

Assignments for the Benefit of Creditors: Overview

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A Practice Note providing an overview of assignments for the benefit of creditors. This Note addresses the basic process by which assignments are generally administered and considerations when determining whether an assignment for the benefit of creditors is the appropriate course for liquidating a business.

An assignment for the benefit of creditors (ABC) is a common law or statute alternative to a formal Chapter 7 bankruptcy proceeding. Through an ABC, the debtor's assets are marshaled and liquidated in an orderly fashion for the benefit of creditors of the debtor's estate.

An ABC is governed by statute in most states and can either be court-supervised or conducted outside the court process. It was originally a product of common law, but over the years, many states have codified the ABC process by statute. Because each state has its own ABC laws or statutes, the rules governing ABCs can vary widely from state to state.

This Note addresses the basic process by which assignments are generally administered and considerations when determining whether an assignment for the benefit of creditors is the appropriate course for liquidating a business.

WHAT AN ABC IS

An ABC proceeding is a mechanism used to liquidate a business entity, such as a corporation or a limited liability company. While an ABC is analogous to a Chapter 7 or a liquidating Chapter 11 bankruptcy proceeding, an ABC is not governed under the Bankruptcy Code but rather administered under the state law where the ABC proceeding is pending.

In an ABC, the debtor, known as the assignor, makes a voluntary transfer of all of its assets to a trustee, known as an assignee. The assignee places the assignor's assets in trust for liquidating the assets and distributing the proceeds to creditors on a pro rata basis.

Because an ABC is a liquidation proceeding, the assignor cannot reorganize and continue its business operations.

Despite the similarities between an ABC and a Chapter 7 bankruptcy case, there are significant differences, including that:

- An ABC does not provide the debtor with a discharge.
- An ABC proceeding does not afford a debtor an automatic stay from creditor collection and enforcement activities.
- A sale in an ABC does not provide the purchaser with the right to purchase the assets free and clear of liens, claims, and encumbrances.

As in the case of a federal bankruptcy proceeding, the decision to undergo an ABC case is made by the company's management and is typically determined by unanimous consent of the board of directors as prescribed by the company's governance documents, such as corporation bylaws or a limited liability company (LLC) operating agreement. An ABC is generally an attractive and cost effective way of liquidating an entity in cases where the debt is largely unsecured. A company that is concerned with Securities and Exchange Commission (SEC) reporting requirements may choose to do an ABC if its debt documents would not require it to publicly report the assignment.

The administration of an ABC does not necessarily dissolve the debtor entity. The act of dissolution must be accomplished by the assignor's management by taking the steps necessary to formally dissolve the assignor within each state the assignor is located or authorized to conduct business. Because most states, such as New Jersey, require that the entity obtain a tax clearance certificate (or other similar type of certificate evidencing the payment of tax debts) before the entity can be formally dissolved, the process of dissolution may take a significant amount of time depending on the particular state law governing corporate dissolutions (see Practice Notes, Dissolving a Delaware Corporation ([5-500-9205](#)) and Dissolving a Delaware LLC ([6-522-2446](#))).

COMMENCING AN ABC PROCEEDING PROCESS OVERVIEW

An assignor commences an ABC by executing a deed of assignment or assignment contract conveying all of the assets of the assignor

to the assignee. Once an assignment is made, all assets are vested in the assignee as of the date of the assignment, which is typically the date of the deed (see *Meeker v. Felts*, 23 A. 672, 673-74 (N.J. Ch. 1892)). The assignee then becomes a fiduciary on behalf of all creditors of the debtor, as well as for the debtor itself. The transfer of the assets is subject to any and all existing liens, and the assignee must honor all valid, perfected, and enforceable liens.

The deed is typically filed with the surrogate court of the relevant county (or other designated governmental offices under state law) where the assignor's primary business or assets are located or where the assignor's registered agent resides. The deed includes a schedule of assets and liabilities, as well as the names and addresses of the creditors of the assignor.

Like a Chapter 7 trustee, the assignee proceeds to liquidate the assignor's assets by taking action to collect the accounts receivable and liquidating the physical assets either through:

- A public auction sale.
- A private sale to a stalking horse or prearranged buyer.
- A going out of business sale.

(See Liquidation of Assets.)

When the assignee conducts a public auction, the assignee must provide notice of the public auction and, after the auction takes place, file a motion with the court for approval of the sale. In a private sale, the assignee must file an appropriate motion advising of the private sale and serve the motion on all creditors in the proceeding. Like a section 363 sale with a stalking horse (see Practice Note, [Buying Assets in a Section 363 Bankruptcy Sale: Overview \(1-385-0115\)](#)), the private sale will invite higher offers and provide an opportunity for creditors or other interested parties to object.

SELECTING AN ASSIGNEE

The assignee is typically selected by the assignor or assignor's counsel. Because the assignor's duties are similar to that of a Chapter 7 trustee in a bankruptcy proceeding (see Practice Note, [Chapter 7 Liquidation: Overview: The Chapter 7 Trustee \(w-000-6231\)](#)), the assignee is generally someone who is an attorney or a certified public accountant with expertise in bankruptcy law and insolvency proceedings, including experience in:

- State and federal liquidation proceedings, such as receiverships and Article 9 secured party sales under the Uniform Commercial Code (UCC).
- Serving as or representing a Chapter 7 trustee.

An assignee must typically post a bond under state statute. The bond is designed to protect the interests of creditors against potential misconduct or negligence by the assignee. While the amount of the bond can vary from state to state under each state's ABC law, the court, in its discretion, can determine the amount of the bond on a case-by-case basis and the assignee can request that the court waive the bond requirement.

Unlike the Bankruptcy Code where a trustee or its professionals must be a disinterested person (§ 327, Bankruptcy Code), there is no rule that the assignee must be disinterested to act as a fiduciary for the ABC estate, though it is preferable. However, the assignee should be someone who can competently and effectively liquidate a business

while fulfilling its fiduciary obligations to the estate and to the creditor body.

Creditors can challenge the appointment of the assignee if they believe that the assignee is not:

- Acting in the best interest of the creditor body or the estate.
- Performing her fiduciary duties as required under the ABC law in that particular state.

Assignable Property

All real and personal property of the assignor should be assigned. This includes:

- Cash or cash equivalents.
- Accounts receivable of the assignor.
- Marketable securities.
- Physical assets, such as real property and improvements, machinery and equipment, and inventory (and work in process if it's a service company).
- Causes of action, including commercial, tort, or contract claims of the assignor.
- General intangibles, including any tax refunds, liquor licenses, interests in other business entities (such as a limited or general partnership interest), patents, trademarks, or other intellectual property interests belonging to the assignor.
- Deposits and banks accounts.

PRELIMINARY STAGES OF AN ABC PROCEEDING

In the initial stages of the ABC process, the assignee must undertake a significant amount of work to marshal the assets that comprise the assignor's estate and ascertain the liabilities that require payment. The assignee must:

- **Create a complete list of the assignor's liabilities.** To have a complete and accurate service list for noticing and payment, the assignee must obtain a current list of accounts payable. The assignee typically gathers this data by reviewing the assignor's books and records and interviewing the assignor's principals, bookkeepers, and accountants.
- **Secure and take inventory of all books, records, and assets.** During the initial stages of the administration, the assignee typically visits the assignor's facility, together with an appraiser, accountant, and auctioneer, to determine what books and records need to be secured, as well as what other assets comprise the estate. Movable objects, such as office equipment, artwork, and machinery, should also be secured and inventoried at this stage.
- **Perform public record searches.** This allows the assignee to determine whether and to what extent any liens are attached to the assignor's assets.
- **Find and close all bank accounts.** The assignee must transfer all funds in the assignor's bank accounts to escrow accounts in the name of the assignee.
- **Provide notice to all creditors of the assignor's ABC proceeding.** Once the creditor list is complete, the assignee sends letters to creditors and to the Internal Revenue Service (IRS) and other state and municipal taxing authorities. The assignee typically places an ad in a newspaper noticing the ABC proceeding to ensure

widespread notice to any other unknown or potential creditors. Newspaper notice is generally placed in the local law journal in the jurisdiction or state where the ABC proceeding is being conducted.

■ **Determine which professionals to hire to conduct the ABC.**

Professionals are necessary to assist in the administration of the estate. In a typical ABC proceeding, the assignee must retain professionals, including counsel, accountants, appraisers, and auctioneers. If there are unique issues in the case, the assignee may also consider hiring special counsel. After the assignee has selected the appropriate professionals, the assignee files the appropriate retention applications with the state court. If the assignee is an attorney with her own law firm, it is not unusual for the assignee to retain its own firm to perform the legal services for the assignee. Most ABC proceedings are filed under emergent circumstances so retention applications are typically not filed on the first day with the court. It is therefore advisable for retention applications and orders retaining these professionals to include a provision that the professionals are retained retroactively, or *nunc pro tunc*, to the filing date of the ABC proceeding.

ESTATE ADMINISTRATION

LIQUIDATION OF ASSETS

An ABC proceeding generally results in a sale of substantially all of the assets of the assignor, such as a sale of real estate or a sale of a business. This is the preferred method of liquidating an estate as this process is faster and generates a higher yield at a lower cost to the estate.

There are several ways an assignee can liquidate inventory, fixtures, and equipment, including:

- A public auction sale, either piecemeal or in bulk.
- A private negotiated sale to a stalking horse or prearranged buyer.
- A going out of business sale.

Each alternative has advantages and must be evaluated based on the nature of the assets. Because the assignee has a fiduciary responsibility to maximize recovery for all creditors, if a buyer comes forward who is willing to pay a higher and better offer, the assignee must consider that offer.

If the assignee chooses to sell the assets in bulk, the assignee and counsel need to consider the state and local law as many states have a special noticing provision under their bulk sales law while other states have exemptions for certain bulk sales. For example, in most states, a bulk sale notice or other similar compliance certificate must be filed with the relevant governmental authority. Taxes may also be due in a bulk sale under some state statutes while other states exempt those tax obligations.

A sale of assets in an ABC proceeding is subject to the liens of secured creditors. In a negotiated sale, the assignee must obtain the secured creditor's consent to the sale price before consummating the sale. Unlike a section 363 sale in bankruptcy where assets can be sold free and clear of liens and encumbrances, sales in an ABC do not provide the purchaser with the statutory right to receive the assets free and clear. The assignee can only sell the right, title, and interest that the assignor held in the assets. However, a free and clear transfer can be requested in the appropriate motion

approving the sale or can be accomplished with the consent of the secured party.

ASSET RECOVERY: AVOIDANCE POWERS

Similar to a Chapter 7 trustee in a bankruptcy proceeding, the assignee is armed with certain avoidance powers under most ABC statutes. The tools available to the assignee to liquidate assets for the estate include the power to recover fraudulent transfers and preferential payments by the assignor to the transferee within a certain period of time before the filing date of the ABC proceeding.

The assignee and its counsel must be aware of the relevant state's law concerning the fraudulent transfers and preference avoidance powers of the assignee. For example, while the Bankruptcy Code provides that certain payments made within 90 days of a bankruptcy filing may be recovered as a preferential transfer, the ABC state statutes vary in terms of the time periods for when this payment could constitute a preferential payment. For example, while some states like California follow the Bankruptcy Code's scheme and allow for the recovery of certain preferential payments made within 90 days of the date of the assignment (Cal. Civ. Proc. Code § 1800), other states like New Jersey provide for a longer look-back period of 120 days from the date of the ABC filing (N.J.S.A. 2A:19-3). While the Bankruptcy Code provides explicit defenses to preferences, such as payments made in the ordinary course of the debtor's business, certain state ABC statutes do not permit these defenses (for example, N.J.S.A. 2A:19-3).

There is some authority suggesting that certain avoidance actions, and particularly preference recovery, are preempted by the Bankruptcy Code. The US Court of Appeals for the Ninth Circuit, in *Sherwood Partners, Inc. v. Lycos, Inc.*, held that the Bankruptcy Code preempted California's preference provisions under its ABC statute (394 F.3d. 1198 (9th Cir. 2005)). While this case has come under heavy criticism by other courts around the country that declined to follow it (see *Ready Fixtures Co., v. Stevens Cabinets*, 488 F. Supp. 2d 787 (W.D. Wis. 2007); *Spector v. Melee Entm't LLC*, 2008 WL 362125 (Del. Super. Ct. Feb. 6, 2008)), as well as several courts in California (see *Haberbush v. Charles & Dorothy Cummins Family Ltd. P'ship*, 139 Cal. App. 4th 1630 (Cal. Ct. App. 2006); *Credit Managers Ass'n of Cal. v. Countrywide Home Loans, Inc.*, 144 Cal. App. 4th 590 (Cal. Ct. App. 2006) (holding that federal bankruptcy law does not preempt an assignee's authority to sue and recover preferential payments under California's ABC statute)), the opinion in *Sherwood Partners* raises an issue, at least in the Ninth Circuit, about the viability of preference litigation or other avoidance actions, such as fraudulent conveyance recoveries, in a state-governed ABC proceeding.

For more information on preferences and fraudulent transfers in bankruptcy, see Practice Notes, Bankruptcy Litigation: Preferences and Fraudulent Transfers ([2-583-6268](#)) and Preferential Transfers: Overview and Strategies for Lenders and Other Creditors ([6-381-6416](#)).

DISTRIBUTION OF FUNDS: PRIORITY OF CLAIMS

As in the case of a bankruptcy proceeding, an ABC proceeding follows an established ordering and priority scheme for the payment of creditors' claims. However, the states vary on the general priority scheme under each of the state's unique ABC laws. Some states

adopt the Bankruptcy Code's scheme, while others leave the priority scheme as set out in the assignment contract. However, even in states that generally follow the Bankruptcy Code's formula, nuances may exist between the Bankruptcy Code's formula and the particular state's priority scheme.

For example, the ABC statute in New Jersey provides special treatment to landlords who lease their premises to an assignor as tenant. Under New Jersey's statute, if the assignor is a tenant, all of its goods and chattels located on the premises in its possession are subject to a lien for the payment of rent due to the landlord, not exceeding one year's rent. Unlike the Bankruptcy Code, which treats a landlord whose lease was rejected as having a general unsecured claim under section 502(b)(6) of the Bankruptcy Code, in a New Jersey ABC proceeding, a landlord's debt is paid as a secured claim totaling one year's rent (N.J.S.A. 2A:19-31). In a New Jersey ABC case where the monthly rent is high, a landlord's claim may absorb much of an estate's assets in an ABC proceeding.

Once the assignee files the ABC and ascertains the creditor body, the assignee serves a notice of the ABC proceeding on those creditors together with a proof of claim form and instructions concerning:

- What information must be included in the claim form, such as the amount of the claim and supporting documents.
- Where and when creditors must file their respective proofs of claim.

Creditors must file a claim with the assignee to share in the distribution of any proceeds generated from the liquidation of the debtor's assets. Some states provide for a specific statutory time period within which a creditor is to file a claim. For example, under Michigan's ABC statute, a creditor must file its proof of claim within 90 days of receipt of the notice of the ABC proceeding (MCL § 600.5221). New Jersey's ABC statute similarly provides for a 90-day proof of claim filing deadline (N.J.S.A. 2A:19-23). Regardless of whether the state statute provides for a specific statutory bar date, most assignees provide notice to creditors to file proofs of claim by a certain date (typically 90 days).

After the assets are sold and the assignee receives and tallies the filed proofs of claim by the creditors of the estate, the assignee can make a distribution to creditors following the priority scheme required in that state. Because only allowed and timely filed proofs of claim can be paid, the assignee must be satisfied that the claims are valid. In cases where there is an issue regarding the validity of a claim, the assignee may file an appropriate motion for an order expunging, reclassifying, or otherwise adjusting the claim amount.

Unless the estate can pay a full 100 percent distribution to the creditors, claims are paid on a pro rata basis. Once the claims are paid, the assignee begins the process of closing the estate (see Closing the Estate).

ASSUME OR REJECT EXECUTORY CONTRACTS

A debtor or trustee's power to assume, assign, or reject executory contracts and unexpired leases is a valuable tool in bankruptcy. Subject to court approval and certain limitations, the debtor can use reasonable business judgment to reject burdensome and unfavorable executory contracts and leases while assuming or

assigning those beneficial to the estate (see Practice Note, Executory Contracts and Leases: Overview ([8-381-2672](#))).

In an ABC, the assignee generally does not have the same statutory or legal authority of a debtor or trustee to reject unexpired leases and executory contracts. However, because the assignor is liquidating its assets and going out of business, executory contracts are deemed rejected unless the assignee takes affirmative action to assume a contract. The contract counterparty is then left with an unsecured claim against the assignor's estate. There may be occasions when the assignee may temporarily assume an executory contract, such as a real estate lease, to provide enough time to ensure an orderly liquidation on the premises. However, the assignee evaluates this strategy on a case-by-case basis.

PROFESSIONAL FEES AND COSTS

While an ABC is generally less expensive to administer than a Chapter 7 bankruptcy, an assignee incurs significant costs in administering the estate. These costs include:

- Out-of-pocket expenses, including postage for mailing notices, utilities, and insurance.
- Rent for the time that the debtor remains in possession of the premises and rent for any storage facility required to store the assignor's assets.
- Fees of the assignee and other retained professionals. Most state ABC statutes provide for a commission to be paid to the assignee. Commissions vary from state to state and can be as high as 20% on all assets distributed, such as in New Jersey. Most statutes also allow for professional fees to be paid. Unlike the payment of a commission to the assignee, the professionals are typically awarded fees on an hourly basis. In states that have court-supervised ABC proceedings, the assignee must file an appropriate fee application seeking court approval for payment of commissions, professional fees, and costs. Creditors have the opportunity to object to fees and commissions sought by the assignee, and the court, in its discretion, may adjust the fees and commissions.

The costs of administration are a function of the specific circumstances of each debtor. When the assets are sold in bulk to a buyer on the date of the assignment, the costs are less than when an assignee has to manage a going out of business sale or do a piecemeal auction.

CLOSING THE ESTATE

After the assignor's assets have been liquidated and the proceeds have been collected and distributed to creditors and professionals, the assignee may proceed to close the estate.

Closing an ABC proceeding is similar to that of a bankruptcy case. The assignee must prepare an accounting detailing the inflows and outflows of the estate monies during the case. While the various jurisdictions differ about how the final accounting should be handled, the assignee typically must file the accounting with the court supervising the ABC proceeding. As part of this process or with the final accounting, the assignee also asks the court to close the estate. The closing of the estate notifies all parties in interest that:

- The estate is fully administered.
- The assignee is no longer required to conduct any further work regarding the estate.

- No other distributions will be made.
- The assignment is terminated.

The order closing the case also formally discharges the assignee from any further duties regarding the estate.

ANCILLARY CONSIDERATIONS

INVOLUNTARY BANKRUPTCY PROCEEDING

During the pendency of an ABC proceeding, creditors may seek to challenge the ABC proceeding itself. One way a creditor can accomplish this is by placing the assignor in an involuntary bankruptcy proceeding. To file an involuntary bankruptcy petition, certain requirements must be satisfied concerning:

- The minimum number of petitioning creditors.
- The types of claims they hold.
- The amount of their claims.

(See Practice Note, *The Involuntary Bankruptcy Process: Requirements for Filing an Involuntary Petition* ([0-522-5462](#)).

If these requirements are satisfied, the bankruptcy court appoints a Chapter 7 trustee to administer the estate instead of the assignee. However, the assignor may challenge the bankruptcy filing and, together with the debtor, move to have the bankruptcy court abstain from hearing the case on the ground that there is already a pending proceeding in a state court that can protect the interests of both parties (§ 305(a), Bankruptcy Code) (see Practice Note, *Notice of Removal, Remand, and Abstention in Bankruptcy: Abstention from the Entire Case Under Section 305* ([W-000-7148](#))). Courts have found grounds to dismiss an involuntary case under section 305 of the Bankruptcy Code where the state insolvency proceeding is less expensive and better serves the interests of parties involved in the case (see *In re Grigoli*, 151 B.R. 314, 319 (Bankr. E.D.N.Y. 1993); *In re Tarletz*, 27 B.R. 787, 793 (Bankr. D. Co. 1983)).

TAX ISSUES

After filing the ABC, the assignee or its professionals must prepare and file tax returns for both the period before the ABC filing and the period after the filing. These tax returns typically include federal and state income tax returns, as well as payroll, sales and use, and unemployment taxes. The assignor must ensure that the relevant taxing authorities, including the IRS, receive notice of the ABC so the taxing authorities have the opportunity to file proofs of claim and participate in the distribution of the estate. Because tax claims generally have priority over unsecured claims, timely notice is crucial.

UNCLAIMED FUNDS

The assignee must address funds that were distributed by the assignee but later returned to the estate as unclaimed. The assignee should file an appropriate motion with the court and request that the unclaimed funds be deposited with the state's unclaimed property division.

Another option is for the assignee to file a supplemental motion asking the court to distribute the unclaimed funds to the remaining creditors of the estate. However, the problem is that if the amount of the unclaimed funds results in each creditor receiving a de minimis check, the costs of the distribution may outweigh the benefits of the supplemental distribution. In that situation, the better alternative

may be for the assignee to file an appropriate motion asking the court to have the unclaimed funds released to the assignee as additional compensation.

SPECIAL ABC CASES

Real Estate

If the assignor's assets are comprised of a factory or an industrial site, the assignee should take special precautions when accepting the assignment because of potential environmental obligations. The assignee may be considered within the chain of title and therefore a potentially responsible party who may be liable for environmental contamination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. §§ 9601 to 9675) and under the applicable state environmental statutes.

While certain amendments have been enacted regarding safe harbor provisions for fiduciaries, the law is not well settled regarding whether an assignee is completely free from liability. For example, Title 42 of the US Code provides a safe harbor concerning the liability of fiduciaries regarding the release or threatened release of hazardous substances from assets held in a fiduciary capacity (42 U.S.C. § 9607(n)). This section defines the term "fiduciary" to include a "trustee," "receiver," or "representative in any other capacity that the Administration, after providing public notice, determines to be similar to the capacities described [in this section]" (42 U.S.C. § 9607(n)(5)(A)(i)(I)-(XI)). While an assignee appointed by the court to administer an ABC may arguably fall within this safe harbor provision, Congress did not expressly define fiduciary to include an assignee appointed in an ABC under this safe harbor provision. The liability of an assignee for environmental obligations therefore remains an open issue.

Law Firm Liquidations

In the case of an ABC involving the liquidation of a law firm, special care is required regarding IOLTA attorney trust accounts because the monies in these accounts potentially belong to clients of the assignor law firm. An assignee therefore should conduct an investigation into the accounts to determine the extent to which the funds represent:

- Client funds that should continue to be segregated or be paid immediately to the client.
- Earned fees that should be paid to the assignor.

The assignee must also gather client file lists and examine which files can be destroyed and which files must be maintained under the rules established by the appropriate state regulatory bodies. The assignee must determine whether the assignor law firm has an existing off-site storage facility or whether the assignee needs to secure one.

Regarding the recovery and collection of old accounts receivable due to the assignor law firm, the assignee must determine which collection actions the firm already began and which ones it did not. Depending on the state law, the assignee also evaluates whether to send out notices to clients advising of their rights to request fee arbitration.

ADVANTAGES OF AN ABC

An ABC is a useful alternative when choosing an appropriate liquidation proceeding for a debtor. To make an informed decision,

the insolvency practitioner must understand the debtor's goals and be familiar with the advantages of an ABC.

LOWER COSTS AND FASTER PROCEEDING THAN A BANKRUPTCY LIQUIDATION

An ABC is often more efficient and less costly than a Chapter 11 or Chapter 7 liquidation. Because the assignee is paid on commission and typically chosen by the debtor, the fees in an ABC may be pre-negotiated before the assignment begins. When compared to a Chapter 11 liquidation, liquidating through an ABC is generally quicker because there is no need for:

- Compliance with US Trustee guidelines (see Practice Note, US Trustee Guidelines and Requirements for Chapter 11 Debtors ([W-000-5977](#))).
- First day motions and filing of schedules and statements of financial affairs (see Practice Notes, First Day Motions: Overview ([W-000-5994](#)) and Schedules and Statements of Financial Affairs: Overview ([W-000-9982](#))).
- Disclosure statement approval and plan solicitation (see Practice Note, Chapter 11 Plan Process: Overview ([0-502-7396](#))).

FLEXIBILITY IN SELECTING ASSIGNEE

In a Chapter 7 bankruptcy proceeding, the US Trustee appoints a trustee at random from a panel of trustees qualified to serve in the district. However, in an ABC, assignees are selected by the assignor or the assignor's attorney, giving the debtor an opportunity to select an assignee familiar with the relevant business (see Selecting an Assignee).

POTENTIAL FLEXIBILITY WITH DISTRIBUTION SCHEME

While the Bankruptcy Code provides a robust and detailed distribution scheme, certain ABC statutes do not contain a complete distribution schedule, potentially leaving the assignor with some flexibility regarding the priority of payments. Despite the potential for flexibility, the distribution process in an ABC remains subject to court approval (see Distribution of Funds: Priority of Claims).

EASE IN CLOSING ASSET SALES

Accomplishing and closing a sale to a related party or prearranged purchaser is both easier and faster in an ABC because bankruptcy procedures are not applicable and the requirements of section 363 do not need to be met (see Liquidation of Assets).

PREFERENTIAL TRANSFERS MAY BE AVOIDED

Certain ABC statutes permit an assignee to prosecute avoidance actions, such as preferences and fraudulent conveyances. Depending on the state, it may be more favorable to pursue these types of actions through an ABC proceeding because:

- The preference look-back period is greater than the 90 days permitted under the Bankruptcy Code.
- Specific defenses available under the Bankruptcy Code are unavailable under some states' ABC laws.
- The threshold dollar amount of \$6,225 for a bankruptcy trustee to prosecute preferential transfers in nonconsumer cases does not generally apply to ABCs. Potential preference recoveries in an ABC therefore may be greater than in a bankruptcy proceeding because

the assignee may commence more avoidance actions without having to comply with statutory dollar limitations.

DISADVANTAGES OF AN ABC

Apart from the advantages to an ABC, there are also disadvantages that counsel and companies must consider when determining whether to pursue an ABC instead of a Chapter 7 liquidation.

NO AUTOMATIC STAY

The automatic stay is only statutorily available in a bankruptcy case. This can pose a problem if the debtor is:

- Facing emergent financial issues that would benefit from the imposition of a stay to give the debtor breathing room to plan its next steps.
- Operating and has assets located in multiple states since an ABC in one state does not have jurisdiction over a debtor's assets or operations in a foreign state.

The UCC, applicable case law, and certain states' ABC statutes make it clear that the rights of an assignee in an ABC proceeding are superior to any claims of a judgment creditor and provide that the assignee stands in the shoes of a hypothetical lien creditor. This has the effect of creating a stay regarding certain foreclosure proceedings or actions taken by lien creditors. For example, under New Jersey's UCC, a "lien creditor" includes "an assignee for the benefit of creditors" (N.J.S.A. 12A:9-102(52); see also *Garretson v. Brown*, 26 N.J.L. 425 (1857) (holding that once legal title to the property of the assignor is vested in the assignee, the assets are no longer liable to be seized and taken under judgment entered against the assignor)).

However, if an assignor is facing an eviction from its landlord, an ABC proceeding does not automatically stay the eviction like a bankruptcy case. As an alternative, an assignee may request injunctive relief to enjoin or stay the actions of creditors by filing an appropriate order to show cause or similar type motion with the court.

FILING OF AN INTERVENING BANKRUPTCY CASE

Creditors may challenge an ABC proceeding in various ways. One typical way is by filing an involuntary bankruptcy during the pendency of an ABC. While the assignee and assignor may seek to dismiss the bankruptcy case under section 305 of the Bankruptcy Code, the involuntary filing disrupts the ABC process and adds additional costs to the administration of the estate (see Involuntary Bankruptcy Proceeding).

LANDLORD CLAIMS MAY NOT BE LIMITED

While landlord claims are limited as general unsecured claims under section 502(b)(6)(B) of the Bankruptcy Code, certain ABC statutes provide priority treatment to landlord claims (see Distribution of Funds: Priority of Claims). In New Jersey, for example, a landlord is given a secured claim for an amount representing rent up to one year from the date of the ABC filing, which "shall be first paid and satisfied by the assignee" (N.J.S.A. 2A:19-31). Because there are no monetary caps or limits on the amount of this secured claim, if yearly rent is a substantial amount, the claim may absorb a significant portion of the estate assets, leaving little or nothing to distribute to junior creditors.

COMPENSATION SCHEME MAY AFFECT RECOVERY TO SECURED CLAIMS

An assignee's commission in an ABC may be as high as 20 percent of the total distribution in a case. The fees of professionals may also be significant depending on the work performed. These amounts can negatively affect the available funds for distribution to creditors of the estate. For example, in states that allow payment of commissions and fees before distributions to creditors, including secured creditors, a payment of a commission may significantly limit the recovery of secured creditors and other junior creditors.

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