

Claims Trading — Educate the Creditors!

Written by: Laura DiBiase

Kurtzman Carson Consultants LLC; El Segundo, Calif.

ldibiase@kccllc.com

No matter how long you have been in the restructuring industry, at some point you've received that telephone call from a friend or relative who owns a small business and, with panic in his or her voice, says, "I've received mail from the bankruptcy court!" I know I've received that frantic call myself, only to find out that the document is a notice of appearance. These documents, no matter how menial in the bankruptcy context, are frightening to a small business owner. Even more confusing to small business owners are the letters and checks they have received offering to purchase their claims. I recently got that telephone call and was really surprised by the lack of information in the claim purchase request. My caller had no idea if they were even permitted to sell their claim and what would occur if they actually did sell.

This is not a problem for large, corporate creditors or institutional creditors who see these notices more frequently. They normally have experience or at least legal counsel to advise them on how to proceed. Small business owners, in most situations, do not have the experience or legal counsel readily available to know what would be the appropriate action to take. This lack of experience and lack of advice can be very detrimental, especially if the claims purchasers utilize shady tactics.

One type of "shady tactic" can include the claims purchaser using language that allows them to transfer the claim, but not actually pay the original creditor until later in the case. The claims purchaser generally states that the creditor will receive a check after the purchaser conducts their "due diligence," but provides no actual time frame for this due diligence. In reality, the purchaser's due diligence is waiting for the reorganization plan to be filed. If the plan calls for more than they offered the creditor, then they send a check for what they offered. If the plan calls for less, they return the claim to the original creditor and undo the transfer. During this delay, the original creditor is usually unaware that the plan has even been filed. Another tactic used by claims buyers is to actually send a check that includes a percentage of the original claim and, in a small typed font, a clause that states that by depositing the check, the claim holder agrees to sell their claim. This situation is especially confusing if the small business owner utilizes a lock box for their payments. Checks are deposited automatically, without the business owner even reviewing the claim purchase offer. Trying to undo this mess is time consuming and frustrating for the small business owner.

There are some relatively simple ways to provide education to these creditors. Every case requires numerous mailings, such as the notice of commencement, the bar date notice and a proof of claim form. Adding another piece of paper to one of these mailings, which provides a brief explanation of the claims-buying process, would be beneficial to the creditors while not adding excessive expense to the estate.

In cases where there is an active creditors committee and a web site set up exclusively for unsecured creditors, normally, a web page can be easily added to explain the process. In the *Dana Corp.* case, Kramer Levin Naftalis & Frankel LLP, counsel to the unsecured creditors committee, added such a page. Go to their site at <http://www.danacreditorcommittee.com/danacommittee> and click on the “Buying and Selling Unsecured Claims” link. You’ll see that it gives a brief explanation of the process, a list of the most active claims buyers and links to counsels’ contact information. Most importantly, however, in simple verbiage it explains the pros and cons associated with the claims-selling process. If a case is required to have such a website, this additional page will cut down on the number of inquiries from confused creditors.

For the small business owner, selling their claim can actually be a cost-effective measure instead of waiting for a plan to be confirmed. Claims traders who utilize improper or even unethical purchasing techniques not only frustrate the entire process, but can do even further damage to the small business owner. The restructuring community can alleviate these possible problems simply by educating creditors.