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**MEMORANDUM ON IMPORTANCE OF OBTAINING ORIGINAL HOLDER'S  
COOPERATION IN PURSUIT OF ASSIGNED CLAIMS<sup>1</sup>**

*JPMorgan Chase Bank v. Winnick*

**An Assigned Litigation Claim May Have Diminished Value  
Without The Agreement Of The Original Holder To Cooperate In Discovery**

**Introduction**

In the purchase and sale of distressed debt and other assets, the buyer customarily obtains from the seller an assignment of any litigation claims or causes of action against the borrower or obligor, its affiliates, and attorneys, accountants, financial advisors and other entities. The buyer expects, as assignee, to be able to assert those assigned litigation claims and, on that expectation, often pays some value for them.

A recent federal district court decision, *JPMorgan Chase Bank v. Winnick*, 228 F.R.D. 505 (S.D.N.Y. May 10, 2005) (Lynch, J.), suggests that assigned litigation claims may actually have no value unless the buyer also obtains an enforceable agreement by the original holder to provide certain kinds of cooperation in litigating those claims. The *Winnick* decision is a cautionary tale of buyers who apparently failed to obtain any agreement from the original holders to cooperate and, as a result, could not produce the evidence underlying the claims in discovery. When it came time to prove the claims in litigation, the plaintiff buyers resisted discovery, saying that they had no authority to produce the documents or witnesses sought by the defendants, and they asserted that the defendants should track down the evidence for themselves from the non-party original holders. The court had no patience with the plaintiff buyers' response to discovery. It issued an order requiring the buyers to provide the evidence (including documents, interrogatory answers, and witness testimony) or face the sanction of dismissal of the claims the buyers had asserted.

In practical terms, as discussed below, this means that a buyer negotiating an assignment of litigation claims should simultaneously negotiate the original holder's agreement to provide

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the evidence necessary to prove the claim or to cooperate upon the buyer's request in connection with litigation of the claims. If the seller has little or no willingness to do so, that may affect the value of the claim and the price that the buyer should be willing to pay.

In asserting assigned claims, the buyer is often described as standing in the shoes of its seller. Under Winnick, a buyer may stand in the shoes of its seller, but without the original holder's cooperation the buyer won't be able to run in them.

### **The Winnick Decision**

In Winnick, JPMorgan Chase Bank ("Chase") acted as an agent for a syndicate of approximately 50 lenders under a credit agreement. On behalf of the lenders, Chase brought suit, claiming that Global Crossing Ltd. ("Global Crossing") and various officers, directors, and employees had made fraudulent misrepresentations to the lenders in order to secure financing and that the lenders had relied on those fraudulent representations in providing financing. Some members of the plaintiff syndicate were original lenders, but most of them were secondary market buyers who had purchased their interest in the outstanding debt along with an interest in the tort claims of the original lenders. Thus, the buyers were assignees of the claims initially held by the original lenders.

The defendants sought discovery from the plaintiff syndicate regarding the original lenders' alleged reliance on the defendants' representations when funding Global Crossing's borrowing requests under the credit agreement and the reasonableness of the alleged reliance. Chase made it plain that the original lenders that had sold their claims to members of the syndicate had not agreed to participate in the litigation as parties or to cooperate in any way in discovery. Acting on behalf of the syndicate, including secondary market purchasers, Chase objected to the discovery requests on the ground that the secondary market purchasers had no contractual or other right to demand documents and information from the original lenders. Because most of the plaintiff lenders were secondary market purchasers, and Chase represented that neither it nor they had custody or control of the responsive information, Chase argued that defendants should conduct non-party discovery of the original lenders as third-parties. From the decision, it does not appear that Chase or the syndicate members who were secondary market purchasers made any proffer to show that they had made an effort to collect the information sought by the defendants in discovery. Rather, it appears that Chase and the secondary market purchasers took the view that it was the obligation of the Global Crossing defendants to obtain the information, if they could, through a costly, time-consuming subpoena process.

This meant that if the Global Crossing defendants wanted to depose an original lender or sought documents from an original lender, the defendants would have to obtain that discovery by use of subpoenas that would be enforced in various jurisdictions. Many of the original lenders were located outside the United States and beyond the subpoena power of U.S. courts. Even within the United States, Chase's position would have imposed a substantial burden on the defendants that would not be required if the original lenders had been parties to the litigation and therefore required to cooperate in discovery.

The district court held that, notwithstanding the secondary purchasers' asserted lack of authority to cause the original lenders to produce information, Chase and the syndicate, including

both original lenders and secondary market purchasers, were obligated to produce the documents, information and witnesses the defendants sought.

While it may seem unfair to impose a duty on secondary market purchasers who have insufficient authority to compel compliance, the district court viewed the equities differently. It said:

It is both logically inconsistent and unfair to allow the right to sue to be transferred to assignees of a debt free of the obligations that go with litigating a claim.

228 F.R.D. 506 (emphasis supplied). The court continued:

It would be unfair to the defendants to permit plaintiff [Chase] and the assignees to divorce the benefits of the claims from the obligations that come with the right to assert them, to the detriment of defendant. . . . The claims being asserted are those of the original lenders. They cannot be asserted by an agent or assignee without the concomitant obligation to produce relevant discovery to defendants. If plaintiff and the assignees failed to obtain rights to insist on cooperation from their assignors in providing such discovery, and cannot persuade the lending [b]anks to cooperate now, that is their problem, not defendants'.

228 F.R.D. 507.

The Winnick court issued an order allowing the Global Crossing defendants to take discovery both of the plaintiff members of the syndicate and the original lenders by serving discovery requests and interrogatories on Chase. The court made Chase responsible for responding on behalf of all of them. The order specified that if Chase could not obtain and produce documents, provide information sought by interrogatories, and produce witnesses for depositions from both the plaintiffs and their original lenders, then the court would entertain motions for sanctions, including motions to strike claims of non-compliant plaintiffs.

The secondary market purchasers in Winnick were thus left with the unenviable task of cajoling their "upstream" assignors into providing documents and information relating to the claims and witnesses with knowledge about the events underlying the claims, or face dismissal if their assignors refused to cooperate.

### *Analysis*

No prospective buyer of legal claims can afford to ignore the Winnick decision. While it is only a single district court decision and is certainly not controlling law, and while it has certain analytic weaknesses that could make it vulnerable to challenge, the Winnick decision nevertheless may be viewed by other courts as providing guidance.

Even before Winnick, prudent buyers who anticipated that they might assert claims in litigation as assignees sought to obtain their sellers' agreement to cooperate in providing documents and information to support the claims. It is critical for a buyer to obtain sufficient

information at the outset to analyze the strength of a claim and, in any event, the buyer ultimately must be able to prove that claim in litigation with appropriate evidence. Since the original lender holds the information necessary to be successful on the claim, the secondary market buyer must obtain access to the information by agreement with the original lender. A secondary market buyer who buys from another purchaser who holds an assignment from an original lender can only obtain whatever rights the other purchaser obtained from the original lender. Accordingly, any buyer in the secondary market should examine closely whether the original lender has agreed to provide cooperation.

Winnick, however, substantially increases the need for a detailed, enforceable agreement to cooperate and to provide information in discovery. The decision imposes a duty on the buyer to obtain and produce the relevant information in document discovery and answers to interrogatories. The Winnick decision also imposes a duty to produce witnesses, apparently including employees and former employees of the original lender. The court did not spell out exactly how the plaintiff secondary market purchasers are supposed to do that, but it imposed the duty, nevertheless. As the court in Winnick made plain, if the buyers are unable to persuade the original lenders to cooperate in providing the requested discovery, the result could be dismissal of the claims.

To the extent that the decision makes the buyer responsible for producing witnesses employed by the original holder (and perhaps others), it appears unprecedented. Ordinarily, even a party to litigation is not required to produce its own former employees as witnesses, because those persons are not in its control. If a defendant (or a plaintiff) seeks testimony of such persons, the parties must do so through non-party subpoenas. The employees and former employees of original holders are even less subject to control or persuasion by a subsequent purchaser. Those persons simply may refuse to appear, and, depending on their location, they may not be subject to subpoena power compelling them to appear.

The courts, however, do recognize one type of case in which the party plaintiff is responsible for providing information held by a non-party – where an insurer sues as subrogee on a claim originally held by the insured-subrogor. One of the precedents cited by the Winnick court, for example, Fireman's Mutual Insurance Co. v. Erie-Lackawanna Railroad Co., 35 F.R.D. 297 (N.D. Ohio 1964), involved a plaintiff insurer as assignee of an insured on a subrogated claim. The court held that the insurer had to answer interrogatories regarding the operation of the insured's business in order to assert a claim for damages to the insured's business. The court required the plaintiff to obtain such information from its assignor as it could, in order to respond to the interrogatories. The unspoken presumption in that case was that the insurer possessed the authority to do this based on the insurance contract.<sup>2</sup>

Winnick appears to presume that, similarly, the buyer of financial assets and potential claims, like an insurer, can and should negotiate to receive information from the original holder to support the claim.

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<sup>2</sup>The insurer-insured relationship has been recognized as a particular kind of close relationship that justifies requiring an assignee to produce information from its assignor. Skelton & Co. v. Goldsmith, 49 F.R.D. 128, 130 (S.D.N.Y. 1969). Accord, LeBlanc v. Ford Motor Co., 251 So.2d 81 (C.A. La. 1971). It follows that insurance contracts are likely to contain explicit provisions dealing with cooperation in subsequent litigation.

### **What This Means In Negotiations To Transfer Claims**

A secondary market purchaser who brings a claim that could have been brought by the original holder must be prepared to produce the evidence that the original holder would have produced to prove that claim. In negotiating the assignment, the secondary market buyer's goal should be to preserve and enhance its ability to do so. Furthermore, under Winnick, potentially any refusal by the original holder to cooperate in the litigation in the same manner as though it had been a party could doom the litigating secondary buyer's claim early in the litigation.

The original holder presumably transferred its claim, however, at least in part because it did not want to be a party to any litigation respecting it. An original holder is likely to resist any contractual obligation to provide discovery in the same manner or to the same extent as a party to litigation. From the original holder's perspective, it assigns the potential benefits of litigating a claim to the buyer, along with the obligations associated with bringing such litigation, including discovery obligations.

As a result, the parties have very different interests in transferred claims and their successful prosecution. The secondary market buyer may need a high degree of cooperation, particularly after the Winnick decision; the original holder who sold may want to walk away completely, money in hand, and think no more about the assets or the claims. The time to strike a balance of these interests is during the negotiations of the transfer. After the transfer closes, the buyer will have little leverage.

In negotiating transfers of assets accompanied by assignments of claims, including potential fraud claims, the minimum that a secondary market buyer should seek is the original holder's express agreement to cooperate with the assignee-buyer in litigation over such claims. An agreement to "cooperate" is not a perfect solution from a buyer's perspective, since the term cooperation could be subject to interpretation, but at least the assignee-buyer and the original holder have evidenced their intent to create some type of ongoing duty owed by the original holder if litigation should arise.<sup>3</sup>

Currently, the LSTA Standard Terms and Conditions for Purchase and Sale, widely accepted in documenting assignments of distressed bank loans, contains a provision that may be construed to constitute such a promise of cooperation. Section 14(ii) provides that each party agrees to "take or cause to be taken all such other and further actions as the other Party may reasonably request to effectuate the intent and purposes, and carry out the terms, of this Agreement...." One might argue that the transfer of a valuable claim and preserving the value of that claim are both purposes of the agreement, and, therefore, that the assignor has agreed to cooperate in fulfilling those purposes.

This provision, however, does not specifically reference cooperation in connection with litigation the assignee might bring. It speaks of the "intent and purposes" of the purchase and

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<sup>3</sup>A secondary market buyer bringing a fraud claim would have to show, for example, that the original holder relied on the alleged fraudulent statements in order to prove the fraud claim, and such a showing would require evidence of the representations made to the original holder and the nature of its decision-making at the time. Reasonably, this agreement to cooperate could be viewed to encompass providing the buyer with the original holder's files relating to the investment to show what statements were made by the defendant to the original holder and what the original holder did in response.

sale agreement itself, and the rest of Section 14 deals with examples of actions required to effect the transfer, such as procuring required consents and delivering any notes evidencing the loans and commitments. The provision may be subject to different interpretations.

Another provision of the LSTA Standard Terms and Conditions for Purchase and Sale also may confuse the ability of the secondary market purchaser to obtain documents from the original holder to support a claim in litigation. Section 5, concerning the buyer's representations and warranties, states in Subsection (g) that the buyer "will not rely on Seller to furnish or make available any documents or other information regarding the credit, affairs, financial condition or business of Borrower or any Obligor, or any other matter concerning Borrower or any Obligor." Subsection (h) continues to say that the buyer acknowledges that the seller has and may receive in the future information material to the decision to purchase but that the buyer has determined to purchase without receiving that information. The purpose of these provisions is to address certain potential insider trading claims, not the problem of cooperation with the assignee in the context of litigating an assigned claim. However, the language might be seized upon by an original holder reluctant to turn over information to be used by the secondary market purchaser in litigation to justify a refusal by the original holder to cooperate.

On balance, the LSTA agreement provides a basis for a secondary market buyer to seek the cooperation of its seller, but it is not as definitive in this respect as it could be. To the extent possible, where it is expected that litigation claims may need to be asserted, the nature of the cooperation sought by a buyer should be specified in a separate provision of the trade confirmation and the form assignment agreement at the time the transfer terms are agreed upon or negotiated. They may include a variety of terms.

Ideally, the buyer should request that relevant documents be preserved and provided to it upon request. Ideally, the seller should segregate and preserve the relevant materials at the time of the transfer of the assets and claims. The buyer must make clear that the relevant materials include correspondence, e-mails, faxes, bonds, analysis of the seller's investment, and any other documents, records of conversations, conferences and telephone calls and other materials received or created by the seller that relate to the assets and claims being purchased. If the buyer has concerns about the seller's record-keeping or document retention policies going forward and litigation claims are ripening, the buyer should seek delivery of the files and documents at closing. This would relieve the seller of further potentially burdensome obligations with respect to those materials and would be the buyer's best insurance against potential loss of the material or a later failure by the seller to cooperate.

The buyer should also request that persons with knowledge relating to the claims be identified. These would include the seller's employees who had contact with the persons who offered, marketed and sold the assets to the seller that the seller is now transferring to the buyer. If those persons are still employed by the seller, the buyer should request that they be made available to it on a reasonable basis, and, if they change employers in the future, the seller should keep the buyer informed of their current location. The buyer should request an agreement to provide to it information required to respond to any interrogatories, if such discovery is taken in litigation.

All of the above types of cooperation can be offered without making the original holder subject to the same obligations as a party in discovery. If these types of cooperation are given,

they may be enough to satisfy most courts that the evidence will be available to reach a reasoned decision on the merits of the claim and that the defendant has been treated fairly.

If Winnick is construed to require that an original holder who has sold and assigned its claims nevertheless must provide discovery as though it were a party to the litigation, then another level of cooperation may be required. The buyer would then need to request that the original holder agree that employees whose depositions are sought may be deposed without requiring a subpoena. This is what would be required of a party. The discussion in Winnick of the difficulty of subpoenaing foreign entities suggests that, in certain circumstances, it will be burdensome, and perhaps impossible, for a defendant to obtain information by means of non-party discovery. In those circumstances, as in Winnick, a court may impose on the secondary market purchasers the burden of securing the information from their assignors. The order issued by the Winnick court is not imposed on the original holders directly, but, by making Chase responsible for producing their witnesses just as though they were parties to the litigation, the order is addressed to them indirectly. It seems to require that the witnesses controlled by the assignors make themselves available.

An original holder who is selling the assets and claims may well balk at any of the suggested detailed and potentially burdensome requirements. A buyer may only be able to secure a general agreement to provide reasonable cooperation. What will constitute reasonable cooperation will depend on the circumstances as they arise. The value of any potential claim will decrease with the decreasing level of cooperation offered by the original holder.

### **Conclusion**

If you purchase a litigation claim along with other assets, it is prudent to obtain as much of the evidentiary basis for asserting it as you can or an agreement to provide the relevant materials and make witnesses available upon reasonable request. If an agreement to provide such cooperation is not obtained, the value of the claim should be discounted accordingly.