Scope of discovery
- Time in which the arbitrator must render a decision
- Number of arbitrators
- Limit on the number of subpoenas
- Limit on the number of depositions
- Showing of good cause required before issuing subpoena [helps limit customer subpoenas]
- Limit on duration of hearing unless good cause shown to expand

# Provisional Remedies

---

- ❑ CCP § 483.010: Allows for prejudgment attachment of a debtor's assets
- ❑ Requirements:
  - ❑ “Claim . . . for money . . . based on a contract”
  - ❑ “Fixed or readily ascertainable amount not less than five hundred dollars”
  - ❑ Claim may NOT be secured by real property
  - ❑ Claim must be a commercial claim (cannot be a consumer dispute)
- ❑ Standard of proof: Plaintiff must establish “probable validity” of claim, meaning “it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim” CCP § 481.190
- ❑ Can exclude provisional remedies from an arbitration provision

# Insurance Coverage

---

- ❑ If a customer counterclaims against you for failure to provide a product or service, insurance coverage may be available to defend against the counterclaims
- ❑ Full discussion of insurance coverage is beyond the scope of this presentation
- ❑ If you are involved in a vendor dispute, ask your broker about insurance coverage

# Good Collection Practices

- Sending invoices at the beginning of the billing period
- Periodically checking in with customers to determine satisfaction; if corrective action is necessary, businessperson should document the issue and the corrective action taken
- In case of delayed payment, prompt follow-up from lawyer or businessperson regarding invoice resolution procedures or interest charges
- Have an automatic process that notifies responsible persons of delinquent accounts
- Be willing to escalate if necessary after an assessment of the customer
- Conduct an internal presentation on provisions in your company's contracts and how to use them effectively during collection discussions

# Questions?

---

James Rapore

*Member*

Mintz

JARapore@mintz.com

+1.310.226.7850



**Thank You**