ASSIGNMENT FOR THE BENEFIT OF CREDITORS

2026 Seminar Material

MI0937.26

New Jersey Institute for
Continuing Legal Education

A Division of the State Bar Association
NJICLE.com

This page intentionally left blank

ASSIGNMENT FOR THE BENEFIT OF CREDITORS

Moderator

John M. August, Esq.
Saiber LLC
(Madison)

Speakers

Marc D. Miceli, Esq.
S. Mitnick Law, P.C.
(Oldwick)

Sari B. Placona, Esq.
McManimon, Scotland & Baumann, LLC
(Roseland)

MI0937.26

Table of Contents

This page intentionally left blank

Assignments for the Benefit of Creditors Checklist

STEVEN J. MITNICK AND MARC D. MICELI, SM LAW PC,
WITH PRACTICAL LAW BANKRUPTCY

Search the Resource ID numbers in blue on Westlaw for more.

This Checklist provides a road map for both assignees and their counsel in conducting assignments for the benefit of creditors. While the procedural and substantive requirements of an ABC vary by state, this Checklist contains general guidelines and tips that typically apply to an ABC.

PRELIMINARY ISSUES AND STEPS

CONSULT STATE LAW

An assignment for the benefit of creditors (ABC) is a common law or statutory alternative to a formal Chapter 7 bankruptcy proceeding. By using 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.

Before commencing an ABC, the assignee and its counsel must review the law in the jurisdiction and determine if the ABC is governed:

- **By state statute.** Representative ABC state specific statutes include, New Jersey (N.J.S.A. § 2A:19-1), New York (N.Y. Debt. & Cred. Law §§ 1 to 24), and Delaware (Del. Code Ann. tit. 10, §§ 7381 to 7387).
- **By common law or a non-ABC specific statute.** Representative states without specific state statutes include Illinois, Hawaii, and Alaska.

For a complete list of states with ABC statutes and states that follow common law practices, see Box, ABC Statutes by State.

INITIAL CONSIDERATIONS

Together with assessing the relevant ABC statute or laws of the state, the assignee should also:

- Determine the location of the property. To avoid challenges to jurisdiction over estate property and disputes over conflicts of state law, consider whether to consolidate all personal property in the state where the assignment is made.
- Consider whether filing an ABC may implicate other statutes of general applicability. For example, in all jurisdictions, counsel should consider whether Section 9-309 of the Uniform Commercial Code applies, giving the assignee lien creditor status as of the date of the assignment.
- Determine whether executing an ABC has consequences under the state's law of **partnerships** or limited liability companies.
- When dealing with a company in a regulated industry (for example, banking or insurance) or a company holding a state license to operate, consult the industry specific statutes and regulations to determine whether additional notice requirements or the revocation of any license are triggered by an ABC filing.

PRELIMINARY ACTIONS

The assignee must take certain actions to begin the ABC process, including:

- Obtain the executed corporate or partnership resolution authorizing the filing of the ABC proceeding on behalf of the assignor.
- Obtain a list of assets and liabilities from the principal of the assignor to assist the assignee in preparing the schedule of assets and creditor list that must attach to the deed of assignment.
- Begin the process of interviewing accountants, auctioneers, and counsel to retain and assist in the administration of the estate.
- Interview bonding companies in the event the court requires the assignee to post a bond.

For more information on commencing an ABC proceeding, see Practice Note, Assignments for the Benefits of Creditors: Overview: Commencing an ABC Proceeding (w-006-7771).

COMMENCING THE ABC

PREPARE DOCUMENTS TO FILE AN ABC PROCEEDING

- The assignee must prepare the following documents to file the ABC:
- Deed of assignment, which is an instrument made by the assignor to the assignee deeding over the property in trust for the benefit of creditors. The deed of assignment must be filed with the county clerk, county register, or the surrogate court, depending on the jurisdiction. The schedule of assets and list of creditors must be attached to the deed.
- Petitions or applications retaining professionals in the ABC proceeding and a proposed order for each retention. Professionals retained include:
  - counsel;
  - accountant;
  - appraiser;
  - broker; and
  - auctioneer.
- All applications should be prepared so that they are effective nunc pro tunc to the date of filing of the deed of assignment. The assignee must calendar the date the court enters each retention order and the date the retention expires.
- If permitted under the applicable state law, papers requesting that the court waive posting of a bond.
- Notice of assignment and proof of claim form to serve on all creditors, including the Internal Revenue Service (IRS), state taxing authorities, and the state's attorney general's office.
- A legal notice advising of the ABC proceeding in the state or local law journal or other similar publication.

FILING THE ABC

After the assignee prepares the necessary documents, the assignee must take the following steps to properly file the ABC:

- Record the deed of assignment with the clerk, register, or surrogate court in the county where the assignor either:
  - is principally located;
  - principally conducts business;
  - has its principal assets located; or
  - has a registered agent.
- File the petitions or applications retaining professionals.
- File and serve the notice of assignment and proof of claim form on all known secured creditors and unsecured creditors.
- Calendar the deadline for receiving the completed proofs of claim (bar date) for a date that is either:
  - 90 days from the date listed on the notice of the ABC proceeding, which typically is shortly after the deed of assignment is recorded; or
  - the relevant time period permitted under the state law.
- File the affidavit of service of the notice of assignment.
- File the proof of newspaper publication.
- If required by the state ABC law or by the court, file the list of the assignor's inventory.

ASSIGNEE'S ACTIONS AFTER FILING THE ABC

After the assignee files the deed of assignment, the assignee begins its investigation into the assets that must be liquidated and recovered for the estate. These actions include:

- Visiting the assignor's premises with the appraiser and the auctioneer to obtain a preliminary valuation of the assets and determine the work required to administer the estate.
- Interviewing the assignor's principal to:
  - determine if there are any interested and potential purchasers for the assets; and
  - uncover any unique issues relating to the assignor's business that may impact the ABC.
- Preparing and send a letter to the postmaster directing the assignor's mail to be forwarded to the assignee. The assignee may also direct the assignor's principals to arrange for all mail to be forwarded to the assignee.
- Opening a bank account in the name of the assignee, for example "Assignee for the Benefit of Creditors of XYZ Corp.," for depositing all post-assignment monies. The bank account typically uses the Employer Identification Number (EIN) of the assignor and serves as the escrow account from which all monies are deposited and disbursed for the estate.
- Preparing and sending letters to the assignor's bank directing the banks to close the assignor's bank accounts and transfer the remaining funds to the assignee's bank account. The assignee may also direct the assignor's principals to have the bank accounts closed and the remaining monies transferred to the ABC account opened by the assignee.
- If required by the court, ordering and obtaining an assignee bond and file proof of the assignee bond with the court.
- Preparing and sending a letter to the assignor's utility companies directing them to discontinue all nonessential utilities to the assignor. If the assignee is considering the sale of the assignor's real estate and improvements, it is advisable that the premises remain sufficiently heated so the water pipes do not freeze.
- Ordering judgment lien and UCC-1 lien searches to ensure that:
  - all creditors have received notice of the ABC; and
  - determine which assets are encumbered.
- Notifying the assignor's landlord of the ABC proceeding.
- Notifying the IRS and the state and local taxing authorities of the ABC proceeding.
- Obtaining all of the assignor's corporate formation documents, including any and all certificates of incorporation and corporate governance documents, such as bylaws or operating agreements.
- Obtaining the following financial records, dating back four years from the date of the deed of assignment:
  - bank account statements;
  - financial books and records, including any and all accounts receivable and accounts payable ledgers;
  - balance sheets, statement of cash flows, and income statements; and
  - filed tax returns.

ESTATE ADMINISTRATION

During the course of the ABC, the assignee generally proceeds to liquidate the assignors' assets by:

- Auctioning or abandoning estate assets (see Auctioning or Abandoning Assets of the Estate).
- Using avoidance powers to recover fraudulent transfers and preferential payments (see Asset Recovery, Preference Litigation and Fraudulent Transfers).
- Reviewing claims and distributing funds (see Reviewing Proofs of Claim and Distribution of Funds).

AUCTIONING OR ABANDONING ASSETS OF THE ESTATE

The assignee must take measures to liquidate the assets by:

- Collaborating with the auctioneer and reviewing all bids for the sale of the assignor's business assets or real estate.
- Arranging and scheduling the auction sale. The auction may be live or conducted online.
- Preparing and filing an application with the court to approve the sale if the auction procures a winning bidder.
- Making a motion to abandon assets if a sale is not possible for all of some of the assets or the auction does not procure a buyer.

For more information on liquidating assets in ABCs, see Practice Note, Assignments for the Benefit of Creditors: Overview: Liquidation of Assets (w-006-7771).

ASSET RECOVERY, PREFERENCE LITIGATION AND FRAUDULENT TRANSFERS

An assignee must consider using its avoidance powers to:

- Collaborate with the accountants to review the assignor's books and records and identify any assets that should be recovered by the estate.
- Review any transactions which may constitute preferential payments or fraudulent conveyances under the applicable state law.
- Prepare and send demand letters to potential defendants of preferences and fraudulent conveyances. To ensure that the assignee is keeping proper records of defendant responses and efficiently administering the ABC, the assignee should consider calendaring 30 days for all potential defendants to respond.
- After expiration of the 30-day time period or if settlement cannot be reached, prepare and file the appropriate complaints seeking to recover the preferential payments or fraudulent transfers.
- After resolving the preferences and fraudulent transfer actions, either by settlement or by litigation, prepare a report to the court advising of the recoveries obtained.

For more information on asset recovery in ABCs, see Practice Note, Assignments for the Benefit of Creditors: Overview: Asset Recovery: Avoidance Powers (w-006-7771).

REVIEWING PROOFS OF CLAIM AND DISTRIBUTION OF FUNDS

An ABC proceeding follows an established ordering and priority scheme for the payment of creditors' claims, which varies state by state (see Practice Note, Assignments for the Benefit of Creditors: Overview: Distribution of Funds: Priority of Claims (w-006-7771)).

Before the assignee can make a distribution to creditors following the priority scheme required in that state, the assignee must:

- Monitor all proofs of claim filings.
- Determine if each proof of claim is timely filed.
- Review the proof of claim for accuracy and supporting records.
- For any claim which is objectionable, prepare and file an appropriate motion seeking to expunge, reclassify, or adjust the claim amount, as appropriate.
- After reviewing the proofs of claim and making a determination regarding the proof of claim's validity and allowance, tally the allowed proofs of claim and prepare a distribution schedule.

CLOSING THE ESTATE

When preparing to fully administer and close the ABC estate, the assignee must take the following actions:

- Finalize the distribution schedule.
- Prepare an application for fees and commissions of the assignee and professionals and seek authority to make an interim distribution.
- After entry of the order granting the distribution to creditors, the assignee must make the distribution according to the state's distribution scheme, which is typically distributed in the following order of priority:
  - administrative claims, including all allowed commissions and professional fees and costs;
  - allowed secured claims;
  - allowed tax claims and any other claims which have priority under the particular state statute; and
  - allowed unsecured claims.
- For any category of payments where there are insufficient funds to pay the claims in full, creditors must receive payment on a on a pro rata basis.
- Close the ABC bank account after the ABC estate is fully administered and the estate's monies are distributed.
- File an appropriate motion seeking to close the ABC proceeding. This motion requests that the order decree that:
  - the ABC is completely and fully administered;
  - the assignee is discharged of its duties; and
  - the assignor's financial books and records may be destroyed.

ABC STATUTES BY STATE

To determine how to conduct an ABC in a particular state, practitioners must evaluate the relevant statutory provisions governing procedural and substantive aspects specific to ABCs. This list indicates which states either have:

- A comprehensive statutory regime for ABC (see States with Comprehensive ABC Statutory Regimes).
- Certain statutory provisions concerning ABCs (see States with Limited ABC Statutory Schemes or ABC Related Provisions).
- No statutes regarding ABCs (see States with no ABC Specific Statutes).

STATES WITH COMPREHENSIVE ABC STATUTORY REGIMES

- Arizona (see Ariz. Rev. Stat. §§ 44-1031 to 44-1047 (ABC statute)).
- Arkansas (see A.C.A. §§ 16-117-401 to 16-117-407 (ABC statute) and see also A.C.A. §§ 11-10-718 (priority of wage claims) and A.C.A. § 28-69-201 (defining an assignee as a fiduciary)).
- California (see Cal. Civ. Pro. Code §§ 493.010 to 493.060 and 493.1800 to 493.1802 (ABC statute)).
- Colorado (see Colo. Rev. Stat. §§ 6-10-101 to 6-10-154 (ABC statute); Colo. Rev. Stat. §§ 39-26-117, and 39-27-210 (priority tax claims)).
- Delaware (see Del. Code Ann. tit. 10 §§ 7381-7387 (ABC statute)).
- Florida (see Fla. Stat. §§ 727.101 to 727.117 (ABC statute)).
- Georgia (see Ga. Code Ann. §§ 18-2-40 to 59 (ABC statute) and see also Ga. Code Ann. § 34-8-174 (priority tax claims)).
- Indiana (see Ind. Code §§ 32-18-1-1 to 32-18-3-2 (ABC statute)).
- Iowa (see Iowa Code §§ 681.1 to 681.30 (ABC statute)).
- Kentucky (see Ky. Rev. Stat. Ann. §§ 379.010 to 379.170 and 378.060 to 378.070 (ABC statute) and see also Ky. Rev. Stat. Ann. §§ 378A.005 to 378A.140 (Kentucky Uniform Voidable Transactions Act)).
- Michigan (see Mich. Comp. Laws §§ 600.5201 to 600.5265 (ABC statute) and see also Mich. Comp. Laws § 421.15 (priority wage claims)).
- Minnesota (see Minn. Stat. §§ 577.11 to 577.18 (ABC statute); see also Minn. Stat. § 268.057 (priority wage claims)).
- Mississippi (see Miss. Code Ann. §§ 85-1-1 to 85-1-19 (ABC statute)).
- Missouri (see Mo. Rev. Stat §§ 426.010 to 426.410 (ABC statute)).
- Montana (see Mont. Code Ann. §§ 31-2-201 to 31-2-230 (ABC statute)).
- New Jersey (see N.J. Stat. Ann §§ 2A:19-1 to 2A:19-50 (ABC statute) and see also N.J. Stat. Ann §§ 2A:20-1 to 2A:20-11 (ABC proceedings for debtors in prison); N.J. Stat. Ann § 3B:15-8 (assignee bond); N.J. Stat. Ann § 54A:8-6 (noticing of ABC proceeding to the New Jersey taxing authority); N.J. Stat. Ann § 54:4-106 (priority of tax claims); N.J. Stat. Ann § 22A:2-35 (fees on assignment for the benefit of creditors)).
- New Mexico (see N.M. Stat. Ann. §§ 56-9-1 to 56-9-55 (ABC statute) and see also N.M. Stat. Ann. § 48-3-6 (priority landlord claims) and N.M. Stat. Ann. § 51-1-36 (priority wage claims)).
- New York (see N.Y. Debt. & Cred. Law §§ 1 to 24 (ABC statute) and see also N.Y. Labor Law § 574 (priority wage claims)).
- North Carolina (see N.C. Gen. Stat. §§ 23-1 to 23-12 (ABC statute) and see also N.C. Gen. Stat. §§ 23-13 to 23-17 (petition for ABC proceeding), N.C. Gen. Stat. §§ 23-18 to 23-22 (trustee for estate of debtor imprisoned for crime), N.C. Gen. Stat. §§ 23-23 to 23-38 (discharge of insolvent debtors), N.C. Gen. Stat. §§ 23-39 to 23-45 (general provisions for above statutes), and N.C. Gen. Stat. §§ 23-46 to 23-48 (miscellaneous other insolvency statutes)).
- Ohio (see Ohio Rev. Code Ann. §§ 1313.01 to 1313.59 (ABC statute)).
- Oklahoma (see Okla. Stat. Title 24 §§ 31 to 50 (ABC statute)).
- Pennsylvania (see 39 P.S. §§ 1 to 154 (ABC statute) and see also 39 P.S. §§ 161-327 (insolvency law before 1901 Act)).
- Rhode Island (see R.I. Gen. Laws §§ 10-4-1 to 10-4-13 (ABC statute)).
- South Carolina (see S.C. Code Ann. §§ 27-25-10 to 27-25-160 (ABC statute)).
- South Dakota (see S.D. Codified Laws §§ 54-9-1 to 54-9-22 (ABC Statute) and see also S.D. Codified Laws §§ 54-10-1 (secured creditor claims in liquidation proceedings)).
- Texas (see Tex. Bus. & Comm. Code Ann. §§ 23.01 to 23.33 (ABC statute)).
- Utah (see Utah Code Ann. §§ 6-1-1 to 6-1-20 and 7-2-5 (ABC statute) and see also Utah Code Ann. § 38-3-2 (priority landlord claims)).
- Washington (see Wash. Rev. Code §§ 7.08.010 to 7.08.900 (ABC statute) and see also Wash. Rev. Code §§ 7.60.005 to 7.60.300 (receivers), Wash. Rev. Code § 50.24.060 (priority unemployment contribution claims), Wash. Rev. Code § 51.14.073 (default liens), and Wash. Rev. Code § 82.32.240 (priority tax claims)).
- West Virginia (see W. Va. Code §§ 38-13-1 to 38-13-16 (ABC statute)).
- Wisconsin (see Wis. Stat. Ann. §§ 128.001 to 128.25 (ABC statute) and see also Wis. Stat. Ann §§ 102.84 (priority of unemployment contribution claims), Wis. Stat. Ann § 108.23 (priority of unemployment contribution claims), and Wis. Stat. Ann § 702.17 (rights of creditors of the donee)).

STATES WITH LIMITED ABC STATUTORY SCHEMES OR ABC RELATED PROVISIONS

- Alabama (see Ala. Code §§ 19-3-28 (notice to creditors) and see also Ala. Code §§ 35-4-57 (deed of assignment, where recorded), Ala. Code §§ 35-9-61 (priority landlord claims), and Ala. Code §§ 40-1-4 (priority unpaid estate tax claims)).
- Maine (see Me. Rev. Stat. Ann tit. 26 § 1231 (priority wage claims) and Me. Rev. Stat. Ann tit. 36 § 607 (priority of personal property tax claims)).
- Maryland (see Md. Code Ann. Com. Law § 15-101 to 15-103 (preferences and priorities in insolvency, assignment for the benefit of creditors)).
- Massachusetts (see Mass. Gen. Laws Ch. 203 §§ 40 to 42 (ABC provisions as part of chapter concerning trusts)).
- Nebraska (see Neb. Rev. Stat. § 48-659 (priority unemployment contribution claims) and see also Neb. Rev. Stat. § 77-2764 (requirement that the assignee provide notice of the assignee's qualifications to the tax commissioner)).
- Nevada (see Nev. Rev. Stat. § 100.010) (priority for certain wage claims).

- New Hampshire (see N.H. Rev. Stat. §§ 568:1 to 568:57 (general insolvency statute) and see also N.H. Rev. Stat. §§ 569:1 to 569:2 (ABC provisions) and N.H. Rev. Stat. § 282-A:147 (priority wage claims)).
- North Dakota (see N.D. Cent. Code §§ 32-26-01 to 32-26-06 (administration of an ABC proceeding)).
- Oregon (see Or. Rev. Stat. § 33.610 (evaluating securities of secured creditor) and see also Or. Rev. Stat. §§ 33.610 and 311.415 (payment of taxes in an ABC Proceeding), Or. Rev. Stat. § 314.310 (priority tax claims), Or. Rev. Stat. § 316.392 (notice of qualification of receiver and others), Or. Rev. Stat. § 652.510 (priority wage claims), Or. Rev. Stat. § 652.570 (priority wage claims), and Or. Rev. Stat. § 657.520 (priority unemployment contribution claims)).
- Vermont (see 9 V.S.A. §§ 2151 to 2158 (limited ABC statute)).
- Virginia (see Va. Code Ann. §§ 55-156 to 55-167 (limited ABC statute)).
- Washington, D.C. (see D.C. Code Ann. §§ 28-2101 to 28-2110 (limited ABC Statute) and see also D.C. Code Ann. § 16-601 (assignee bond), D.C. Code Ann. § 51-104 (priority wage claims), and D.C. Code Ann. § 47-2012 (priority tax claims)).

STATES WITH NO ABC SPECIFIC STATUTES

- Alaska.
- Connecticut.
- Hawaii.
- Illinois.

Idaho (the only ABC specific statutory provision is a residency requirement, see Idaho Code Ann. § 68-201).

- Kansas.
- Louisiana.
- Wyoming.

This page intentionally left blank

Fordham Urban Law Journal

Volume 41
Number 4 *Until Civil Gideon: Expanding Access to Justice*

Article 5

March 2016

Making Assignments For The Benefit Of Creditors As Easy As A-B-C

Carly Landon
Fordham University School of Law

MAKING ASSIGNMENTS FOR THE BENEFIT OF CREDITORS AS EASY AS A-B-C

Carly Landon[*]

---

[*] J.D. Candidate, 2015, Fordham University School of Law; B.A., 2012, University of Notre Dame. Many thanks to Professor Susan Block-Lieb for her expertise, guidance, and lively discussions from this Note's inception.

INTRODUCTION

Small business ownership remains the American dream,[1] inspiring many Americans to create their own businesses—there are nearly 550,000 new start-ups each month.[2] These start-ups create new jobs and occasionally spur the beginning of new industries.[3]

Unfortunately, however, not all new start-ups succeed. It is common for start-up businesses to fail in their first years of existence.[4] In fact, according to the United States Small Business Administration (SBA), "[Twenty] percent of all small businesses survive the first year, [thirty] percent survive the second year, and half survive the first five years."[5] Further, while seventy percent of new businesses survive at least two years, this rate drops to fifty percent by the five-year mark and thirty-three percent at the ten-year point, with just twenty-five percent of all new businesses lasting fifteen years or more.[6]

Many new business owners thus find themselves consulting lawyers about how to handle business failure.[7] More often than not, lawyers recommend filing for bankruptcy.[8] Although bankruptcy is frequently the default response, it is not the only option. For financially troubled companies, one size does not fit all.[9] In 2003, of

---

1. Bob Llewellyn, *What Is the American Dream?*, SAFE INVESTOR (Jan. 2003), http://www.thesafeinvestor.com/articles/articleTheAmericanDream.pdf.

2. Jennifer Bury, *The New American Dream is Not Owning a House but Owning Your Own Business*, MARKETING DEPT. FRANCHISE BLOG (Jan. 30, 2012, 12:42 P.M.), http://www.tmdfranchise.com/blog/bid/121379/The-New-American-Dream-is-not-owning-a-House-but-owning-your-Own-Business.

3. U.S. SMALL BUS. ASS'N OFFICE OF ADVOCACY, FREQUENTLY ASKED QUESTIONS (2012), *available at* http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf.

4. *Id.*; MICHAEL G. WILLIAMSON, THE ABCS OF BUSINESS LIQUIDATIONS—A FLEXIBLE ALTERNATIVE TO BANKRUPTCY (2013), *available at* http://html.documation.com/cds/NCBJ2011/assets/PDFs/XIII_C.pdf.

5. *SBA Helps Parkersburg Small Business Beat First Year Failure Statistic*, U.S. SMALL BUS. ADMIN., http://www.sba.gov/content/sba-helps-parkersburg-small-business-beat-first-year-failure-statistic (last visited Mar. 29, 2014).

6. U.S. SMALL BUS. ASS'N OFFICE OF ADVOCACY, *supra* note 3.

7. WILLIAMSON, *supra* note 4.

8. *Id.*

9. Bob Eisenbach, *Assignment for the Benefit of Creditors: Simple as ABC?*, BUSINESS BANKR. BLOG (Mar. 16, 2008, 11:38 PM), http://bankruptcy.cooley.com/

almost 550,000 failing small businesses, only 34,000 filed for bankruptcy.[10] What happened to the other ninety-four percent of these businesses? Some scholars have attempted to answer this question by inferring that the "vast majority of small businesses resolve distress under state law" in a process called an "assignment for the benefit of creditors" (ABC).[11]

ABCs provide a state-law alternative to the filing of a federal bankruptcy case. Aptly named, they involve the assignment of an insolvent company's assets to a third-party assignee, who is selected by the company and charged with the duty of liquidating the company's assets to satisfy creditors' claims against the company.[12] In recent years, states such as California, Florida, Illinois and Massachusetts have seen frequent use of ABCs; in the majority of states, however, ABCs are routinely passed up for bankruptcy and its other alternatives.[13]

Despite the varying frequency of use across the states, ABCs have become much more commonplace since the turn of the twenty-first century as venture-capital and private-equity firms saw investments in high-tech, dot-com companies fail at an enormous rate.[14] In the early 2000s, many California dot-com and technology companies used the California ABC to deal with the collapse of the dot-com industry.[15]

2008/03/articles/business-bankruptcy-issues/assignments-for-the-benefit-of-creditors-simple-as-abc.

10. *Id.*

11. *See* William Choslovsky & Eric Walker, *An Alternative to Bankruptcy: the ABCs of ABCs*, *in* THE AMERICAS RESTRUCTURING & INSOLVENCY GUIDE 2008/2009, at 90, 91 (2009), *available at* http://www.americasrestructuring.com/08_SF/p90-95%20An%20alternative%20to%20bankruptcy.pdf (although ABCs likely account for a percentage of these companies that are no longer in business, other out-of-court workouts are also responsible); Edward R. Morrison, *Bargaining Around Bankruptcy: Small Business Workouts and State Law*, 38 J. LEGAL STUD. 255, 255 (2009).

12. *See* Choslovsky & Walker, *supra* note 11, at 91–92.

13. Robert Richards & Nancy Ross, *Practical Issues in Assignments for the Benefit of Creditors*, 17 AM. BANK. INST. L. REV. 5, 5 (2009); *see also* Morrison, *supra* note 11, at 257 ("One state procedure, the ABC, is nearly as popular as federal bankruptcy law.").

14. GEOFFREY BERMAN, GENERAL ASSIGNMENTS FOR THE BENEFITS OF CREDITORS: THE ABCS OF ABCS, at vii (2d ed. 2006).

15. Vivian Luo, *A Preference for States? The Woes of Preempting State Preference Statutes*, 24 BANKR. DEV. J. 513, 513 (2008); COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, N.Y.C. BAR, NON-BANKRUPTCY ALTERNATIVES TO RESTRUCTURING AND ASSET SALES 12 (2010), *available at* http://www.nycbar.org/pdf/report/uploads/20072001-NonBankruptcyAlternativestoRestructuringsandAssetSales.pdf.

As a result, California became the "capital of ABCs" during the dot-com meltdown.[16] The management of a deteriorating dot-com or other failing technology company often required a faster and more cost-efficient process than bankruptcy so that it could "engage in last-ditch efforts to sell the business in the face of mounting debt."[17] Potential buyers of those companies, on the other hand, were only willing to move forward if they were able to continue producing and using the technology assets of the insolvent company.[18] Thus, these companies needed to work fast to assure that certain key employees, whose departure from the company would greatly diminish the value of the firm and its assets, would continue working for the successor company and would not look elsewhere for jobs.[19] Time was of the essence for these companies because the more time that passed, the more likely that those key employees would find other employment.[20]

Interested buyers were also often only willing to move forward if they could be assured that they would be free of liability from unsecured debt of the insolvent company.[21] ABCs were ideal for addressing these unsecured debt and time issues because "the assignee [could] act more quickly; the assignee [was] likely to be more experienced at dealing with technology-related assets; and the use of an assignee [involved] lower transaction costs."[22]

Moreover, the benefits of ABCs over bankruptcy are not confined to only dot-com and technology industries, or even to the past. After credit markets experienced a dramatic increase in defaults in the second half of 2007, many expected an increase in corporate federal bankruptcy filings.[23] Nevertheless, business bankruptcy filings dropped significantly in the period since 2008, specifically in the commercial context.[24] Some theorize that this low number of filings

---

16. David S. Kupetz, *Assignment for the Benefit of Creditors: Effective Tool for Selling and Winding Up Distressed Businesses*, VALLEY LAW., June 2013, at 34, 35.

17. David Kupetz, *Assignment for the Benefit of Creditors: Exit Vehicle of Choice for Many Dot-Com, Technology, and Other Troubled Enterprises*, 11 J. BANKR. L. & PRAC. 71, 81–82 (2001).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Ronald J. Mann, *An Empirical Investigation of Liquidation Choices of Failed High Tech Firms*, 82 WASH. U. L. REV. 1375, 1390 (2004).

23. Choslovsky & Walker, *supra* note 11, at 90.

24. *See Bankruptcy Filings Through First Three Quarters of 2013 Fall 13 Percent from 2012, Commercial Filings Fall 23 Percent*, AM. BANKR. INST. (Oct. 3, 2013), http://news.abi.org/press-releases/bankruptcy-filings-through-first-three-quarters-of-2013-fall-13-percent-from-2012-com; *Percent Change in Bankruptcy Filings, 2011–*

can be explained, in part, by small business debtors relying on simpler ABC practices rather than federal bankruptcy.[25]

Today, the debate about the advantages of bankruptcy versus ABCs remains urgent.[26] In light of the many advantages of ABCs to small businesses, which are not limited to technology industries, it is surprising that ABCs have not seen more widespread use outside of a select few states. ABCs are currently in a unique position because they have become "particularized to fit the needs of those states that have found the process a useful tool."[27] In doing so, ABCs have become so diverse on a state-by-state basis[28] that the divide between the states that find ABCs to be a useful tool and the states that rarely, if ever, use ABCs has increased and will continue to increase if no reform occurs.

This Note evaluates the different approaches to ABCs across the states, and suggests that these procedures can be used in a wider range of companies, especially if states reform their current ABC laws. It argues that a state would enhance the benefits of ABCs and minimize the current disadvantages if it were to adopt a minimally regulated ABC. Part I begins by explaining the process of an ABC, its differences from bankruptcy, and the varying frequency of its use amongst the states. Part II sorts the varying forms of ABCs into three categories to address the positive and negative aspects of each of these ABCs and explain three general forms in which ABCs are found. Finally, Part III proposes reforms to increase reliance on ABCs throughout all states. This Note concludes by arguing that adopting a minimally regulated ABC form, like the ABC found in California, offers the best solution after which to model ABC reforms.

2013, U.S. COURTS, http://www.uscourts.gov/Statistics/BankruptcyStatistics/interactive-map.aspx (last visited Apr. 15, 2014); *U.S. Bankruptcy Courts Bankruptcy Cases Filed, Terminated, and Pending, Fiscal Years 2008–2012*, U.S. COURTS, http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-bankruptcy-courts.aspx (last visited Apr. 15, 2014).

25. *See*, *e.g.*, Choslovsky & Walker, *supra* note 11, at 91; Morrison, *supra* note 11, at 255.

26. *See* Gordon Eng, *Going Out of Business: Practitioners Need to Consider the Advantages of Formal Bankruptcy to Other Means of Closing a Business*, 32 L.A. LAW. 32, 33–35 (2009).

27. Geoffrey Berman & Catherine E. Vance, *Relief without a Petition: Non-Bankruptcy Alternatives: Model Statute for General Assignments for the Benefit of Creditors: the Genesis of Change*, 17 AM. BANKR. INST. L. REV. 33, 33 (2009).

28. *Id.*

I. UNDERSTANDING THE BASICS OF ASSIGNMENTS FOR THE BENEFIT OF CREDITORS

This Part explains what ABCs are and how the ABC process works. It also briefly explains how ABCs differ from federal bankruptcy proceedings, particularly Chapter 11 and Chapter 7 bankruptcy cases. Using federal bankruptcy as a point of comparison, this Part explores the advantages and disadvantages of ABCs to demonstrate those types of companies that would especially benefit from the ABC process. This Part finally provides a brief history of ABCs, and discusses ABCs in their current use and form.

A. What Is an Assignment for the Benefit of Creditors?

ABCs are the state or common law alternatives to bankruptcy, which trace their roots back to English common law.[29] ABC statutes today may supersede common law assignments entirely, or merely supplement them, allowing common law assignments to continue.[30] Black's Law Dictionary defines a "general assignment for the benefit of creditors" as "a transfer of legal and equitable title to all debtor's property to a trustee, with authority to liquidate the debtor's affairs and distribute proceeds equitably to creditors."[31] An ABC is a business liquidation device available to an insolvent debtor as an alternative to bankruptcy proceedings.[32] However, "ABCs are not limited to liquidations. Just as in bankruptcy, an ABC can be used to facilitate a going-concern sale of the debtor's assets to a third-party."[33] Basically, ABCs are used as a vehicle for the sale or liquidation of a business in an orderly, controlled way.[34] It is important to note that ABCs are not used to turn a business around, restructure, or financially rehabilitate the business. Rather, ABCs are purely used to wind the business down by selling or liquidating it.[35]

At the risk of oversimplifying the process, an ABC involves a trust arrangement in which an insolvent business assigns its assets to an

29. *See* DEBTOR-CREDITOR LAW § 35.03 (Theodore Eisenberg ed., 2014).

30. Neil V. Verbrugge, *The "ABC's" of Hawaii's Assignment for Benefit of Creditors Law*, 13 HAW. B. J. 127, 127 (2009).

31. BLACK'S LAW DICTIONARY (9th ed. 2009).

32. *See* Kupetz, *supra* note 16, at 35.

33. Choslovsky & Walker, *supra* note 11, at 92.

34. *E.g.*, BERMAN, *supra* note 14, at 1; Richards & Ross, *supra* note 13, at 5.

35. *See* Kupetz, *supra* note 16, at 35; Matthew S. Barr & Peter K. Newman, *Examining Assignments for the Benefit of Creditors*, L. 360 (May 1, 2013), http://www.law360.com/articles/433794/examining-assignments-for-the-benefit-of-creditors (password required); BERMAN, *supra* note 14, at 3.

assignee, i.e. the trustee, who then holds property for the benefit of a special group of beneficiaries, i.e. the creditors.[36] Some suggest ABCs are the "functional equivalent" of liquidation under Chapter 7 of the U.S. Bankruptcy Code.[37] However, bankruptcy holds distinct federal advantages over ABCs.[38] For example, it imposes an automatic stay, allows for avoidance of preferential transfer, and may grant a discharge to an individual debtor—for example, a sole proprietor.[39] Further, ABCs have become particularized to fit the needs of those states that have found the process of a useful tool in managing debtor-creditor relationships and as a vehicle for the orderly liquidation of a business outside of bankruptcy.[40]

ABCs are generally used in two scenarios.[41] In the first, similar to a Chapter 7 bankruptcy, the company is unable to continue operating throughout the insolvency process and it cannot find a buyer for the company.[42] Using an ABC, the insolvent business's assets are liquidated, accounts receivable are collected, and distributions are made to creditors.[43] In the second scenario, there is a potential buyer for the failing business, but not enough cash to justify the time and expense associated with a Chapter 11 bankruptcy.[44] As a result, the

---

36. *See*, *e.g.*, *In re* Sundance Corp., 83 B.R. 746, 748 (Bankr. D. Mont. 1988) ("An assignee for the benefit of creditors is one to whom, under an insolvent or bankrupt law, the whole estate of a debtor is voluntarily transferred to be administered *for the benefit of creditors*." (emphasis added)); Paul H. Schwendener, Inc. v. Jupiter Elec. Co., 829 N.E.2d 818, 827–28 (Ill. App. Ct. 2005) (explaining "an assignment for the benefit of creditors is simply a unique trust arrangement in which the assignee (or trustee) holds property for the benefit of a special group of beneficiaries, the creditors" (internal quotation marks omitted)); BERMAN, *supra* note 14, at 3; Choslovsky & Walker, *supra* note 11, at 91; Williamson, *supra* note 4.

37. BERMAN, *supra* note 14, at 1.

38. *See generally*, BERMAN, *supra* note 14, at 4–7; Jeffrey Davis, *Florida's Beefed Up Assignment of the Benefit of Creditors*, 19 U. FLA. J.L. & PUB. POL'Y 17, 33 (2008) ("Bankruptcy, with all its complexity and formality, is a much more powerful process than an assignment for the benefit of creditors. Where there is a need for that power, it is the superior choice. Examples are: 1) where there is an immediate need for the automatic stay, 2) where the debtor is engaged in significant multi-state operations, 3) where assets are located in numerous states, 4) where the debtor's corporate structure is complex, 5) where the debtor has made large preferential transfers to outsiders, 6) where there is potential liability for environmental or other future claims, or 7) where successors have a high risk of liability.").

39. 28 U.S.C. § 1334(e) (2012); *see also* 11 U.S.C. § 362(a) (2012).

40. *See* Berman & Vance, *supra* note 27, at 33–34.

41. *See Assignments for the Benefit of Creditors*, ROSEN, P.A., http://www.rosenpa.com/Articles/Assignment-for-the-Benefit-of-Creditors-in-Florida.shtml (last visited Mar. 5, 2013).

42. *Id.*

43. *Id.*

44. *Id.*

company chooses an ABC over bankruptcy in the interests of saving time and money.[45] Whether used to wind down the company or accomplish the sale of a troubled company, ABCs can work to maximize a creditor's recovery from the assets of the distressed debtor.[46]

B. How Do ABCs Work?

Because of differences in state law[47] and the circumstantial differences of each business, ABC processes are never identical; however, each assignment overall involves the same basic principles.[48] To commence the ABC process, a distressed corporation will generally need to "obtain both board of director authorization and shareholder approval."[49] Although ABCs are a state law procedure, many of their requirements, such as board and shareholder approval, are rooted in state corporate law rather than in ABC statutes or ABC common law.[50] Courts generally apply either the corporate law of the state in which the debtor is incorporated, the state law of the assignor's domicile, or the law of the state where the assignment is made.[51] Next, the distressed entity (the "debtor" or "assignor")

---

45. *Id.*

46. *See* Kupetz, *supra* note 16, at 34.

47. *See supra* Part II. The differences between ABCs across the states will be covered in depth later. The purpose of this subpart is to provide background information so that the information later can be better understood. It is useful to note, however, that the differences between categories of ABCs are most visible during the ABC process. For example, whether an ABC is judicial or non-judicial in addition to the amount of judicial involvement is crucial to how that state's ABC is categorized. Additionally, the distribution scheme of ABCs, i.e. notice deadlines and priority schemes, can also affect the process.

48. BERMAN, *supra* note 14, at 6.

49. *See* Kupetz, *supra* note 16, at 35 ("The ABC constitutes a transfer of all of the assignor's assets to the assignee and the law of many states provides that the transfer of all of a corporation's assets is subject to shareholder approval (although this approval may be obtained, in some instances, retroactively).").

50. *C.f.*, BERMAN, *supra* note 14, at 1 (saying ABCs are subject to the laws of the state in which the assignment takes place); COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 10 (explaining how corporate law can impact the ABC process); Leslie R. Horowitz & John A. Lapinski, *Advising Distressed Businesses on an Alternative to Bankruptcy*, L.A. LAW., Sept. 2001, at 18, *available at* http://www.lacba.org/Files/LAL/Vol24No6/977.pdf; Richards & Ross, *supra* note 13, at 8–9; Scott E. Blakely, *Say Goodbye to the State Preference Action*, COVERING BUS. CREDIT, http://www.coveringcredit.com/business_credit_articles/Bankruptcy/art708.shtml (last visited Apr. 15, 2014).

51. *See* Judd v. J.W. Forsinger Co., 186 A. 525, 526–27 (N.J. 1936); DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03; Horowitz & Lapinski, *supra* note 50, at 18; Richards & Ross, *supra* note 13, at 8–9 (stating that courts apply the law of the "state of incorporation" to corporations filing for ABCs).

enters into an agreement with the assignee[52] where the debtor will transfer its estate in trust (i.e., all of its rights, title, interest in, and custody and control of its property) to the assignee.[53] The transfer of these assets is subject to all existing liens so the assignee is "bound to honor all valid, i.e. perfected and enforceable, liens."[54] Further, in some states, before any significant event can take place or the agreement can be executed, the assignment agreement must be filed with the court, and in some states, it must also be court approved, which could entail a hearing.[55]

Because the assignee is crucial to the ABC process, it is worth explaining who the assignee is and what his or her function is. As stated previously, an assignee for the benefit of creditors is one to whom "the whole estate of a debtor is voluntarily transferred to be administered *for the benefit of creditors*."[56] The assignee is generally a disinterested third party who is not related to the debtor and who has experience liquidating businesses.[57] Often, especially in states where ABCs are more common, assignees have expertise in the debtor's industry.[58] For example, many of the assignors used in ABCs following the crash of the dot-com industry had expertise in the technology industry so they understood how to best value and liquidate the assets particular to a dot-com business.[59] The assignee becomes a fiduciary on behalf of any and all creditors of the debtor, as well as for the debtor, and ultimately, its owner and shareholders.[60]

Before the assignee can liquidate the assets and distribute the proceeds, he or she needs to know what assets comprise the assignment estate and who has a claim against the assets of the

---

52. *See* Richard H.W. Maloy, *The "Priority Statute"—The United States' "Ace-in-the-Hole*," 39 J. MARSHALL L. REV. 1205, 1278 (2006) (indicating that terms "assignee" or "trustee" are used interchangeably to define "person to whom the assignment has been made").

53. *See* Moecker v. Antoine, 845 So. 2d 904, 910 (Fla. Dist. Ct. App. 2003) (noting that in ABCs the "debtor voluntarily assigns its assets to a third party as trustee for the purpose of liquidating the assets to satisfy, in full or in part, creditors' claims against the debtor"); BERMAN, *supra* note 14, at 6 ("The execution and acceptance of the assignment contract creates an 'estate,' which includes the transferred assets and the proceeds thereof, subject to the claims of the assignor's creditors."); Kupetz, *supra* note 16, at 34–35.

54. BERMAN, *supra* note 14, at 4.

55. *Id.*

56. *In re* Sundance Corp., 83 B.R. 746, 748 (Bankr. D. Mont. 1988) (emphasis added).

57. *See* BERMAN, *supra* note 14, at 9.

58. *See id.*; Kupetz, *supra* note 17, at 73.

59. *See* Kupetz, *supra* note 16, at 35.

60. *See* BERMAN, *supra* note 14, at 4.

proceeds thereof.[61] Many states require the debtor to provide the assignee with a list of its shareholders and creditors and an inventory of its assets subject to the assignment.[62] Whether these requirements are required by statute or just common law, all states require some form of notice.[63]

These requirements give creditors a short time, anywhere from fifteen days to six months, to file a claim with the assignee.[64] As part of this notification process, the assignee is required to send "separate letters, by certified mail, to the IRS and all other appropriate taxing authorities, including taxing authorities in states, counties, and cities in which the debtor operated as well as the debtor's state of incorporation."[65] Once the assignee has taken these steps, he or she should begin figuring out precisely what assets are included in the assignment and how much is due to each creditor.[66]

The assignee then conducts a winding down and/or liquidation or going-concern sale, and thereafter distributes the proceeds of the sale or liquidation to the debtor's creditors.[67] The final step in the assignment process is either to request that the court close the estate, or in states where there is no court supervision, to provide notice to creditors that the estate is closed.[68] As in a federal bankruptcy proceeding, unsecured creditors have no right to pursue the assets assigned to the assignee.[69] Rather, these unsecured creditors are required to file a proof of claim to the assignee, and, if the claim is allowed, will ultimately participate in the assignee's distribution of funds of the debtor's estate.[70]

---

61. *Id.* at 17.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 17–18.
66. *Id.* at 18.
67. *See* BERMAN, *supra* note 14, at 23–28; Kupetz, *supra* note 16, at 35. In the *ABCs of ABCs*, Berman discusses liquidation of assets, and how liquidation requires research and consultation with other professionals to figure out how the debtor's assets could best be liquidated to maximize their value. There are a variety of ways that an assignee may conduct the liquidation; different assets can be liquidated in several ways, including a going-out-of-business sale, an auction of the assets either on a piecemeal basis or in bulk, a "negotiated" sale to a pre-arranged buyer, or a going-concern sale, with the assignee operating the business until the closing, in an effort to maximize the value of certain time-sensitive assets (i.e., supply contract) or to reduce exposure to contingent liability claims.
68. *See* BERMAN, *supra* note 14, at 52.
69. *See* BERMAN, *supra* note 14, at 5; Kupetz, *supra* note 16, at 34–35; Barr & Newman, *supra* note 35.
70. *See* Kupetz, *supra* note 16, at 34–35.

An ABC stops creditors from pursuing the debtor through collection lawsuits.[71] The practical effect of many of the state laws surrounding ABCs is that these creditor actions are rendered ineffective.[72] This does not mean, however, that creditors are left completely without a remedy.[73] Creditors can always file an involuntary bankruptcy petition without proof of the debtor's cash flow insolvency.[74] Proof of the ABC is itself grounds for involuntary bankruptcy relief.[75]

Furthermore, choice of law bears significant import on the process of ABCs because it can complicate the process. The law of the state of the assignor's domicile, which in most cases is the law of the state where the assignment is made, generally governs ABCs.[76] The Restatement (Second) of Conflict of Laws proposes that the law of the state with the most significant relationship to the debtor and assignment should be applied, but acknowledges that this state will generally be the state of the assignor's domicile.[77] Many scholars suggest that if a company holds assets in multiple states, it should consolidate those assets into one state before beginning the ABC process in order to simplify the process.[78]

ABCs will generally not be enforced when they conflict with the public policy of the state in which the assignment is sought.[79] Moreover, principles of comity do not require a state to give effect to an ABC brought in another state when doing so would "impair

---

71. BERMAN, *supra* note 14, at 4–5. Creditors are not completely powerless: they can challenge the validity of an assignment, and can also initiate involuntary bankruptcy proceedings. *See* Bruce C. Scalambrino, *Representing a Creditor in an Assignment for the Benefit of Creditors*, 92 ILL. B.J. 263, 265 (May 2004).

72. BERMAN, *supra* note 14, at 5.

73. *See* Davis, *supra* note 38, at 33; Richards & Ross, *supra* note 13, at 24 ("Subsequent voluntary or involuntary bankruptcy case can still take place. An ABC does not preclude the possibility of turning to bankruptcy later.").

74. Davis, *supra* note 38, at 33; Richards & Ross, *supra* note 13, at 24.

75. Richards & Ross, *supra* note 13, at 24.

76. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03; Judd v. J.W. Forsinger Co., 186 A. 525, 526–27 (N.J. 1936). When the debtor is a corporation, however, courts generally apply the corporate law of the state in which the debtor is incorporated; *see also* Maloy, *supra* note 52.

77. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03.

78. BERMAN, *supra* note 14, at 6; DEBTOR-CREDITOR LAW, *supra* note 29, § 35.07. As a side note, transferring assets to one state in order to consolidate jurisdiction should be okay, but there is still a risk of a creditor claiming fraudulent transfer and it should be considered. DEBTOR-CREDITOR LAW, *supra* note 29,§ 35.10.

79. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03.

remedies or lessen security" of its own citizens.[80] Additionally, when a state has a statutory ABC system (as opposed to a common law ABC system), an ABC in that state will "only operate upon property in the jurisdiction in which the assignment is made."[81] As for property located in other jurisdictions, the law of that jurisdiction controls the rights of creditors generally.[82]

C. How ABCs Fit into the Bigger Insolvency Picture: Comparing ABCs to Chapter 7 and Chapter 11 Bankruptcy

Businesses facing financial distress have several options available to them to address their financial issues beyond just ABCs.[83] ABCs vary from state to state, and Part III argues that one form of ABC is preferable over the other options, and thus reform should occur for ABC usage to become more frequent.[84] However, before it is possible to understand how one form of ABC can be preferable to another, it is necessary to compare ABCs to bankruptcy and explore how ABCs are both similar and different from bankruptcy.

Bankruptcy is a legal procedure for dealing with the debt problems of individuals and businesses, and is specifically filed under one of the chapters of title 11 of the United States Code.[85] United States bankruptcy courts are units of the federal district courts, and have jurisdiction over bankruptcy proceedings.[86] Businesses can file a voluntary case under either Chapter 11 or Chapter 7 of the Bankruptcy Code.[87] The federal nature of bankruptcy means that a bankruptcy case pending in one federal district is automatically enforceable throughout the country.[88] Thus, the automatic stay that applies in bankruptcy, whether a Chapter 11 or 7 case has

---

80. COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 15 ("This is due to the principle of comity, which does not require one state to give effect to an ABC in another state when doing so would impair remedies or lessen securities of its own citizens.").

81. *Id.*

82. *Id.*

83. *See* JACK F. WILLIAMS, ASSIGNMENT FOR THE BENEFIT OF CREDITORS, STATE COURT RECEIVERSHIPS, AND BANKRUPTCY OPTIONS 3 (2009), *available at* http://www.sbli-inc.org/archive/2009/documents/M.pdf.

84. *See supra* Part III.

85. *Glossary*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Glossary.aspx (last visited Mar. 29, 2014).

86. *Id.*

87. 11 U.S.C. §§ 701–84, 1101–74 (2012); *see also Bankruptcy: An Overview*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/bankruptcy (last visited Apr. 15, 2014).

88. 28 U.S.C. § 1334(a) (2012).

commenced, applies on a national basis to protect the debtor's assets, "wherever located."[89]

To understand how ABCs can better address a company's financial distress, it is first necessary to have a basic understanding of Chapter 11 and Chapter 7 bankruptcy cases and how they differ from ABCs.[90]

1. Chapter 11 Bankruptcy

Chapter 11 of the U.S. Bankruptcy Code provides for a reorganization of the debtor, which may be in the form of either a rehabilitation of the debtor or an orderly liquidation.[91] Sometimes distressed companies file for Chapter 11 bankruptcy specifically to sell "all or substantially all" of their assets using Section 363 of the Bankruptcy Code.[92] Debtors frequently retain their assets and remain in business during the reorganization.[93] Generally, the debtor remains in control of the bankruptcy estate and proposes a plan of reorganization that sets a schedule of payments to creditors.[94] Ultimately, the debtor hopes that the court will confirm the plan so that the plan can be consummated.[95] Confirmed plans bind all the debtor's creditors, whether or not they have filed a claim and whether or not they have accepted the plan.[96]

While Chapter 11 often resolves the financial problems of big corporations, small business Chapter 11 cases entail a less complex process than a full-blown Chapter 11 case.[97] Notwithstanding this

---

89. § 1334(e); *see also* 11 U.S.C. § 362(a) (2012).

90. Chapter 11 and Chapter 7 bankruptcies are complex matters with extensive case law and publications regarding them. This Note gives only a non-exhaustive description of Chapter 11 and Chapter 7 bankruptcies in the hope of illustrating that ABCs may be a viable alternative in some but not all cases. *See* COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 1; MARC BARRECCA & AMIT RANADE, PICK YOUR POISON: ALTERNATIVE TO BUSINESS BANKRUPTCY 1 (2008), *available at* http://www.klgates.com/files/upload/barreca_pickyourpoison.pdf.

91. *See* WILLIAMS, *supra* note 83, at 5.

92. Justin K. Edelson & Christopher A. Ward, *Selling Distressed Assets: Weighing 363 Sales, Other Options*, TURNAROUND MGMT. ASS'N (Feb. 3, 2010), *available at* http://www.turnaround.org/Publications/Articles.aspx?objectID=12351.

93. *See* WILLIAMS, *supra* note 83, at 5.

94. *Id.*

95. *Id.* at 6 ("Plan confirmation can take two paths: (1) by unanimous consent or (2) by cram down so long as one non-insider impaired class of claim has accepted the plan.").

96. 11 U.S.C. § 1141(a) (2012).

97. *See* Davis, *supra* note 38, at 30. Under the U.S. Bankruptcy code, a "'small business case' means a case filed under chapter 11 of this title in which the debtor is a

streamlined process, small business Chapter 11 cases remain expensive.[98] Not every distressed company has the financial wherewithal to endure the time and costs associated with a Chapter 11 bankruptcy proceeding.[99] These expenses may be unjustified in simple cases or in cases involving small businesses.[100]

Further, if the company is looking for a reorganization rather than a wind down or liquidation, a Chapter 11 bankruptcy proceeding would be preferable to an ABC.[101] However, if the company does not have enough financing to continue operating throughout the bankruptcy process or if it is clear the company is going to close its doors, an ABC would be a more desirable process.[102] In sum, in situations where there is insufficient cash to fund operations going forward, no significant revenues being generated, and gaining additional financing for the debtor seems unlikely, an ABC can be a better choice than a Chapter 11 case.[103]

2. *Chapter 7 Bankruptcy*

ABCs are considered to be most similar to a Chapter 7 liquidation case.[104] A Chapter 7 bankruptcy case involves the liquidation of a

---

small business debtor." 11 U.S.C. § 101(51C)–(51D) (2012). It further defines a small business debtor as:

> [A] person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under this title and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) that has aggregate non-contingent liquidated secured and unsecured debts as of the date of the filing of the petition or the date of the order for relief in an amount not more than $2,000,000 (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States trustee has not appointed under section 1102 (a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor.

§ 101(51D).

98. *See* WILLIAMSON, *supra* note 4.

99. *See* Edelson & Ward, *supra* note 92.

100. *See* WILLIAMSON, *supra* note 4.

101. *See* Choslovsky & Walker, *supra* note 11, at 92. ABCs never rehabilitate a business; they end a business. In other words, if a business wants to go through bankruptcy in order to reorganize and attempt to stay in business, ABCs are not the right option.

102. COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 9; *Assignments for the Benefit of Creditors*, *supra* note 41.

103. Choslovsky & Walker, *supra* note 11, at 92; *Assignments for the Benefit of Creditors*, *supra* note 41.

104. *See e.g.*, BERMAN, *supra* note 14, at 3; DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03; WILLIAMSON, *supra* note 4; Choslovsky & Walker, *supra* note 11, at 91.

debtor's assets.[105] In Chapter 7 bankruptcy, a trustee in bankruptcy generally identifies, collects, liquidates, and distributes all of the debtor's assets.[106] While individual debtors receive a discharge from most unsecured obligations that remain unpaid at the conclusion of a Chapter 7 case, corporate debtors do not.[107]

Chapter 7 trustees are often lawyers or accountants, who are assigned cases in large numbers; their task is to efficiently analyze whether the business has any assets that can be readily liquidated for cash.[108] They may have no experience in the particular industry of the company or in running businesses at all.[109] In an ABC, on the other hand, the debtor can select an assignee with appropriate experience and expertise to conduct the "wind down of its business and liquidation to its assets."[110]

Further, in a Chapter 7 case, the business's directors and owners are excluded from the liquidation process.[111] A trustee in bankruptcy supersedes their authority.[112] In most states' ABCs, however, these principals may participate to whatever extent they choose to, as long as they have not engaged in illegal or improper conduct.[113]

In Chapter 7, debtors must file numerous forms with the court.[114] In ABCs, whether forms need to be filed with the court and the amount of court involvement depend on the state.[115] Generally, however, in states where common law ABCs are used, no formal filing is required prior to the occurrence of the assignment.[116]

---

105. WILLIAMS, *supra* note 83, at 3.

106. *Id.* at 4.

107. 11 U.S.C. § 727(a)(1) (2012). Thus, an ABC's lack of discharge is not a basis for distinguishing between bankruptcy and these state law remedies.

108. Davis, *supra* note 38, at 26.

109. *Id.*

110. *See* Kupetz, *supra* note 16, at 36.

111. 11 U.S.C. §§ 701, 704 (2012). The Court appoints an impartial case trustee to administer the case and liquidate the debtor's nonexempt assets.

112. *Id.* § 721 (Authority to operate business); *id.* § 783 (Additional powers of the trustee).

113. *See* Davis, *supra* note 38, at 27–28.

114. § 704; U.S. COURTS, *United States Bankruptcy Court Required Lists, Schedules, Statements and Fees*, U.S. COURTS, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_Current/B_200.pdf (last visited Apr. 15, 2014) [hereinafter *U.S. Bankruptcy Courts Lists*].

115. *See infra* Part III.

116. *See infra* Part III.A.

3. Advantages of ABCs over Federal Bankruptcy

Overall, compared to Chapter 11 and Chapter 7 bankruptcy, ABCs are considered to be less time consuming, less expensive, less public, and less subject to oversight.[117] ABCs are also viewed to be faster and to contain more flexibility due to the lack of cumbersome procedural requirements.[118] For example, Chapter 7 and Chapter 11 bankruptcies have more paperwork and judicial involvement,[119] whereas ABCs, depending on the state, generally are less formal and require less documentation.[120]

ABCs also require less work for the board of directors and management than a Chapter 11 case because the assignee handles operations through the end of the assignment.[121] On the other hand, in a reorganization case, managers and directors are often responsible for winding down business and disposing of the assets.[122] Further, even when a trustee is appointed in a Chapter 7 liquidation case, the assignee in an ABC is often preferable because the company can

---

117. Choslovsky & Walker, *supra* note 11, at 91.

118. James A. Chatz & Joy E. Levy, *Alternatives to Bankruptcy*, 17 NORTON J. BANKR. L. & PRAC. 149, 153 (2008) ("An assignment is often less expensive than a Chapter 11. Additionally, an ABC provides greater flexibility than would be available in a Chapter 7 or 11 bankruptcy proceeding.").

119. 11 U.S.C. §§ 521, 704, 1106 (2012); *U.S. Bankruptcy Courts Lists*, *supra* note 114.

120. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03.

121. *Cf.* Jay Alix et. al., *Assignments for the Benefit of Creditors*, *in* FIN. HANDBOOK BANKR. PROF. § 3.14 (2d ed., 2013) ("The assignee takes possession of the debtor's premises directly, or delegates physical possession to a custodian. Locks are changed, notice of Assignment is posted on the door of the business, and full security measures are implemented."); Kupetz, *supra* note 17, at 73.

122. *See* CAROLINE FULLER & GEOFFREY L. BERMAN, BANKRUPTCY V. RECEIVERSHIP V. ASSIGNMENT FOR THE BENEFIT OF CREDITORS: ADVANTAGES AND DISADVANTAGES OF EACH (2009), *available at* http://www.abiworld.org/committees/newsletters/busreorg/vol8num8/comparative.pdf. In Chapter 7 bankruptcy, the trustee typically never operates the business although they make seek court approval to have interim authority to do so. *See id.* In Chapter 11 bankruptcy, the managers and directors maintain authority to operate company in ordinary course of business, and the management is paid in the ordinary course of business. *See id.* However, in both ABCs and bankruptcy, the fiduciary duty that managers and directors owe to their company extends to creditors once their company enters the zone of insolvency. *See* Jeffrey Baddeley, *Defending Directors and Officers Against Breach of Fiduciary Claims in Bankruptcy*, BLOOMBERG BNA (Sept. 27, 2012), *available at* http://about.bloomberglaw.com/practitioner-contributions/defending-directors-and-officers-against-breach-of-fiduciary-duty-claims-in-bankruptcy. *But see* COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 9 (explaining that ABCs differ from bankruptcy in that "ABCs typically require that an officer of the company has to 'stay on board' to ensure the ABC is properly executed and carried through.").

select someone with expertise in marketing and selling assets in that particular industry as the assignee.[123] Since the assignee has experience operating a business, he or she will operate the business of the insolvent company as long as need be to maximize return by realizing some form of going concern value.[124] They are also experts at convincing creditors to be patient.[125]

Furthermore, ABCs generally generate less negative publicity, if any publicity, whereas bankruptcy is public and can reflect negatively on the company.[126] For example, in bankruptcy, the headline might read "Company shuts its doors" or "Company files for Bankruptcy," but with an ABC, by the time news reaches the media, the headline will read "New Company Acquires Old One."[127]

4. Disadvantages of ABCs over Bankruptcy

While there are many advantages of ABCs, there are still some disadvantages in choosing an ABC over a bankruptcy proceeding.[128] ABCs are not and never should be a default answer for how to deal with any insolvent company. First, ABCs "[lack] the institutional formality and widespread familiarity of a formal bankruptcy proceeding" because they are infrequently used.[129] Additionally, it can be difficult to find buyers in ABCs because some buyers may refuse to purchase assets outside of a Chapter 11 or Chapter 7 bankruptcy, which provides statutory protections to buyers.[130] Often, specifically in states where the ABC process is non-judicial, there is no court order approving the sale by the assignee.[131] Some buyers prefer the clarity given by those court orders, so they will stay away from purchasing assets from an ABC.[132] Further, in an ABC, an assignee may not sell property free and clear of liens,[133] and executory

---

123. *See* BERMAN, *supra* note 14, at 9; Edelson & Ward, *supra* note 92.

124. *See* Davis, *supra* note 38, at 27–28.

125. *Id.*

126. *See* Kupetz, *supra* note 16, at 36.

127. *See id.*; Kupetz, *supra* note 17, at 73.

128. This is not an exhaustive list of the disadvantages but rather a brief list meant to show that there are advantages and disadvantages to using ABCs over bankruptcy.

129. *See* COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 16.

130. 11 U.S.C. § 363(f) (2012) (discussing the circumstances in which a trustee may sell certain property free and clear of any interest in such property). *See generally* § 363; *Assignments for the Benefit of Creditors*, *supra* note 41.

131. *See* Kupetz, *supra* note 16, at 36.

132. *Id.*

133. *See* WILLIAMS, *supra* note 83, at 9; Kupetz, *supra* note 16, at 36. In bankruptcy, on the other hand, a trustee may sell certain property free and clear of

contracts and leases cannot be assigned without the consent of the other party to the contract.[134] In ABCs, the debtor's debts are not discharged,[135] and there is limited or no immunity provided to assignees.[136] There is also no automatic stay in ABCs, as there is in bankruptcy.[137] Additionally, the preference power does not exist in most states and is controversial in those states that do recognize it.[138] Further, as mentioned above, there is limited territorial jurisdiction for ABCs, so companies often must consolidate their assets in one state before performing an ABC.[139] Bankruptcy, on the other hand, is a matter of exclusive federal jurisdiction; thus, there is no need to consolidate assets or worry about the differing laws between states.[140]

Finally, the debtor company's owner may have personally guaranteed the company's debts, in which case both Chapter 7 and Chapter 11 bankruptcies might present enormous efficiency.[141] As mentioned previously, ABCs do not provide a discharge of the business's debts.[142] While a corporation similarly does not receive a discharge at the conclusion of a Chapter 7 bankruptcy case,[143] many banks require the owner of a small business organized as a corporate entity to guarantee the lending obligations of the owner's business. As a result, individual owners of an insolvent corporation may themselves require the protections of a bankruptcy filing in order to

---

any interest in such property subject to certain exceptions set forth in 11 U.S.C. § 363(f).

134. *See* § 365 (discussing executory contracts and unexpired leases in the bankruptcy context); Kupetz, *supra* note 16, at 36.

135. For businesses, the lack of discharge is no disadvantage compared to Chapter 7 bankruptcy because it only offers discharge to individuals. *See* 11 U.S.C. § 727 (2012); *see also* Davis, *supra* note 38, at 33 ("Because modern assignments for the benefit of creditors still do not provide a discharge of the assignor's debts, individuals and partnerships generally do not utilize them. Individuals and individual partners must look to bankruptcy law for a discharge.").

136. *See* 11 U.S.C. § 704 (2012) (duties and immunities of Chapter 7 trustee); *id.* § 1106 (duties and immunities of Chapter 11 trustee); WILLIAMS, *supra* note 83, at 9.

137. Eisenbach, *supra* note 9; 11 U.S.C. § 362 (automatic stay in bankruptcy).

138. *See* WILLIAMS, *supra* note 83, at 9. For more information on the problems state preference statutes have encountered, see Luo, *supra* note 15. For preferences in bankruptcy, see 11 U.S.C. § 547 (2012).

139. *See* WILLIAMS, *supra* note 83, at 9; *supra* Part I.B.

140. *See* 28 U.S.C. § 1334 (2012); COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 16; WILLIAMS, *supra* note 83, at 9.

141. ABCs do not deal whatsoever with guarantees. Thus, if the debtor made a guarantee, the trustee has to figure out a way around it, which can significantly reduce the efficiency of ABCs.

142. *See supra* note 106 and accompanying text.

143. 11 U.S.C. § 727(a)(1) (2012) ("The Court shall grant the debtor a discharge, unless the debtor is not an individual.").

receive a discharge from the guarantee obligation; in some instances, there may be strategic advantages to simultaneous filing of related corporate and individual bankruptcy cases, but these synergies vary from case to case and should not be presumed.[144]

D. A Brief History of ABCs and Their Reform

ABCs originated at common law, where they functioned as liquation procedures for troubled debtors, just as they do today.[145] Although Congress passed federal bankruptcy laws, ABCs have persisted, evolved with the times, and remain a viable alternative[146] to formal bankruptcy proceedings.[147] Although ABCs have been used frequently in recent years in states such as California, Illinois, and Florida, "there are relatively few reported cases discussing ABCs and even fewer modern cases."[148]

Nevertheless, ABCs are not an antiquated legal concept. Not only have they found use in several states in recent years, but they also greatly resemble similar "winding up" procedures used frequently throughout Europe and Australia.[149] Further, the call to reform ABC procedures is not a new one.[150]

---

144. David M. Madden, *Dissecting Chapter 7 Bankruptcy for Businesses*, J. DUPAGE COUNTY B. ASS'N (2009), http://www.dcbabrief.org/vol220510art4.html ("A business Chapter 7 will not stop a creditor from pursuing a shareholder in connection with the shareholder's personal guaranty of a business line of credit or preclude an action for the liability associated with the business's debts. As such, individuals facing personal liability for substantial business debt often consider filing for personal bankruptcy in coordination with the business bankruptcy, in order to eliminate personal liability for the business debt.").

145. *See*, *e.g.*, BERMAN, *supra* note 14, at 1; DEBTOR-CREDITOR LAW, *supra* note 29, § 35.02; Choslovsky & Walker, *supra* note 11, at 91.

146. When Congress first created a uniform bankruptcy law, exercising its constitutional powers to do so under Article 1, Section 8(4) of the Constitution, the Supreme Court was faced with the question of whether ABC's would continue to be a viable alternative state regime for business liquidation, and the court answered in the affirmative. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.02; Choslovsky & Walker, *supra* note 11, at 92.

147. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.01.

148. *Id.*

149. *An Out-of-Court "Winding Up" Entitled to Recognition Under Chapter 15? You Bet!*, SOUTHBAY L. FIRM BLOG (Mar. 23, 2009, 6:46 P.M.), http://www.southbaylawfirm.com/blog/?p=141 ("A voluntary 'winding up' is essentially a private liquidation authorized by the Australian Corporations Act, conducted by company-retained liquidators under the auspices of the Australian Securities & Investments Commission (ASIC) and reviewable on appeal by Australian courts. It has statutory analogues in most countries whose civil law derives from the old British Commonwealth system, and is very generally analogous to an American 'assignment for the benefit of creditors' (ABC). ABCs are recognized under the laws of virtually every state in the US, and—in California—are

This Note offers a fresh take on how states can reform their ABC processes to make ABCs more accessible, maximize their benefits, and more frequently use them. Many times in the history of ABCs, advocates of ABCs have recognized that ABCs were becoming too "particularized to fit the needs of those states that have found the process a useful tool." [151] As a result, ABCs were so diverse that "[they] were less useful than [they] might otherwise be because of the significant differences among state laws governing the process."[152]

In the 1990s, the American Bankruptcy Institute proposed the adoption of "statutes that would make the state laws on general assignments more uniform, and hopefully more utilized on a national basis."[153] While practitioners throughout the country considered these proposals, the issue was dropped until recently when practitioners began again to advocate for reform.[154] In response, additional statutory reforms, including a Model Statute on General Assignments, were suggested.[155]

In drafting a model statute, these advocates proposed having bonds to be posted by the assignee at the time of the assignment, requiring "consent" to the assignment by a majority of the creditors, and having court supervision.[156] However, the model statute raised as many questions as it solved by incorporating comments within its text about items that would need to be later resolved.[157] For example, while the model statute referred to posting bonds, it contained no bond requirement.[158] Further, within its text, the model statute conceded that involuntary bankruptcy may be preferable to creditors, suggesting the writers of the model statute did not themselves believe in the strength of ABCs as a preferable alternative to bankruptcy.[159] Likely due to these flaws, no state has yet adopted the model statute,

---

commonly used as a very quick and inexpensive means of winding up a company's affairs and disposing of its assets.").

150. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.02; Choslovsky & Walker, *supra* note 11, at 92.

151. *See* Berman & Vance, *supra* note 27, at 33.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 34.

156. *Id.* at 35.

157. *Id.* at 35 n.4.

158. *Id.* at 44.

159. *See id.* ("The remedy of an involuntary bankruptcy petition may be more appropriate for creditors.").

but should any model statute be drafted in the future, it should consider the issues described below.

II. A SPECTRUM OF ABCS AND COMPARING THE VARIOUS FORMS ACROSS THE STATES

ABCs are used frequently in some states, such as California, Florida, and Illinois, and infrequently or rarely in other states despite their being an attractive alternative[160] in certain situations.[161] Today, some states maintain tight control over the ABC process while others provide little regulation.[162]

This state-to-state variance in ABC procedure has led some scholars to conclude that there are two approaches to the assignment process[163] and others to describe ABCs as existing in three forms.[164] This Note argues that ABCs are best explained as existing on a spectrum from one pole that is purely common law, to another pole in which ABCs are heavily regulated and lose most of their advantages over formal bankruptcy proceedings.[165] For the purposes of explaining the ABC processes without examining each states ABC individually, the following sub-Parts break ABCs in three categories: states with common law ABCs, states with minimally regulated ABCs, and states with heavily regulated ABCs.[166]

Recognizably, the success of an ABC depends on maximizing its benefits over bankruptcy by being more flexible and thrifty; frequency of its use depends on practitioners' familiarity with its state's ABC process. There are positive and negative aspects, however, within each category. This Part examines each category of

---

160. *See infra* Part II.C.

161. Richards & Ross, *supra* note 13, at 5.

162. Blakely, *supra* note 50, at 1.

163. *See* BERMAN, *supra* note 14, at 3 ("[O]ne approach requires court supervision of the assignment and the assignee; the other permits assignments to proceed without court supervision, but requires that the assignee follow state laws applicable to and governing the liquidation of a business and its assets.").

164. Richards & Ross, *supra* note 13, at 7 (describing ABCs as existing in three forms which are minimalist states, states with a medium amount of requirements, and states with the widest scope of statutory requirements).

165. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03. Although it would seem only logical that the statutes most frequently used would fall somewhere within this spectrum, after analyzing the ABC process of the states where they are most frequently used, there appears to be no correlation between how regulated the ABC process is and the frequency of its use. *See infra* Part II A–C.

166. Richards & Ross, *supra* note 13, at 7 (describing ABCs as existing in three forms which are minimalist states, states with a medium amount of requirements, and states with the widest scope of statutory requirements).

ABCs to determine which is preferable and which parts of each should be used to create a new category. Thus, this Note evaluates the advantages and disadvantages of the processes found within the spectrum in order to uncover the form of ABC that would be most useful.[167]

A. States with Common Law ABCs

Although some form of ABC exists in all states, only thirty-three states have statutes governing ABCs, to varying degrees. Until the 1900s, practically all ABCs involved common law assignments.[168] While most states have enacted statutory schemes of ABCs, some still depend on common law to regulate these assignments.[169] Today, ABCs are governed by common law in eleven states, including Illinois and Hawaii.[170] A common law ABC involves no comprehensive statute governing the creation, validity, or administration of ABCs.[171]

In its common law form, the ABC process is relatively uncomplicated because the process usually does not require any filings or court approval.[172] Because a common law ABC is usually an out-of-court process, many courts will only see ABCs in these states when and if disputes occur.[173] Common law ABCs begin when the debtor executes a deed of assignment of all assets to an assignee who then becomes a fiduciary for the creditors.[174] Once the assignment has occurred and the assignee has taken inventory of the assets and the creditor's claims, the assignee liquidates the assigned assets and makes a pro rata distribution to the creditors who filed claims with the assignee.[175] Common law ABCs thus give the debtor enormous flexibility in setting the terms and conditions of the assignment.[176]

---

167. This section will treat ABCs as if there are three types of ABC processes: (1) the predominantly common law ABC, (2) the moderately regulated statutory ABC, and (3) the heavily regulated ABC. Granted, each state's statute may fall in between these three extremes but overall these three categories encompass the three types of that ABCs take amongst the states. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03 (discussing statutes that require court involvement such as the filing of documents with the court and supervision of the court); *infra* Part II.C.

168. DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03.

169. *See* Luo, *supra* note 15, at 523.

170. *See* DEBTOR-CREDITOR LAW, *supra* note 29, at § 35.03.

171. *See* Verbrugge, *supra* note 30, at 1.

172. *Id.*

173. *See* DEBTOR-CREDITOR LAW, *supra* note 29, at § 35.03.

174. *See* Verbrugge, *supra* note 30, at 1.

175. *Id.*

176. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.02.

Common law ABCs are admittedly hard to summarize, because there are no comparable statutes and each state's case law differs from other states' case law. Further, usually in common law ABCs, the instrument of the assignment, or the agreement entered into by the parties to the assignments, defines the powers and duties of the trustee and the manner of distribution.[177] To illustrate how common law ABCs differ, this Part examines the case law in a state in which a common law ABC is frequently used, Illinois, and that of a state whose common law ABC is infrequently used, Hawaii.

The Illinois ABC is so popular that some scholars have concluded that debtors in financial distress are as likely to rely on it as on federal bankruptcy law in Illinois.[178] In Illinois, since ABCs are out-of-court remedies, the assignee is not even required to seek creditor or court approval for administration of the estate.[179] Illinois courts consider an ABC to be a unique trust arrangement whereby the assignee holds the property for the benefit of a special group of beneficiaries consisting of the assignor's creditors, and when the time is right, liquidates it in order to use the proceeds of the assets as payments to the creditor.[180]

Although an Illinois ABC is not statutorily regulated and does not have any consent or approval requirements, there are still certain formalities that Illinois ABCs must meet.[181] First, the debtor and assignee must create a written instrument detailing the powers of the assignee over the trust.[182] Without this formal written agreement, courts will invalidate an attempted ABC that gets challenged.[183] While the lack of a formal written agreement will invalidate an attempted ABC, it will not deprive any creditor of its rights.[184] Rather, the effect of failing to make a formal written agreement is that the debtor's property remains in the debtor's property as if no ABC had been attempted.[185]

Although Hawaii's ABC is rarely used, it differs in important ways from the Illinois ABC. For example, while Hawaii's ABC is a common law ABC, Hawaii's Fraudulent Transfer Law heavily

---

177. *See* Russell J. Davis et. al., *Creditors' Rights § 34: Common-law and Statutory Assignments Compared*, 23 OHIO JUR. 3D (2013).
178. Morrison, *supra* note 11, at 257.
179. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*

impacts how its ABC process is conducted, causing Hawaii's ABC process to be impacted, at least to some extent, by statutes.[186] Further, while the Illinois legislature seems to believe that ABCs are best left as they are, Hawaii's legislature has proposed reforming Hawaii's ABC process to make it statutorily regulated, although to date these proposals have not been adopted.[187] If passed, Hawaii would require the assignee to sign acceptance of the assignment and to file the assignment with the clerk of the state circuit court.[188] This bill would give courts control over the ABC process, not just disputes arising in that context.[189] The purpose of these revisions is to eliminate priority disputes that sometimes occur in the wake of a completed ABC,[190] but nonetheless would subject Hawaiian ABCs to heightened administrative cost and expense.

Although common law ABCs can be efficient, flexible and cost saving, they also have drawbacks. In the absence of formal legislative requirements, the instrument of the assignment usually defines the powers and duties of the trustee and the manner of distribution.[191] Thus, practitioners must either have extensive knowledge of how to conduct an ABC in that state, or research the case law surrounding ABCs in that jurisdiction before they can conduct the assignment.[192] Case law can be voluminous and, in any event, can provide less guidance than a statute. This may either dissuade practitioners from pursuing ABCs as an option or it will cause billable hours to stack up and thus add additional administrative costs that detract from the cost-saving abilities of ABCs.

Further, common law ABCs lack judicial review prior to the completion of the ABC process.[193] Courts can impose restrictions after the assignment and subsequent liquidation has occurred, but cannot oversee the process or require filings until after litigation is

---

186. *See* Verbrugge, *supra* note 30, at 2 ("If a creditor is able to establish that the assignment violates HAW. REV. STAT. § 651 C-4 or HAW. REV. STAT. § 651 C-5, then the creditor would be able to have the transfer avoided under HAW. REV. STAT. § 651C-7.").

187. *Id.* at 1.

188. *Id.* at 12.

189. *Id.*

190. *Id.*

191. *See* Davis, *supra* note 177, at 14.

192. *Cf.* Verbrugge, *supra* note 30, at 1 (arguing that statutes can help to clarify a state's common law concerning the "creation, validity, and administration of an assignment for the benefit of creditors").

193. *See* Scalambrino, *supra* note 71, at 264; *cf.* Choslovsky & Walker, *supra* note 11, at 93.

brought.[194] As a result, courts cannot prevent problems in this context; they only react to them.

There is also less transparency in common law ABCs because there may be no requirement that creditors receive notice, and in some places, a common law ABC can occur without prior notice to all shareholders or creditors.[195] There may be factual disputes regarding when the assignment was made and if sufficient notice was given to creditors, but without transparency, filings, or certain other requirements, it is often difficult to tell when exactly an assignment was made.[196] Finally, the flexibility of common law ABCs has a large potential for abuse because they give the debtor a wide berth of freedom and give creditors almost no control over the assignee.[197] For these reasons, many prefer ABCs in which statutes govern the process.[198]

B. States with Minimally Regulated ABC Processes

ABC statutes either supplement common law ABCs or override them.[199] In some states, ABC statutes are permissive, allowing common law ABCs to continue alongside their statutory counterpart, essentially codifying the common law format.[200] Generally, ABC statutes that are designed to supplement the common law fall into the minimally regulated statutory ABC category, which some might call a

---

194. Depending on how you view the court's oversight abilities in ABCs, this can either be a major drawback or a major advantage. *Compare* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03 (arguing that less court involvement saved time and made the ABC more efficient), *with* Verbrugge, *supra* note 30, at 135 (noting that court supervision can help reduce or eliminate factual disputes related to the assignment).

195. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03; Verbrugge, *supra* note 30, at 135.

196. *Cf.* Verbrugge, *supra* note 30, at 1. As is, Hawaii currently has no set notice requirements, and the deed of assignment currently sets notice requirements on a case-by-case basis. Further, because the express consent of creditors is not a necessary element of an ABC in Hawaii, an ABC could occur without a creditor even being aware of the assignment.

197. *Id.*; *see* Mann, *supra* note 22, at 1394 (calling the ABC process a very secret process and saying, "The basic point is that the process can be accomplished quickly, without a public filing, and often without any public notoriety.").

198. *See* Edelson & Ward, *supra* note 92, at 6 ("An ABC is a particularly attractive option in Delaware because the state is one of the few in which statutes govern the process rather than relying solely on common law."); Verbrugge, *supra* note 30, at 8.

199. *See* Chatz & Levy, *supra* note 118, at 153 (noting various state statutes merely codify the common law concept or essentially override it).

200. Choslovsky & Walker, *supra* note 11, at 91.

mix between statutory and common law ABCs.[201] In other words, minimally regulated ABCs involve the middle ground between common law ABCs and heavily regulated ABCs, and thus exist across a wide spectrum.

For the purposes of this Note, the spectrum of minimally regulated ABCs begins where common law ABCs end. This category covers ABC statutes that are extremely brief and do little more than refer to judicial decisions—for example, Iowa's statute—all the way to ABC statutes that involve the judiciary by requiring assignees to merely file notice of the assignment with the court.[202]

The most famous minimally regulated ABC is arguably California's because it is used more frequently than any other state's ABC.[203] Dot-com companies and private equity and venture capital companies frequently rely on the California ABC format.[204] The California common law ABC was absorbed into California state law governing an ABC, but over time, the California legislature repealed the complete absorption and eventually returned to a predominantly common law ABC system.[205] They enacted "supplementary statutes," however, to address specifically troubling aspects of ABCs.[206] These supplementary statutes contain very bare bones requirements, and even with them, California does not require a public court filing and the debtor's assigned assets can be sold without court approval.[207] Among the rules enacted by the supplementary statutes is a notice rule requiring the assignee to set a deadline and give 150 to 180 days' notice to creditors of the assignment for submission of claims to the assignee.[208] California also requires debtors to provide the assignee with a list of creditors, shareholders, and other parties in interest.[209] Further, California has a complex priority scheme that includes giving priorities for unsecured claims for up to $4,300 for each individual,

---

201. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03 (describing this category as a mix between statutory and common law).

202. *Id.*; *see, e.g.*, IDAHO CODE ANN. § 68-201 (2006).

203. *See* COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 12; DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03; Luo, *supra* note 15, at 513; Mann, *supra* note 22, at 1390.

204. *See* COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 12; *supra* Introduction, Parts I, II.

205. *See* Luo, *supra* note 15, at 524.

206. *See id.*; Eisenbach, *supra* note 9. Examples of "troubling aspects" include the time allowed for notice to be given and the required components of notice to creditors.

207. Eisenbach, *supra* note 9, at 2.

208. CAL. CIV. PROC. CODE § 1802 (West 1992).

209. *Id.*

priority for consumer deposit claims, and priority treatment of claims for wages, salaries, commissions, and employee benefit contributions.[210]

The drawbacks of minimally regulated statutes are hard to pin down because they fall across such a wide spectrum. In states where no court filing is necessary, one drawback at least from the standpoint of analyzing ABCs and their impact, is that no statistics are kept.[211] In states where filing after the fact is required or a certain date is tracked by the state, statistics on filings are generally kept in the offices of city and county clerks.[212] Regardless, it is very difficult to get an aggregate number about how many ABCs occur statewide in states with minimally regulated ABCs.[213] This also makes it more challenging to study the effects of these types of ABCs.[214] Without more knowledge, it is difficult to encourage other states to reform their ABCs to adopt a process about which there is very little empirical data.

Another drawback is that many minimally regulated ABC statutes, such as California, do not give rise to an automatic stay, as in bankruptcy.[215] The lack of a stay means that creditors can obtain judgments in pending lawsuits, which effectively could help some creditors jump the line of all creditors and collect on these judgments ahead of the line.[216]

---

210. *Id.* § 1204(a) (1999). In *Sherwood Partners v. Lycos Inc.*, the Ninth Circuit struck down California's preference law, which allowed assignees for the benefit of creditors to avoid preferential transfers to creditors. *See* 394 F.3d 1198 (9th Cir. 2005), *cert. denied*, 546 U.S. 927 (2005). Despite their invalidation of the law, many still argue that preference actions are still good law. *See* Geoffrey L. Berman & Catherine E. Vance, *State Law Preference Actions: Still Alive after* Sherwood Partners v. Lycos, 26 AM. BANKR. INST. J. 24, 24 (2008); David S. Kupetz, *The Venerable Assignment for the Benefit of Creditors Weathers the Ninth Circuit's Decision in* Sherwood v. Lycos *and Remains a Valid Alternative to Federal Bankruptcy Proceedings*, 2008 ANN. SURVEY BANKR. L. 12; Luo, *supra* note 15, at 513.

211. *See* Mann, *supra* note 22, at 1394. Although this is listed as a disadvantage for minimally regulated ABCs, it is a disadvantage that flows across the entire spectrum of ABCs. Empirical data on ABCs is very difficult to find, and where it can be found, it is hard to compare it to any other states since data is sparsely collected.

212. *Id.* at 1394–96.

213. *Id.*

214. *Id.*

215. *See* Luo, *supra* note 15, at 522; Eisenbach, *supra* note 9, at 2.

216. *See* Luo, *supra* note 15, at 522.

C. States with Heavily Regulated ABC Forms

In addition to minimally regulated ABCs and common law ABCs,[217] there is a third category of ABCs: the heavily regulated ABC. Heavily regulated ABC statutes essentially abolish the common law form and create a new, separate ABC process.[218] There is some variation, however, even between different states' heavily regulated ABCs.[219] For example, while some ABC statutes may not expressly render common law ABCs void, others do.[220]

Whether the statutes explicitly or implicitly override common law ABCs, all such statutes govern the procedural formalities associated with this process, including "whether they must be recorded, when the assignee must give notice to creditors, whether the assignee must be bonded, the nature of the schedule of assets and liabilities that the assignee must file with the court, and court supervision of the proceedings."[221] They also make explicit who is authorized to make these assignments, the requisites for a valid assignment, the role and duties of an assignee, how an assigned estate is to be managed and administered, and the manner in which creditors' claims are to be presented, proved, and paid.[222]

In heavily regulated ABCs, courts often oversee the entire process, imposing duties that range from approving the assignee to filing interim reports with the court.[223] For example, in Ohio, an assignee is required to file a verified inventory of all estate property with the court; in New York, the assignee is required to file multiple times with the court, including a final report in connection with the termination of the trust.[224] In Delaware, the Court of Chancery is very involved in the proceedings, which some practitioners see as an unmitigated positive, given the court's prestige.[225]

---

217. *See supra* Part II.A–B.

218. *See* Chatz & Levy, *supra* note 118, at 153 (discussing how "some states effectively abolish common law ABCs by requiring that all ABCs be made in accordance with those statutes"); Choslovsky & Walker, *supra* note 11, at 91.

219. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03.

220. *Id.* (discussing how Michigan's ABC statute preempted the common law ABC).

221. *See* Chatz & Levy, *supra* note 118, at 153.

222. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03.

223. *See*, *e.g.*, COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 13; DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03; Barr & Newman, *supra* note 35, at 11.

224. Barr & Newman, *supra* note 35, at 10. These mirror similar obligations under bankruptcy law.

225. *See* COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 13; Edelson & Ward, *supra* note 92. Notably, there is a big difference between

Florida has a heavily regulated ABC process that is a popular alternative to bankruptcy and has seen frequent use amongst in-state insolvent companies.[226] In recent years, reform was initiated in Florida to create an ABC statute that would provide a "uniform procedure for the administration of insolvent estates and to ensure full reporting to creditors and equal distribution of assets according to the Florida ABC statute."[227] Many believe Florida's amended ABC statute "substantially reduces the number of situations in which the advantages of bankruptcy outweigh those of an ABC."[228] Furthermore, scholars believe that having a uniform ABC procedure will enable more practitioners to understand and use ABCs in the future.[229]

In Florida, the ABC process commences when the debtor and the assignee enter into an irrevocable assignment.[230] The debtor is required by law to assist the assignor with the process.[231] The debtor also must submit him or herself to an under-oath examination by the assignee about all acts, conduct, assets, liabilities, his or her financial condition, and any other matters related to the assignee's administration of the estate.[232] The assignee then files a petition in state court, to which the assignment document, along with the schedules of assets and creditors, are attached.[233] The ABC proceeds as an ongoing case, which simplifies the process of obtaining court assistance. Thus, like in other cases, court authorizations, approvals of transactions, determinations of bond amounts, orders of cooperation of third parties, and resolutions of disputes are initiated by motion.[234] This differs from ABCs in other states where to obtain court assistance, one has to initiate a motion.[235] The assignee must also create a register of all claims filed against the estate and make it

---

having access to that court if creditors see a problem with the process, and having to report to the court along the way, which may just increase the cost of the proceeding and thus dilute the advantages of using an ABC over bankruptcy.

226. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03; Davis, *supra* note 38, at 33.

227. *See* DEBTOR-CREDITOR LAW, *supra* note 29, at § 35.03; Ronald G. Neiwirth & Jason Bloom, *Florida Legislature Overhauls Assignment for the Benefit of Creditors*, 82 FLA. B.J. 21, 21 n.3 (2008).

228. *See* Davis, *supra* note 38, at 18.

229. *See* Neiwirth & Bloom, *supra* note 227.

230. FLA. STAT. § 727.104(1)(b) (2007).

231. *Id.* § 727.107(3).

232. *Id.*

233. *Id.*

234. *See* Davis, *supra* note 38, at 19–20.

235. *Id.* at 20.

available to all creditors, who can then review and challenge any of those claims.[236]

Florida, like many other states with heavily regulated ABCs, limits an assignee's ability to run the debtor's business.[237] In the past, Florida required court authorization for the assignee to run the debtor's business.[238] Today, however, if it is in the estate's best interest, Florida allows the assignee to conduct the assignor's business without court approval, for at least fourteen days and for up to a total of forty-five days upon notice.[239] After forty-five days, court authorization is required.[240] This important change permits a "seamless transition in operation" from the debtor to the assignee, and enables the assignee to sell off the assets of the business more easily.[241] Court approval is still required for selling off the assets.[242]

Extensive and detailed procedures for the administration of ABCs can also be found in a number of states besides Florida, including Michigan, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin.[243] In Wisconsin, the county court supervises the process, and determines if a receiver will be appointed; issues injunctions against creditor actions; approves sales, distributions, and fees; hears preference and avoidance actions; and resolves controversies, including disputes over claims.[244] Unlike in Florida, the assignment does not actually occur until it has been filed with the court and the case begins.[245] In both Florida and Wisconsin, the court supervises the process; however, in Wisconsin, an ABC is considered to be a "special proceeding" rather than an action.[246]

---

236. *Id.*

237. *See id.* at 21.

238. *See id.* at 21 (citing FLA. STAT. § 727.108(4) (2007)). ("Previously, this section required court authorization for the assignee to conduct the business. This gave rise to a diverse practice in which some assignees moved ex parte and others moved upon notice and hearing. The confusion and delay in obtaining authorization, which was often detrimental to the estate, has been eliminated. Interested parties receive notice and may object to continued operation beyond fourteen days.").

239. FLA. STAT. § 727.108(4) (2007).

240. *Id.*

241. *See* Davis, *supra* note 38, at 21.

242. FLA. STAT. § 727.109(7) (2007).

243. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03; Richards & Ross, *supra* note 13, at 5.

244. WIS. STAT. ANN. § 128.01 (West 2009); JONATHAN FRIEDLAND, STRATEGIC ALTERNATIVES FOR AND AGAINST DISTRESSED BUSINESSES § 37.1 (2010).

245. FRIEDLAND, *supra* note 244, § 37.1.

246. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.3.

The Wisconsin ABC also creates an injunction against all other actions relating to the debtor's insolvency issues.[247] Wisconsin requires the assignee to be a resident of Wisconsin, but does not define resident.[248] The assignee must provide all creditors with prompt notice, publish the notice in the county where the proceeding is pending, and must provide notice of the injunction against all other actions and the time period for filing claims.[249] Further, Wisconsin courts tend to enjoin single creditors from participation in ABCs. Hence, these ABCs are really only an option for small businesses.[250]

Advocates of the heavily regulated ABC form see it as giving the process a framework, enabling it to be more easily understood, more consistent with public policy, and better able to protect creditors.[251] Where heavily regulated ABCs go wrong, however, is by trying to work out the kinks of common law and minimally regulated ABCs to the detriment of the benefits that made ABCs as a process favorable in the first place. For example, heavily regulated ABCs require court filing and enable court involvement throughout the process.[252] While this may be viewed as presenting needed transparency for creditors because they are better able to challenge the assignee's actions, court filings can slow down the process by involving another actor and another hurdle to overcome.[253] When the court is involved and filing is necessary throughout, ABCs can become a waiting game where assignees must wait for the court's response before they can act.[254] This creates more lost opportunities, busier dockets, and more expenses on the already financially strained estate of the debtor.[255]

For example, Florida used to require court approval before the assignee could run the debtor's business.[256] However, Florida recently revised this requirement after realizing it was hurting already financially-strapped companies because often by the time the court

247. FRIEDLAND, *supra* note 244, § 37.1; Eisenbach, *supra* note 9 (comparing this injunction to a stay under the Bankruptcy Code).

248. WIS. STAT. ANN. § 128.02 (West 2009).

249. FRIEDLAND, *supra* note 244, §§ 37.2, 37.4 (citing WIS. STAT ANN. § 128.14 (West 2009)).

250. *Id.* § 37:4.

251. *See generally* Davis, *supra* note 38.

252. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03. On the other hand, court supervision can help reduce or eliminate factual disputes related to the assignment. *See* Verbrugge, *supra* note 30, at 10.

253. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03.

254. *See* Davis, *supra* note 38, at note 19.

255. *Id.* at 20.

256. *Id.* at 21.

had approved the assignee to run the business, much of the remaining value of the business had already decreased.[257]

In general, heavily regulated ABCs have comprehensive and detailed procedures for their administration.[258] These procedures were created to solve prior problems that existed with less regulated forms. However, experience shows that what they really do is make the ABC process more cumbersome, more expensive, and more drawn-out, thus removing many of the benefits of using an ABC over bankruptcy.[259]

III. MAKING ABCS A VIABLE ALTERNATIVE TO BANKRUPTCY THROUGHOUT THE STATES

As addressed above, ABC reform is not a new idea.[260] ABCs in all states started out as common law forms.[261] The almost complete freedom enjoyed by assignors and assignees at common law had a large potential for abuse, and led to many calls for reform.[262] Throughout the past century, many states enacted legislation and additional rules to address these issues.[263] Over time, the ABC process became too widely varied by state and too cumbersome, and, as a result, ABCs were not widely used in many states.[264]

Despite their desuetude, ABCs can provide a more efficient way to address insolvency than bankruptcy in certain types of companies.[265] As discussed in Part II, the success that an ABC sees depends on its maximizing its benefits over bankruptcy, and the frequency of its use depends on practitioner familiarity with its state's ABC process. To most legal practitioners, including even those specializing in bankruptcy, ABCs are an unfamiliar process.[266] Accordingly, for ABCs to see more frequent use in all states, they need to be

---

257. *See id.*

258. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03 ("The majority [of heavily regulated ABC statutes] are fairly comprehensive, spelling out in detail who may make assignments, the requisites for a valid assignment, the role and duties of an assignee, what property may be included in an assigned estate, how an assigned estate is to be managed and administered, and the manner in which creditor's claims are to be presented, proved and paid.").

259. *See generally* Neiwirth & Bloom, *supra* note 227 (explaining how Florida's ABC was revised and scaled back).

260. *See supra* Parts I.D, II.

261. *See* Choslovsky & Walker, *supra* note 11, at 93.

262. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03.

263. *Id.*

264. *See supra* Part I.D.

265. *See supra* Part I.C.

266. *See supra* Part I.D.

reformed, and that reform needs to be twofold.[267] First, this Part argues that ABCs should be reformed across the states into an ABC that will maximize the benefits and minimize the disadvantages of ABCs. Second, it suggests that a minimally regulated ABC process would strike this balance because it is in the middle of the spectrum between common law and heavily regulated ABCs. This Part concludes by arguing that legal education about ABCs also needs to be reformed to include more instruction on ABCs.

A. States Need to Reform ABCs but Maintain Minimum Statutory Regulation

The lack of empirical data on ABCs makes it challenging to judge which ABC type is statistically the most successful or most popular. Further, since frequently used states' ABC processes do not all fall into the same category,[268] it is difficult to conclude that one ABC form is a superior choice after which to model reform than another. However, comparing the advantages and disadvantages of each ABC group offers one way to find the best ABC form after which to model reform.

As previously mentioned, common law ABCs are not transparent enough.[269] Because common law ABCs usually follow the form of the assignment, ABCs can very extensively from one ABC to another even if taking place within the same state.[270] Furthermore, practitioners must either be very familiar with their state's ABC process or must conduct extensive research before being able to conduct an ABC.[271] Research can be extremely time-consuming and expensive, undermining the efficiency associated with using an ABC.[272]

In addition, since debtors are the ones choosing to use ABCs over bankruptcy, the lack of transparency in common law ABCs may cause creditors to doubt the motives of debtors who are given a lot more freedom by ABCs.[273] The fact that common law ABCs lack judicial

---

267. *See supra* Part I.D.

268. *See* Morrison, *supra* note 11, at 5.

269. *See supra* Part II.C.

270. *See* Davis, *supra* note 38, at 33.

271. *See* COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 16 (discussing the unfamiliarity of judges and clerks alike, and the necessary resulting research); *supra* Part II.C. *See generally* DEBTOR-CREDITOR LAW, *supra* note 29.

272. *Cf.* COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 16.

273. *See supra* Part II.A.

review prior to the completion of the ABC process only adds to creditors' concerns.[274] Many creditors would prefer at least some oversight of the process, which minimally regulated ABCs can offer.[275]

Minimally regulated ABCs are by no means without problems.[276] Given that minimally regulated ABCs differ greatly even from one another, however, it is very hard to summarize a shared list of disadvantages of minimally regulated ABCs.[277] Rather, their advantages and disadvantages seem to result from where they fall on the spectrum of ABCs.[278]

Heavily regulated ABCs, on the other hand, often impose obligations on debtors that undercut the time- and cost- savings efficiencies of an ABC process, thus making their state's ABC have almost as many requirements and burdens as bankruptcy.[279] For example, heavily regulated ABCs spell out in detail who may make assignments, the requisites for a valid assignment, the role and duties of an assignee, what property may be included, how the assigned estate is to be managed and administered, and much more.[280] This reduces the amount of freedom and creativity an assignee may use in administering the estate and liquidating the assets.[281] Also, while heavy regulation may appear to give more security to creditors, it really makes the ABC process less efficient and resourceful with how it liquidates the assets, and thus a less attractive alternative to bankruptcy.[282]

In recent years, some states, including California and Florida, have revised their heavily regulated ABCs to remove unnecessary requirements, and as a result, have seen an uptick in reliance on their

274. *See* Scalambrino, *supra* note 71, at 264; *cf.* Choslovsky & Walker, *supra* note 11, at 93.

275. Depending on how you view the court's oversight abilities in ABCs, this can either be a major drawback or a major advantage. *See* Verbrugge, *supra* note 30, at 135 (noting that court supervision can help reduce or eliminate factual disputes related to the assignment).

276. *See supra* Part II.B.

277. *See supra* Part II.B.

278. *See supra* Part II.B. In other words, if a minimally regulated ABC falls close to the common law ABC line, it shares many of the same disadvantages as common law ABCs; on the other hand, if it falls closer to the heavily regulated ABC line, it no longer has the disadvantages of a common law ABC but rather has the disadvantages of a heavily regulated ABC.

279. *See supra* Part II.C.

280. *See supra* Part II.C.

281. *See supra* Part II.C.

282. *See supra* Part II.C.

state's ABCs.[283] Additionally, California has been called by multiple sources "the capital of ABCs," and many recent articles on the subject matter center their discussions on California ABCs.[284] California has experienced all three categories of ABCs.[285] The state replaced its common law ABC with a heavily regulated ABC only to realize that a heavily regulated form detracted from many of the attractive qualities of ABCs.[286] In response, the California legislature repealed the heavily regulated ABC and returned to a hybrid form of ABC that was mainly based in common law.[287] However, they enacted "supplementary statutes" to address specific aspects of ABCs that had been seen to cause confusion without regulations, such as notice requirements.[288]

While Florida was categorized into the heavily regulated ABC, the reasons behind Florida's ABC reform resonate with why reform in all states is a beneficial idea.[289] The reforms were meant to make the process run smoothly and more efficiently by removing needless burdens.[290] Florida believed that having a uniform ABC procedure, rather than a common law ABC, would enable more practitioners to understand and use ABCs in the future.[291] Therefore, while it did not completely abolish its court-filing and authorization requirements, it decreased the amount of court involvement.[292] Although these reforms did not necessarily categorize Florida's ABC as minimally regulated, Florida's reforms reveal that heavily regulated ABCs can go too far. To avoid the dangers of becoming too regulated while avoiding the problems of common law ABCs, states should rely on an ABC standard similar to the one that this Note refers to as "minimally regulated."[293]

---

283. *See supra* Part II.
284. *See, e.g.*, David Kupetz, *For Bankruptcy Alternative, Know Your 'ABCs'*, TURNAROUND MGMT. ASS'N (July 1, 2003), https://www.turnaround.org/Publications/Articles.aspx?objectID=2190.
285. *See supra* Part II.B.
286. *See supra* Part II.B.
287. *See supra* Part II.B.
288. *See supra* Part II.B.
289. *See supra* Part II.C.
290. *See generally* Verbrugge, *supra* note 30; *supra* Part II.C.
291. *See* Davis, *supra* note 38, at 18–19.
292. *See supra* Part II.C.
293. *See supra* Part II.B.

B. While Minimally Regulated ABCs Are Not Perfect, they Provide the Best Opportunity for ABCs to See More Frequent Use

Minimally regulated ABCs exist on a wide spectrum. Some minimally regulated ABCs appear to be almost completely common law based, while others appear to be very similar to heavily regulated ABCs.[294] However, minimally regulated ABCs represent the best of both categories. They can avoid the lack of transparency in common law ABCs, while also avoiding the over-cumbersomeness of heavily regulated ABCs.[295] Minimally regulated ABCs generally follow a common law format to some extent but have statutes that help structure the process.[296] This helps make the process more transparent, and should put creditors more at ease with a debtor's choice of using an ABC over a bankruptcy. Furthermore, regulation of an ABC might be minimal while still providing the best protections afforded by heavily regulated ABCs. For example, filing requirements enable data collection, which at very least permits policymakers to keep track of ABCs.[297] Data collection improves the court's ability to review an ABC, and it will assist scholars in better forming opinions about ABCs and legislatures in adjusting their ABC laws.[298] Furthermore, collecting more data using better methods has little downside because it adds little expense to the process itself and does not restrain the assignee's practices.[299]

Furthermore, advocating for reforming to a minimally regulated ABC process gives states options when reforming their ABC processes.[300] While minimally regulated ABCs avoid many of the problems of common law ABCs and heavily regulated ABCs, minimally regulated ABCs are not perfect. Some forms of minimally regulated ABCs may be better than others.[301]

Since California's ABC is arguably the most successful in the nation, states looking to reform their ABC should look to California's

---

294. *See supra* Part II.B

295. *See supra* Part II.B

296. *See* DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03; Chatz & Levy, *supra* note 118, at 4; Choslovsky & Walker, *supra* note 11, at 91.

297. *See* Mann, *supra* note 22, at 1396.

298. *Id.*

299. *Id.*

300. Since minimally regulated ABCs fall across a wide spectrum, there is a lot of variety in how minimally regulated ABCs are found and can be structured. *See supra* Part II.B.

301. *See supra* Part II.B.

ABC for guidance.[302] As mentioned previously, the success of California's ABC is not limited to the dot-com industry.[303] It is not the type of company that makes ABCs a viable solution; it is the form of the solution itself that makes California's ABC work.[304] California's ABC is extremely assessable, and it is not overly burdensome in requirements.[305]

States reforming to minimally regulated ABCs should also enact supplementary statutes, like California, in order to address common problems that occur within their state.[306] Through supplementary statutes, states can give courts some form of oversight, up to that state's discretion.[307] However, states ought to structure the amount of court involvement by attempting to avoid pushing their ABC into heavily regulated ABC territory.[308]

In sum, minimally regulated ABCs provide the best solution to making ABCs see more frequent use. They require low court involvement and have minimal requirements and hindrances to the process.[309] Minimally regulated ABCs give debtors and assignees enough flexibility in forming an assignment to maximize the time- and cost-efficient benefits of ABCs, while minimizing the fears of creditors that debtors and assignees have too much freedom. Finally, they enhance the benefits of ABCs over bankruptcy while minimizing the drawbacks. Therefore, when reforming its ABC process, a state should strive to achieve a minimally regulated ABC form.

C. Legal Education, Including Law School Classes and CLE Programs, Ought to Adjust Their Curriculum to Include Instruction on ABCs in Order to Make Reforms as Successful as Possible and Make ABCs an Alternative to Be Considered

Before the benefits of minimally regulated ABCs as a format can be realized, ABCs, their processes, and the need for reform first need to come to the attention of the legal community at large. ABCs currently lack "the institutional formality and widespread familiarity

---

302. *See supra* Part II.B. Further, since California's ABC has itself undergone reform in order to maximize its usage and benefits, it provides an excellent model for reform. *See* Luo, *supra* note 15, at 524.

303. *See* Mann, *supra* note 22, at 1390.

304. *See supra* Parts I, II.

305. *See supra* Part II.B.

306. *See supra* Part II.B.

307. *See supra* Part II.B

308. For guidance on what constitutes "heavily regulated," see *supra* Part II.C.

309. *See supra* Part II.B.

of a formal bankruptcy proceeding" because they are infrequently used.[310] Once reform occurs, ABC will have institutional formality.[311] Reforming the process, however, cannot in itself create widespread familiarity, which is necessary for ABCs to be truly successful on a more widespread scale.[312] The frequency with which ABCs are used depends as much upon the choice of practitioners as it does on the form of ABC.

Therefore, to create widespread familiarity, ABCs should be incorporated into legal education. Whether ABCs are just taught in a day of a bankruptcy course or make up their own course, law schools need to incorporate ABCs into their curriculum. In addition, if states add ABCs to their bar exams, ABCs would undoubtedly become more well-known. Furthermore, Continuing Legal Education (CLE) courses ought to incorporate ABCs into their discussions to inform current practitioners on the possibility of using ABCs as an alternative to bankruptcy. Legal practitioners will be the ones who ultimately choose the fate of any reformed ABC and how frequently it is used, so their knowledge of the process is crucial. Hence, before any reform will be successful, practitioners need to become aware that ABCs are another way to deal with an insolvent company, and ABCs may be preferable to bankruptcy and other alternatives to it, in some cases.

CONCLUSION

For some insolvent companies ABCs are a great alternative to bankruptcy because they can be more time efficient, less costly, and less public than bankruptcy.[313] Although ABCs have these benefits in certain situations, ABCs are found in many different forms; thus these advantages over bankruptcy are not found in every state's ABC process.[314] Further, some states' ABCs see more frequent use than other states where ABCs are rarely, if ever, used.[315] ABC reform across all states would benefit insolvent companies by providing an accessible alternative to bankruptcy.

---

310. *See* COMM. ON BANKRUPTCY & CORPORATE REORGANIZATION, *supra* note 15, at 16. *See generally*, DEBTOR-CREDITOR LAW, *supra* note 29, § 35.03.

311. *See* Berman & Vance, *supra* note 27, at 33–34 (proposing a model statute that would lessen the state by state diversity of ABCs and make the process more uniform).

312. *See generally id.* (discussing how a proposed model statute aimed to make the ABC process more uniform and, in turn, more utilized on a nationwide basis.).

313. *See supra* Part I.

314. *See supra* Part I.

315. *See supra* Parts I, II.

Although it may be expected that one type of ABC might be used more frequently than another, no one ABC category encompasses all the frequently used ABC processes.[316] In other words, while one ABC form may maximize the advantages of ABCs better than another, the type of the ABC is currently not enough to determine whether that state's ABC sees frequent use or not.[317] For example, while California's minimally regulated ABC saw frequent use, many other states with minimally regulated ABCs saw little to no use.[318] Despite this incongruity, this Note still concludes that minimally regulated ABCs offer the best model for reform because they best maximize the benefits of ABCs while avoiding many of the disadvantages found in common law and heavily regulated ABCs.

However, before ABCs can be more frequently used nationwide, reform efforts cannot stop at reforming the ABC process itself. Reform also needs to reach into law schools and CLE programs to inform lawyers about ABCs. If ABCs were better incorporated into legal instruction, practitioners would be more familiar with the process, and would be more likely to consider using ABCs as an alternative to bankruptcy. Once these reforms take place and knowledge about ABCs is more widespread, ABCs will be able to truly reach their potential as a beneficial alternative to bankruptcy.

---

316. *See supra* Part II.
317. *See supra* Part II.
318. *See supra* Part II.

I. New Jersey Assignments for the Benefit of Creditors

A. Overview

1. An "ABC"[1] is a state law-based[2] insolvency proceeding in the Superior Court.[3]

2. The "Assignor"[4] in an ABC is "any debtor"[5] who executes a written deed of assignment (the "Deed") for the benefit of that Assignor's "creditor[s]"[6] who hold "debt[s], demand[s] [and/or] claim[s]"[7].

3. The "Assignee"[8] in an ABC is the party to whom the Assignor transfers, by way of the Deed, all of the Assignor's property to be held in trust for the benefit of the Assignor's creditors.[9]

4. The Assignee must:

   a. annex to the Deed an asset inventory and a list of creditors;[10]

   b. commence the ABC within the county where the Assignor resides;[11]

   c. record the Deed in the manner used for real estate deeds;[12]

   d. file an inventory and valuation with the court;[13] and

   e. obtain a bond.[14]

B. Notice to the Public & Creditors

1. The Assignee must give public notice of the ABC at least four (4) times during four (4) consecutive calendar weeks.[15]

---

[1] An ABC is technically defined as a "[g]eneral assignment", which is "a transfer or conveyance by a debtor in writing, whereby the debtor transfers or conveys to an assignee, in trust for the benefit of his creditors, all of his property." *See* N.J.S.A. § 2A:19-1(a).
[2] N.J.S.A. §§ 2A:19-1 *et seq.*
[3] N.J.S.A. § 2A:19-1(c).
[4] N.J.S.A. § 2A:19-1(f).
[5] N.J.S.A. § 2A:19-1(b).
[6] N.J.S.A. § 2A:19-1(d).
[7] N.J.S.A. § 2A:19-1(e).
[8] N.J.S.A. § 2A:19-1(g).
[9] N.J.S.A. § 2A:19-1(a).
[10] *See* N.J.S.A. §§ 2A:19-7 and 2A:19-11.
[11] *See* N.J.S.A. §§ 2A:19-7 and 2A:19-11.
[12] *See* N.J.S.A. §§ 2A:19-1(g) and 2A:19-4.
[13] *See* N.J.S.A. §§ 2A:19-5, 2A:19-9, and 2A:19-11.
[14] *See* N.J.S.A. § 2A:19-10.
[15] *See* N.J.S.A. § 2A:19-8.

2. Notice must, among other things, advertise the claims procedure,[16] *e.g.,* set forth that all claims against the assignment estate must be presented under oath to the Assignee within three (3) months from the date of the filing of the Deed.[17]

3. Within 30 days after the date of the general assignment, the Assignee must mail a copy of this notice to every creditor.[18]

4. Court may extend or fix the time for presentation of claims and the giving/mailing of notice.[19]

5. Once the claims bar date expires,[20] Assignee must file a list of all creditors with the court,[21] and give notice of the list of creditors to all creditors.[22]

C. **Similarities to Bankruptcy**

1. An ABC is, through the issuance of notice to creditors and the public, an open and public process.

2. The Assignee functions largely like a Chapter 7 Trustee, and has the power, authorization and responsibility to marshal and liquidate assets for the benefit of creditors.[23]

3. The Assignee's powers include:

    a. to dispose of the Assignor's property;[24]

    b. set aside conveyances; in this regard treated as the holder of a perfected judgment with the ability to reach assets for the benefit of creditors;[25]

    c. continue the Assignor's business;[26]

    d. issue subpoenas;[27]

---

[16] *See* N.J.S.A. § 2A:19-8.
[17] *See* N.J.S.A. § 2A:19-8.
[18] *See* N.J.S.A. § 2A:19-8.
[19] *See* N.J.S.A. § 2A:19-8.
[20] *See* N.J.S.A. § 2A:19-23.
[21] *See* N.J.S.A. § 2A:19-25.
[22] *See* N.J.S.A. § 2A:19-26.
[23] *See* N.J.S.A. § 2A:19-13.
[24] *See* N.J.S.A. §§ 2A:19-13 and 2A:19-18.
[25] *See* N.J.S.A. § 2A:19-14.
[26] *See* N.J.S.A. § 2A:19-16.
[27] *See* N.J.S.A. § 2A:19-15.

e. compel Assignee to cooperate;[28]

f. recover property of the Assignor transferred within four (4) months of the commencement of the ABC;[29]

g. retain professionals, including accountants, special counsel, auctioneers and appraisers.[30]

4. Assignee can sell the Assignor's real property.[31]

5. Assignee can also sell the Assignor's personal property.[32]

6. Assignee can, in some instances, sell the Assignor's business as a going-concern to a buyer.[33]

    a. Similar to a liquidating Chapter 11, Assignee can allow Assignor to operate the business pursuant to court order until a sale is finalized (as per above, Assignee may also have these powers pursuant to state statute);[34] and

    b. Proceeds must be paid to the equal benefit of creditors in proportion to their respective claims.[35]

7. **Key Differences from Bankruptcy**

    a. No automatic stay, however, the court can and will stay, restrain and/or limit creditor action.

    b. The debtor entity (the Assignor) may select its own estate fiduciary (the Assignee).

    c. ABCs are generally quicker and a more cost-effective process.

    d. ABCs provide flexibility given the brevity of the statutes and small amount of case-law interpreting same.

---

[28] *See* N.J.S.A. §§ 2A:19-15 and 2A:19-17.
[29] *See* N.J.S.A. §§ 2A:19-2, 2A:19-3 and 2A:19-14.
[30] *See* N.J.S.A. § 2A:19-13.
[31] *See* N.J.S.A. § 2A:19-18.
[32] *See* N.J.S.A. § 2A:19-19.
[33] *See* N.J.S.A. § 2A:19-19.
[34] *See* N.J.S.A. § 2A:19-16.
[35] *See* N.J.S.A. § 2A:19-2 ("Every general assignment made by a debtor residing in this state shall be made for the equal benefit of his creditors in proportion to their several demands.").

This page intentionally left blank

Prepared by:

____

DEED OF ASSIGNMENT

THIS INDENTURE, made on this ____ day of November, 2018, by and between ASA Apple, Inc., (hereinafter the "Assignor"), with an address of 888 McLester Street, Elizabeth, New Jersey 07201 and Anthony Sodono, III, Esquire (hereinafter the "Assignee") with an address of 75 Livingston Avenue, Roseland, New Jersey 07068.

WITNESSETH:

That the Assignor, for the purpose of securing to its creditors an equal distribution of its estate in proportion of their several just demands, and for the consideration of One Dollar and no cents ($1.00) to it in hand paid by the Assignee, has, and by these presents does grant, bargain, sell, convey, and assign unto the Assignee, and to his heirs, administrators, executors, and assigns, all and singular, the lands, tenements, hereditaments, and real estate, of which the Assignor, is now seized or possessed or is in any way entitled, wheresoever the same may be situate, together with the appurtenances; and also all and singular the goods and chattels, bonds, notes, books of account, contracts, rights, and credits of the Assignor, whatsoever and wheresoever;

TO HAVE AND TO HOLD the same unto the Assignee, his heirs, administrators, executors, and assigns forever, in trust to sell, collect and disburse and dispose of the same for the equal benefit of the creditors of the Assignor, and to distribute the net proceeds to the creditors of the Assignor, in proportion of their several just demands pursuant to the statutes in such case made and provided, and in further trust to pay the surplus, if any there be, after fully satisfying and paying the creditors and all proper costs and charges to Assignor.

Attached as Exhibit A is a list of all assets of ASA Apple, Inc.

Attached as Exhibit B is a list of creditors of ASA Apple, Inc.

IN WITNESS WHEREOF, by the Unanimous Written Resolution of the Board of Directors of the Assignor, ------- has been authorized and does hereby execute this Deed of Assignment on behalf of the Assignor on the first day above written.

ASA APPLE, INC.

By:

ATTEST:

____

CORPORATE ACKNOWLEDGMENT

STATE OF NEW JERSEY }
} ss
COUNTY OF }

I certify that on the _______ day of November, 2018, ---------, personally came before me and this person acknowledged, under oath, to my satisfaction, that:

(a) this person is the CEO of ASA Apple, Inc., the Company named in this document;

(b) this document was signed and delivered by the Company as its voluntary act duly authorized by a proper resolution of its Board of Directors;

(c) that the foregoing instrument was signed and delivered by ------, in her capacity as CEO of ASA Apple, Inc., as and for the voluntary act and deed of the Company, in the presence of the deponent, who thereupon subscribed his name thereto as witness.

____

ASA APPLE, INC.

UNANIMOUS WRITTEN RESOLUTION
OF THE BOARD OF DIRECTORS

WHEREAS, -------, is the CEO of ASA Apple, Inc.; and

WHEREAS ASA Apple, Inc. no longer has the means to continue its business and authorizes -------- to place ASA Apple, Inc.'s assets and liabilities in the hands of an assignee for the benefit of all of its creditors.

By: ___________________________________

Dated: November ____, 2018

SCHEDULE "A"

ASSETS OF ASA APPLE, INC.

Account Receivables	$1,184,069.58
Furniture, Fixtures, Office Equipment	$5,000.00
Warehouse Racking	$15,000.00
Material Handling Equipment	$40,000.00
Investors Bank - checking/operating account (Acct No. ending 1800)	$90,503.81
Investors Bank - checking/payroll account (Acct No. ending 2212)	$41,551.04

This page intentionally left blank

SCHEDULE "B"

LIST OF CREDITORS

AAA Mobile Wash, Inc. PO Box 1120 Elizabeth, NJ 07207	$1,785.96
American Express PO Box 1270 Newark, NJ 07102	$33,510.00
Associated Truck Parts 1075 E Philadelphia Ave. Gilbertsville, PA 19525	$39.58
Bressler Amery & Ross PO Box 1980 Morristown, NJ 07962	$29,410.15
Buckeye Business Products PO Box 392340 Cleveland, OH 44193	$1,100.48
Lisa Campagna **[NEED ADDRESS]**	$1,436,950.00
Chase Card Service PO Box 15153 Wilmington, DE 19886	$2,688.21
Cigna **[NEED ADDRESS]**	$
Cintas Corporation 51 New England Ave. Piscataway, NJ 08854	$1,363.63
Cintas First Aid & Safety PO Box 631025 Cincinnati, OH 45263	$830.25
Comcast PO Box 1577 Newark, NJ 07101	$1,095.49

Comcast PO Box 70219 Philadelphia, PA 19176	$
Coyote Logistics, LLC PO Box 742636 Atlanta, GA 30374	$1,600.00
Crown Packaging 3380 US Hwy 22 West Branchburg, NJ 08876	$3,533.54
Custom Bandag, Inc. 401 East Linden Ave. Linden, NJ 07036	$2,109.66
Daily Truck Tire Service PO Box 50008 Newark, NJ 07105	$335.00
Direct Equipment Repair 330 Edgeview Road Keyport, NJ 07735	$5,183.03
Edgar Transport Parts 1001 East Linden Ave. Linden, NJ 07036	$3,093.94
Elizabethtown Gas PO Box 1450 Elizabeth, NJ 07207	$
Evergreen **[NEED ADDRESS]**	$696,475.89
F&S Tire Corp. 58 Brunswick Ave. Edison, NJ 08817	$10,879.81
Grainger Dept. 843183187 Palatine, IL 60038	$76.06
Horizon Blue Cross/Blue Shield **[NEED ADDRESS]**	$

Horizon Termite & Pest 45 Cross Ave. Midland Park, NJ 07432	$92.49
Hudson County Motors 614 New County Road PO Box 2611 Secaucus, NJ 07096	$2,154.83
HYG Financial PO Box 14545 Des Moiners, IA 50306	$
Industrial Rubber Co. PO Box 359 Elizabeth, NJ 07207	$224.30
Integral Systems, Inc. 132 Parkview Loop Staten Island, NY 10314	$420.00
Inter City Tire 777 Dowd Ave. Elizabeth, NJ 07201	$836.24
Internal Revenue Service PO Box 7346 Philadelphia, PA 19101	
Investors Bank 101 Wood Avenue South Iselin, NJ 08830	$1,175,000.00
IPFS **[NEED ADDRESS]**	$
J.B. Hunt PO Box 98545 Chicago, IL 60693	$1,774.05
Johnny On The Spot, Inc. 3168 Bordentown Ave. Old Bridge, NJ 08857	$309.48
J.W. Goodliffe & Son PO Box 1305 Brattleboro, NJ 05302	$365.75

Liftec 124 Sylvannia Place South Plainfield, NJ 07080	$2,114.75
McLester Realty, LLC 1201 Corbin Street Elizabeth, NJ 07201	$
Middlesex Water Company PO Box 826538 Philadelphia, PA 19182	$1,649.68
Motivated Security Svcs PO Box 215 Somerville, NJ 08876	$34,979.96
Mutual of Omaha **[NEED ADDRESS]**	$
New Jersey Manufacturers Insurance Co. 301 Sullivan Way West Trenton, NJ 08628	$23,173.46
Office Depot PO Box 88040 Chicago, IL 60680	$313.23
One Pack 160 Fieldcrest Ave. Edison, NJ 08837	$3,161.23
On Target Staffing c/o Wells Fargo Business Credit PO Box 60839 Charlotte, NC 28260	$43,906.16
Pitney Bowes Global PO Box 371887 Pittsburgh, PA 15250	$114.60
Plumb-Rite Plumbing 86 Gibian Street Edison, NJ 08837	$1,677.00
Premium Finance **[NEED ADDRESS]**	$

Prime Lube, Inc. PO Box 539 Carteret, NJ 07008	$948.59
Prologis Linden Airport Associates Urban Renewal, LLC **[NEED ADDRESS]**	$
PSE&G PO Box 14444 New Brunswick, NJ 08906	$4,856.61
Service Tire Truck Center 2255 Avenue A Bethlehem, PA 18018	$1,191.84
Stanley Convergent Sec. Dept CH 10651 Palatine, IL 60055	$3,574.66
Suburban Propane PO Box 290 Whippany, NJ 07891	$8,653.08
Superior Distributors 4 Midland Ave. Elmwood Park, NJ 07407	$1,729.65
State of New Jersey Division of Taxation 1 Barrack Street Trenton, NJ 08625	$
Rehmann Transportation PO Box 1028 Mt. Laurel, NJ 08054	$4,965.00
Teletrac, Inc. 32472 Collection Center Drive Chicago, IL 60693	$5,176.27
Teletrac Navman 7391 Lincoln Way Garden Grove, CA 92841	$
Tyco Integrated Security PO Box 371967 Pittsburgh, PA 15250	$510.31

Union Overhead Door, Inc. 824 Hemlock Road Union, NJ 07083	$2,925.00
Universal Parts 1057 Pennsylvania Ave. Linden, NJ 07036	$1,163.50
USI **[NEED ADDRESS]**	$
Verizon PO Box 15043 Albany, NY 12212	$1,473.04
Verizon Enterprise PO Box 15043 Albany, NY 12212	$
Waste Management of NJ PO Box 13648 Philadelphia, PA 19101	$9,479.22
Wells Fargo Advisors 331 Newman Springs Road Suite 230 Red Bank, NJ 07701	$9,467.49
Wells Fargo Financial PO Box 777 San Francisco, CA 94120	$
Western Pest Services 1048 Route 22 Mountainside, NJ 07092	$1,617.38

SPECIAL MEETING OF THE BOARD OF DIRECTORS OF

ASA APPLE, INC.

A special meeting of the Board of Directors of ASA Apple, Inc. (The "Company") was held on November ___, 2018, and the following resolution was proposed and unanimously adopted:

WHEREAS, the Directors believe it is in the best interest of the Company and its creditors that the Company make an assignment of all of its assets to an Assignee for the benefit of creditors;

THEREFORE, BE IT RESOLVED that this Company be and it is hereby authorized to make an assignment of all of its assets for the benefit of its creditors;

FURTHER RESOLVED that **ANTHONY SODONO, III, ESQUIRE**, is hereby appointed to act as interim member and is hereby authorized to perform all acts and execute all documents necessary or required pursuant to such purpose.

There being no further business, upon motion made, the Meeting was adjourned.

ASA APPLE, INC.

By: ___________________________________

McMANIMON, SCOTLAND & BAUMANN, LLC
75 Livingston Avenue, Suite 201
Roseland, NJ 07068
(973) 622-1800
Anthony Sodono, III (007631990)
Sari B. Placona (108842014)
Counsel to Anthony Sodono, III, Esq., Assignee for the Benefit of Creditors of ASA Apple, Inc., et. al.

In the Matter of the General Assignment for the Benefit of Creditors of: ASA APPLE INC.; JOB LEASING, INC.; and ABSOLUTE STORAGE TRAILERS, LLC, Assignors, - to - ANTHONY SODONO, III, Assignee.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION - PROBATE PART UNION COUNTY Docket No. R8520 On Assignment **PROOF OF CLAIM**

STATE OF ________________________)
) SS:
COUNTY OF _____________________)

___________________________, being duly sworn according to law, deposes and says that (s)he is the ____________________of ______________________________________ and that the annexed statement of the account of ASA Apple, Inc., *et. al.*, lately doing business in the State of New Jersey, is just, true, and correct, and that there is now due the sum of ____ Dollars (**$**__________________) that no part thereof has been paid or satisfied, and that there are no setoffs or counterclaims thereto to the knowledge or belief of deponent. Deponent hereby submits to and acknowledges the subject matter and personal jurisdiction of the above-mentioned Superior Court of the State of New Jersey.

Check One
[ ] secured
[ ] unsecured
[ ] priority

____
(Authorized Signature)

Print Name: ______________________________
Title:_____________________________________

____
(Name and Address of Creditor)

____

Sworn and subscribed to before me this
________day of _____________ 2019.

____

ATTACH STATEMENT OF ACCOUNT AND RETURN TO:
Sari B. Placona, Esq., and Anthony Sodono, III, Esq.
McMANIMON, SCOTLAND & BAUMANN, LLC
75 Livingston Avenue, Ste. 201
Roseland, NJ 07068

Assignor v. Assignee

Assignor

- Any debtor who has executed a general assignment (See N.J.S.A § 2A:19-1
- Company prepares the Deed of Assignment
- Transfers all assets to the Assignee

Assignee

- Assignee under a general assignment, including an assignee appointed under chapter 20 of this title (See N.J.S.A § 2A:19-1
- Court appointed fiduciary
- Holds legal title to all Assignor's assets

Alternative to Bankruptcy

- No Automatic Stay
- State Court
- Less Expensive
- No monthly reporting

Assignee's Powers

full power and authority to dispose of all of the assignor's property

may sue for and recover in his own name everything belonging or appertaining to the estate

may compromise, settle and compound all claims; 2A:19-13

at all times be the representative of the creditors of the assignor, and shall have the same power to set aside conveyances, and to recover or reach assets for the benefit of the creditors as a creditor would have who was the holder of a judgment and levy against the assignor and his property at the date of the assignment; 2A:19-14

File Order to Show Cause; Settle Account Pursuant to R. 4:87

Closing of the ABC

- Finalize Distribution
- Final Report / Accounting
- Administrative Fees
- Assignee gets discharged of his duties
- Assignor's Books and Records Abandoned / Destroyed

Uniform Assignment for Benefit of Creditors Act

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

WITH PREFATORY NOTE AND COMMENTS

October 20, 2025

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 134th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.

- ULC statutes are representative of state experience because the organization is made up of representatives from each state, appointed by state government.

- ULC keeps state law up to date by addressing important and timely legal issues.

- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.

- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.

- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service and receive no salary or compensation for their work.

- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.

- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

Uniform Assignment for Benefit of Creditors Act

The committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this act consists of the following individuals:

Edwin E. Smith	Massachusetts, *Chair*
Thomas J. Buiteweg	Michigan
Thomas A. Edmonds	Virginia
Kyle Evans Gay	Delaware
Patrick A. Guida	Rhode Island
William H. Henning	Alabama
John T. McGarvey	Kentucky
Gail Russell	Kentucky
Donald L. Swanson	Nebraska
Patrick A. Guida	Rhode Island, *Division Chair*
Timothy J. Berg	Arizona, *President*

Other Participants

Laura Coordes	Arizona, *Reporter*
Patricia A. Redmond	Florida, *American Bar Association Advisor*
Geoffrey L. Berman	California, *Advisor*
Patrick Costello	California, *Advisor*
James Hayes	California, *Advisor*
Robert Saunders	California, *Advisor*
Russell C. Silberglied	Delaware, *Advisor*
Thomas J. Buiteweg	Michigan, *Style Liaison*
Eric Weeks	Illinois, *Executive Director*

Copies of this act may be obtained from:

Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
(312) 450-6600
www.uniformlaws.org

Uniform Assignment for Benefit of Creditors Act

Table of Contents

Uniform Assignment for Benefit of Creditors Act

Prefatory Note

An assignment for the benefit of creditors (“assignment”) is a voluntary, debtor-initiated state law alternative to federal bankruptcy, state receiverships, and voluntary workouts. An assignment is a liquidation procedure in which an “assignor” in financial distress, usually a company, voluntarily assigns all of its assets to an “assignee,” a fiduciary, which liquidates the assets and distributes the proceeds to the assignor’s creditors. The assignment operates through the creation of a fiduciary relationship, with the assignor’s creditors as the beneficiaries. As originally conceived, assignments were adapted from trust law to provide an informal liquidation option for debtors.

The process for carrying out an assignment varies widely from state to state. In some states, such as Florida, New York, and New Jersey, assignments are governed by statute. In other states, including California and Illinois, assignments are primarily or completely governed by the common law. Several states have little to no law governing assignments; in some, existing laws date back several decades or more.

Furthermore, the process of an assignment varies from state to state. In some states, such as Florida, assignments are carried out under the supervision of a court. In other states, an assignment occurs with little or no court supervision.

Despite these differences, an assignment for the benefit of creditors is often viewed as a cheaper and more flexible option than a bankruptcy proceeding. Because it is initiated by the debtor, rather than the debtor’s creditors, it also differs from a creditor-initiated receivership. However, due to the variation in state laws governing assignments, the frequency of their use also varies widely. In some states, assignment law is well developed, and assignments are used frequently. In other states, practitioners may have little to no experience with assignments.

Because bankruptcy is often too costly for businesses, there is increasing interest in bankruptcy alternatives, including assignments, among the fifty states. However, as assignments have grown in popularity, the lack of a uniform state law has contributed to complications, especially where a state’s law on assignments is underdeveloped or rarely utilized or when the business’s assets are located in more than one state. In particular, the varying state approaches to assignments have made it difficult to generalize what assignment law and practice look like. In recent years, some states have begun to blur the line between assignments and receiverships, essentially collapsing two different remedies into one.

The Uniform Assignment for Benefit of Creditors Act is intended to encourage further use of assignments by improving the clarity and integrity of the law. The act provides for a streamlined assignment process, giving states the tools to modernize outdated assignment statutes and codify aspects of common law assignment practice. The act comes at a particularly timely moment, as many states are beginning to think about reforming their laws relating to assignments.

The act provides a roadmap for understanding how existing state and federal statutes, including the Bankruptcy Code, interact with assignments. It sets out a straightforward, streamlined process for commencing and completing an assignment and provides a scheme for distributions to the assignor's creditors. It lays out the duties and powers of the assignor and assignee, a process for allowing and disputing claims, and limitations on liability for the assignor and assignee. It also addresses interstate assignments and court involvement. Importantly, although the act neither mandates nor specifically contemplates court involvement, it does not preclude court involvement, and thus may be attractive to states, regardless of any state's current usage of court-supervised assignments.

The act is thus intended to provide greater clarity, consistency and uniformity to the assignment process across the fifty states, in the hope that assignments will, where appropriate, become a robust tool for debtors throughout the country.

Uniform Assignment for Benefit of Creditors Act

Section 1. Title

This [act] may be cited as the Uniform Assignment for Benefit of Creditors Act.

Section 2. Definitions

In this [act]:

(1) "Affiliate" means:

(A) a person that directly or indirectly owns, controls, or holds, with power to vote, 20 percent or more of the outstanding voting interests of another person, other than a person that holds the interests:

(i) in a fiduciary or agency capacity without sole discretionary power to vote the interests; or

(ii) solely to secure a debt, if the person has not in fact exercised the power to vote;

(B) a person with 20 percent or more of the person's outstanding voting interests directly or indirectly owned, controlled, or held, with power to vote, by another person;

(C) a person whose business is operated under a lease or operating agreement by another person, or a person substantially all of whose assets are controlled by the other person; or

(D) a person that operates the business or substantially all the assets of another person under a lease or operating agreement.

(2) "Asset" means a legal or equitable interest in property of an assignor, regardless of the person holding or in possession, custody, or control of the property or where the property is located. The term does not include:

(A) a legal or equitable interest in property restricted from assignment if the restriction is effective under other law, unless the other law permits assignment with the consent of another person and the person consents to the assignment in a manner permitted by the other law; or

(B) if the assignor is an individual, a legal or equitable interest in property to the extent it is exempt from legal process under other law.

(3) "Assigned asset" means an asset transferred under an assignment.

(4) "Assignee" means a person to which assets are transferred under an assignment.

(5) "Assignment" means a transfer by a person of all the person's assets to another person for the benefit of the transferor's creditors.

(6) "Assignment agreement" means an agreement that transfers or provides for a transfer of all the assignor's assets.

(7) "Assignment estate" means the assets held at a given time by the assignee under an assignment.

(8) "Assignor" means a person whose assets are transferred under an assignment.

(9) "Claim" means a creditor's right to payment or to an equitable remedy, regardless of whether the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(10) "Cohabitant" means each of two individuals not married to each other who live together as a couple after each has reached the age of majority or been emancipated.

(11) "Creditor" means a person that has a claim against an assigned asset or the assignor.

(12) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(13) “Good faith” means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(14) “Insider” includes:

(A) in the case of an individual:

(i) a relative of the individual;

(ii) a partnership or limited liability company in which the individual is a general partner or managing member; or

(iii) an organization of which the individual is a director, officer, or person in control;

(B) in the case of an organization:

(i) a director, officer, manager, or other person in control of or with controlling equity interest in the organization;

(ii) a partnership or limited liability company in which the organization is a general partner or managing member;

(iii) a general partner or managing member of the organization; or

(iv) a relative of a general partner, managing member, director, officer, manager, or other person in control of or with controlling equity interest in the organization;

(C) an affiliate; or

(D) a managing agent of an organization.

(15) “Lien” means an interest in an asset that secures payment or performance of

an obligation.

(16) “Organization” means a person other than an individual.

(17) “Perfected lien” means a lien on:

(A) real property other than fixtures on which a bona fide purchaser of the property cannot acquire an interest superior to the interest of the lienholder; or

(B) fixtures or property other than real property on which a creditor cannot acquire a lien by attachment, levy, or the like that is superior to the interest of the lienholder.

(18) “Person” means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity. The term includes a protected series, however denominated, of an entity if the protected series is established under law that limits, or limits if conditions specified under law are satisfied, the ability of a creditor of the entity or of any other protected series of the entity to satisfy a claim from assets of the protected series.

(19) “Proof of claim” means a record a creditor submits to an assignee to evidence the creditor’s claim.

(20) “Record” means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(21) “Relative” means an individual related by affinity or consanguinity within the third degree or a cohabitant.

(22) “Security interest” means a lien created by an agreement.

(23) “Send”, in connection with a record or notification, means:

(A) to deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances; or

(B) to cause the record or notification to be received within the time it would have been received if properly sent under subparagraph (A).

(24) "Sign" means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic symbol, sound, or process.

(25) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

(26) "Transfer" means disposing of or parting with an asset or with an interest in an asset, regardless of whether the disposition or parting is indirect, conditional, or involuntary.

Legislative Note: *A state should enact the definition of "person" that includes a "protected series" regardless of whether the state has enacted the Uniform Protected Series Act or otherwise recognizes a protected series under its law. Inclusion of the sentence does not require the enacting state to recognize a limit on liability of a protected series organized under the law of another state or a limit on liability of the entity that established the protected series. It clarifies the status of a protected series as a "person" under the choice-of-law and substantive law rules of the enacting state's law.*

Comment

The definition of "affiliate" is derived from Section 101(2) of the Bankruptcy Code, and the concept of an affiliate is intended to be understood as that term is understood under bankruptcy law.

The term "asset" has a limited definition. If an asset is not assignable by its terms or under other law, that asset is not part of the assignment estate unless either the counterparty assents or other law overrides the anti-assignment provision. This act does not preclude the assignee from negotiating with a counterparty to obtain its consent for the assignment of an asset.

The definition of "cohabitant" is derived from Section 2(1) of the Uniform Cohabitants' Economic Remedies Act, and the concept of a cohabitant is intended to be understood as that term is defined and explained in the text and comments of that act.

The definition of "insider" is derived from Section 101(31) of the Bankruptcy Code, and the concept of an insider is intended to be understood as that term is understood under bankruptcy law.

Although included in the definition of "organization," a governmental unit cannot make an assignment unless permitted to do so under other law. This act does not address whether other law permits a governmental unit to make an assignment.

For the purpose of defining the term "perfected lien" in paragraph (17), the term "property other than real property" includes intangible assets. The phrase "attachment, levy, or the like" in clause (B) of the paragraph is derived from the definition of "lien creditor" in UCC § 9-102(a)(52). The words "or the like" contemplate that a state may provide for other means for a judgment or other involuntary lien to be perfected.

The concept of a "perfected lien" is derived from Section 547 of the Bankruptcy Code and Section 6 of the Uniform Voidable Transactions Act. If a party has a perfected lien on a debtor's property, a subsequent creditor of the debtor cannot obtain a superior lien on that property.

The meaning of the phrase "affinity or consanguinity" in the definition of "relative" is intended to encompass relationships beyond those that share common ancestry. The definition of "relative" is intended to include familial relations recognized under other law. The definition of "relative" is derived from Section 101(45) of the Bankruptcy Code and Section 1(14) of the Uniform Voidable Transactions Act and includes an individual's spouse, descendant, stepchild, parent, stepparent, grandparent, brother, sister, uncle, or aunt, whether by the whole or half blood or by adoption.

The term "transfer" in paragraph (26) includes a security interest under Article 9 of the Uniform Commercial Code.

Section 3. Scope

This [act] applies to an assignment made by an assignor that is:

(1) an organization whose principal place of business is in this state;

(2) an organization whose internal affairs are governed by other law of this state;

(3) an individual whose principal residence is in this state;

(4) an organization wholly owned, directly or indirectly, by an assignor that

satisfies paragraph (1), (2), or (3); or

(5) an organization that:

(A) is partly owned, directly or indirectly, and controlled by an assignor that satisfies paragraph (1), (2), or (3);

(B) has no place of business or employees; and

(C) relies on the services the organization receives from an assignor that satisfies paragraph (1), (2), or (3).

Comment

This act creates a statutory assignment that displaces common law assignment procedures in the adopting state.

The assignee's jurisdiction of organization or principal place of business is not of itself a basis for jurisdiction for an assignment under this act. *See* In re Vernon Hills Serv. Co., 2024 Del. Ch. C.A. No. 2021-0783 (Mar. 28, 2024) (finding lack of subject matter jurisdiction over an assignment commenced in Delaware Chancery Court where the assignor was an Illinois corporation with no assets or operations in Delaware, and the sole connection with the State of Delaware was that the assignee was a Delaware entity).

Section 4. Requirements for Assignee and Assignment Agreement

(a) An assignee must be a person that:

(1) is not a creditor, affiliate, or insider of the assignor;

(2) is not an affiliate or insider of a creditor of the assignor;

(3) does not have a claim against the assignment estate, other than a claim for fees and expenses to be paid under the assignment agreement;

(4) does not have a material financial interest in the outcome of the assignment, other than a claim for fees and expenses to be paid under the assignment agreement;

(5) does not hold an equity interest in the assignor other than a noncontrolling interest in a publicly traded company; and

(6) is not an affiliate of a person that fails to satisfy paragraph (1), (2), (3), (4), or (5).

(b) A person that satisfies subsection (a) is not precluded from being an assignee merely because the person performed services for the assignor before the assignment.

(c) An assignment agreement must be in a record signed by the assignor and the assignee. The record must:

(1) state the name and address of the assignor and of the assignee;

(2) transfer or provide for a transfer of all the assignor's assets;

(3) describe the assigned assets in sufficient detail to identify the assets;

(4) provide for the distribution of the assignment estate;

(5) describe the fees to be charged by the assignee in connection with the assignment, including the basis on which they are to be calculated; and

(6) include a representation by the assignor, under penalty of perjury, that the assignor is assigning all the assignor's assets.

(d) If an assignee relies in good faith on the assignor's representation made under subsection (c)(6), all the assignor's assets are deemed to be assigned, even if the representation is inaccurate.

Comment

The term "equity interest" in subsection (a)(5) refers to an interest in an organization, not a beneficial interest in a trust.

Prior to becoming an assignee, a person may waive any claim to payment from the assignor. Subsection (b) is intended to clarify that a person remains eligible to be an assignee even if the person contracted with, or performed services for, the assignor prior to the assignment, as long as the person is paid for this work, or payment is provided for, prior to the assignment.

A lawyer may act as an assignee. A lawyer acting as an assignee should ensure that funds received as a result of the assignment or any subsequent asset sales are deposited in a bank account separate from the lawyer's client trust accounts. The bank account should be solely for funds received as a result of the assignment and any subsequent collections or asset sales. It should not be part of any operating account or trust account for client funds.

The assignor must assign all assets to the assignee. If the assignor needs funds for the purpose of winding up the business, the assignor may arrange to have the funds paid in advance of the assignment, or the assignor and assignee may agree in the assignment agreement that the assignee may pay the funds from the assigned assets. If the assignor needs to compensate remaining officers or directors, any compensation or payment should be addressed before the assignment is made through a transition services, consulting, or similar agreement that provides for both the services and for payment for the services from the assignment estate. The assignee may also retain former employees of the assignor as independent contractors. In any of these cases, any payments should be only for those services necessary to wind up the business or, if applicable, to operate the business until the assets may be sold. *See* Section 10(b)(1).

The definition of "asset" in Section 2(2) contains an exclusion for an individual's exempt property. Some state law exemption provisions allow the beneficiary of an exemption to waive the exemption, either expressly or by implication. This act does not preclude an individual assignor from waiving an exemption under other law.

The assignment agreement should describe the assignee's fees in sufficient detail so that either the amount of the fees, or the method of computing the amount, is reasonably determinable. A mere reference to a side fee agreement is not sufficient to comply with subsection (c)(5), unless the fee agreement is attached to the assignment agreement.

The assignment agreement should be notarized if other law requires notarization to transfer an asset or if the assignment includes a power of attorney to be used to transfer an asset otherwise requiring notarization for the transfer.

Section 5. Effect of Assignment; When Assignment Agreement Effective

(a) An assignee obtains the rights, title, and interests of the assignor in the assigned assets.

(b) If the assignor is an organization, an assignee obtains the rights, title, and interests of the assignor in assets acquired after the assignment.

(c) Except as provided in Section 10(b)(12), an assignee takes each assigned asset subject to an existing interest in the asset held by another person.

(d) An assignee holds the assigned assets subject to the assignee's duties under Section 9.

(e) An assignment is subject to other law under which the assignment may be fraudulent or otherwise voidable.

(f) The effective date of an assignment agreement is the date the agreement is signed by the last party to the agreement that is required to sign the agreement unless a later date is identified in the agreement as the effective date.

Comment

The transfer of assets from an assignor to an assignee is not intended to be treated as a taxable sale. *See* Section 6, Legislative Note.

This act does not require that a creditor consent to an assignment. As a practical matter, however, the consent of a secured party, mortgagee or lienholder will in most cases be necessary for the use of cash collateral or to avoid immediate foreclosure of the lien.

Subsection (e) makes the assignment subject to state voidable transactions law; this act does not preempt that law.

Proceeds of the assigned assets are included in the assignment estate.

The scope of the assignee's fiduciary duty is delineated in Section 9(a).

Section 6-103(3)(f) of the Uniform Commercial Code exempts an assignment from the scope of Article 6's bulk transfer laws if otherwise applicable.

Although the act does not provide explicit rules for doing so, it is anticipated that the assignor and assignee would negotiate and prepare a budget prior to the assignment to ensure that there are sufficient funds available to accomplish the administration of the assignment.

Section 6. Filing, Recording, and Title Transfer Requirements

(a) In this section, "financing statement" has the meaning in [cite to Uniform Commercial Code Section 9-102(a)(39)].

(b) An assignee of a legal or equitable interest in personal property may file a financing statement in the filing office of:

(1) this state established for purposes of [cite to Uniform Commercial Code Section 9-501(a)(2)];

(2) any other state in which:

(A) the assignor would be located under [cite to Uniform Commercial Code Section 9-307] if the assignor were a debtor for the purpose of that section; or

(B) an asset of the assignment estate may be located.

(c) A financing statement filed under subsection (b) must indicate that it is filed in connection with an assignment.

(d) When filing a financing statement under subsection (b), the assignee must:

(1) attach a copy of the assignment agreement to the financing statement; or

(2) state on the financing statement that a copy of the assignment agreement is available on request to the assignee.

(e) A financing statement filed under subsection (b) may:

(1) designate the assignor as “debtor” and the assignee as “secured party”; or

(2) use the terms “assignor” and “assignee” or words of similar import.

(f) The filing of a financing statement under subsection (b) is not itself a factor in determining whether an asset secures an obligation. The rights of the assignee under the assignment are not affected if the assignee does not file a financing statement under subsection (b).

(g) An assignee of a legal or equitable interest in real property shall record the assignment of the interest or notice of the assignment under the real estate recording law of the jurisdiction where the property is located.

(h) An assignee shall comply with other law governing the transfer of title to an asset.

(i) By signing an assignment agreement, the assignor authorizes the assignee to take the actions required by this section.

***Legislative Note:** For the purposes of state transfer tax applicability, it is intended that the transfer of assets from an assignor to an assignee be treated as the equivalent of a bankruptcy plan or actions pending lien foreclosure. Accordingly, to the extent that state transfer tax provisions would apply, the enacting state should consider amending those provisions so that an assignment does not constitute a taxable transaction.*

Comment

The definition of "financing statement" in Uniform Commercial Code Section 9-102(a)(39) includes a continuation statement as an amendment to the initial financing statement.

This act does not change the status of the assignee as a lien creditor under UCC § 9-102(52)(B), or, to the extent that the assignment constitutes a security interest, change the automatic perfection of the security interest under UCC § 9-309(12) for an assignee or any subsequent transferee.

This act recognizes that the assignee may wish to file a financing statement in the interests of transparency to indicate to searchers of Uniform Commercial Code filing offices that the assignment has occurred. Because Article 9 of the Uniform Commercial Code does not otherwise authorize the filing of a financing statement in these circumstances, the assignee could be subject to penalties for filing an unauthorized financing statement. See UCC § 9-625. This act gives the assignee the necessary authorization to file a financing statement if the assignee chooses to do so. However, if the assignee does not file a financing statement, this section does not invalidate the assignment, nor does the assignee's filing of a financing statement perfect any lien.

This section does not displace any rules under other law, including the Uniform Commercial Code and a state's real property recording act. All real property transfers in an assignment must satisfy all the formalities applicable to real property transfers in the state where the real property is located. The filings and recordings made under this section are for transparency purposes only.

For purposes of the filing in subsection (b), the assignee should check "non-UCC filing" in Box 6b on the initial financing statement form, as found in UCC § 9-521(a).

For purposes of complying with subsection (c), the assignee may indicate that the financing statement is filed in connection with an assignment in the collateral description box on the initial financing statement form, as found in UCC § 9-521(a). A financing statement sufficiently indicates that it is filed in connection with an assignment if the financing statement so states and provides an indication that it covers all assets or all personal property of the assignor.

An assignee's duty to comply with the requirements of title transfer laws includes compliance with certificate of title laws, stock transfer laws, and intellectual property laws.

Section 7. Notification to Creditors

(a) Unless a creditor waives in a signed record the right to notification, an assignee shall send a notification of the assignment to each creditor known to the assignee within a reasonable time not to exceed [30] days after the effective date of the assignment agreement.

(b) The notification must:

(1) be in a record signed by the assignee;

(2) include the assignee's name, address, and other contact information reasonably necessary to communicate with the assignee;

(3) provide reasonable instructions for submitting a proof of claim using the method established by the assignee under Section 9(b)(5); and

(4) identify the date established under Section 9(b)(6) by which each creditor whose claim is not otherwise allowed without a timely proof of claim under this [act] must submit a proof of claim.

(c) An assignee shall use reasonable means to provide the information in subsection (b) to unknown creditors, including by any means the assignor regularly used to:

(1) provide information to the assignor's creditors; or

(2) communicate information about the assignor, other than advertising, to the public.

Comment

The waiver in subsection (a) is intended to address situations where a creditor is already aware of the assignment.

The effective date of the assignment agreement referenced in subsection (a) is addressed in Section 5(f).

This act does not preclude the assignee from providing notification of the assignment to the assignor's equityholders, or to other parties, such as governmental authorities or licensing issuers that may have an interest in the assignment. The assignee should determine whether to send such notification in accordance with its duties and the requirements of other law, including

Section 9(b)(9).

Significant transactions or transactions outside the ordinary course of the assignor's business may in some circumstances need to be completed quickly to maximize recoveries. If so, notice earlier than 30 days may be reasonably required under subsection (a). The assignee should determine a reasonable period of time for notification of such transactions in accordance with its fiduciary duties.

Section 12 provides the process for the assignee to dispute creditor claims.

In the assignment agreement, the assignor may provide the assignee with a description of the type(s) of electronic media the assignor uses for purposes of the assignee's compliance with subsection (c).

The assignee may decide on the content of the notification described in subsection (c) using its reasonable judgment in compliance with any statutory duty.

Section 8. Duties of Assignor

(a) Subject to Section 23, an assignor has a duty to take all reasonable actions necessary for the assignee to administer the assignment, the assigned assets, and the assignment estate.

(b) In furtherance of the duty under subsection (a), the assignor shall:

(1) preserve and turn over to the assignee the assigned assets in the assignor's possession or control;

(2) provide to the assignee information reasonably necessary to administer the assignment, the assigned assets, and the assignment estate;

(3) sign any record reasonably necessary to transfer an assigned asset and comply with any notarization required under other law;

(4) designate, and provide the assignee with the name, address, and other contact information reasonably necessary to communicate with, an appropriate person willing and able to act as a representative on behalf of the assignor as may be reasonably necessary to administer the assignment, the assigned assets, and the assignment estate;

(5) if the assignment includes a legal or equitable interest in real property or titled

personal property, cooperate with the assignee in taking actions under Section 6;

(6) on or as soon as practicable after the effective date of the assignment agreement, provide the assignee:

(A) a list of all assets;

(B) a list of all the assignor's employees, including those whose employment is terminated in connection with the assignment; and

(C) a list of all the assignor's known creditors, including, for each creditor, the creditor's address and other contact information reasonably necessary to communicate with the creditor;

(7) verify under penalty of perjury the accuracy of the lists required under paragraph (6);

(8) with respect to a legal or equitable interest in property restricted from assignment, cooperate with the assignee to obtain consent from a person whose consent to assign the interest is necessary under other law; and

(9) provide assistance to the assignee as required by the assignment agreement.

(c) The duties in this section also apply to a representative designated under subsection (b)(4).

Comment

It is anticipated that the assignment agreement will set forth specific information concerning assignor assistance. The parties can expand, narrow, or otherwise modify by agreement the standards measuring the fulfillment of these duties to the extent set forth in Section 23.

As indicated in subsection (b)(4), the assignor may designate an individual to act on the assignor's behalf and to remain available to the assignee during the assignment. As referenced in Section 17(c), that individual has the same exculpation as provided to directors and officers under state entity law. However, some unincorporated organization statutes permit fiduciary duties to be limited or eliminated. To the extent that the relevant organizational documents of the assignor effectively limit or eliminate an individual's fiduciary duties, this act does not create fiduciary duties for the individual.

For purposes of subsection (b)(4), an "appropriate" person is anyone who may be necessary to assist the assignee in carrying out its responsibilities related to the assignment. If the assignor has not already purchased insurance relating to the person's post-assignment acts before the assignment is made, the assignee may be able to purchase the insurance under the assignee's powers in Section 10.

If a contract is assigned to the assignee, and the contract counterparty is a contingent creditor entitled to notice, the contract counterparty should be included on the list of the assignor's known creditors provided in subsection (b)(6)(C).

The effective date of the assignment agreement referenced in subsection (b)(6) is addressed in Section 5(f).

Section 9. Duties of Assignee

(a) Subject to Section 23, an assignee has a fiduciary duty to the assignment estate for the benefit of creditors:

(1) of loyalty, including the duty to manage the assignment in good faith;

(2) to use reasonable care to maximize distributions under Section 15; and

(3) to wind up the assignment under Section 19 in a manner compatible with the best interests of the assignment estate and creditors.

(b) Without limitation on the duties under subsection (a), and subject to Section 23, the assignee also has a duty to:

(1) maintain a separate deposit account for funds related to the assignment;

(2) collect on or dispose of each assigned asset, unless the assignee determines it is more economically efficient to abandon the asset;

(3) prepare and retain appropriate business records, including a record of each receipt, disbursement, and collection on or disposition of an assigned asset;

(4) pay administrative expenses of the assignment estate, to the extent the

assignment estate has sufficient unencumbered assets;

(5) establish a method that is reasonably designed to permit a creditor to submit a proof of claim;

(6) establish a single date by which creditors whose claims are not otherwise allowed without timely proofs of claim under this [act] must submit proofs of claim, which must be [[insert a number not less than 90 and not more than 210][not less than [90] and not more than [210]] days after the effective date of the assignment agreement;

(7) unless a claim would receive minimal or no distribution without regard to the claim's validity or asserted priority, examine the validity and priority of claims against the assignment estate and, if necessary, consult with the representative designated by the assignor under Section 8(b)(4);

(8) at least every six months, provide to each creditor a summary of the assets, liabilities, and expenses of the assignment estate;

(9) comply with all requirements of the Internal Revenue Service and state and local taxing authorities;

(10) send a notification to each creditor of the assignee's compensation and any change in the method of determining the assignee's compensation from the method provided in the assignment agreement;

(11) send a final accounting under Section 19(a); and

(12) comply with the other requirements imposed on the assignee under this [act].

Legislative Note: *In subsection (b)(6) a state should insert a number of days for a creditor to submit a proof of claim. A state should (1) insert a single number, e.g., 90 days, for all claims, which is not less than 90 days and not more than 210 days, or (2) allow an assignee to establish a single date within a range of days, e.g., 90 to 210 days. To decide the number of days, the state may wish to consider local practice, including the practice under state receiverships.*

Comment

An assignee's fiduciary duty under this act is equivalent to the fiduciary duty of an estate representative in a bankruptcy case. The assignee's fiduciary duties are owed to the assignment estate for the benefit of its creditors.

An assignee's duty of loyalty is derived from trust law, and it is intended that the scope of the assignee's duty of loyalty be understood as that concept is understood under trust law. See Uniform Trust Code Section 802 and comments thereto.

Consistent with the assignee's fiduciary duties, the assignee should take reasonable steps to identify other creditors of the assignor beyond those provided by the assignor under Section 8(b)(6)(C).

It is anticipated that the assignment agreement will set forth specific information concerning the assignee's duties. With the exception of the assignee's duties delineated in subsection (a), the parties can expand, narrow, or otherwise modify by agreement the standards measuring the fulfillment of these duties to the extent set forth in Section 23. In addition, any relevant court may require compliance with its local rules and orders that may delete, modify, or provide additional requirements.

It is expected that the assignee will undertake a cost-benefit analysis in exercising its duties under subsection (a). The reference to maximizing distributions in paragraph (a)(2) does not require the assignee to incur unreasonable costs and expenses.

Determination of any other specific duties that constitute the assignee's fiduciary duty is left to other law. The assignee's fiduciary duty may, for example, include preserving and insuring assigned assets, obtaining liability insurance, or making a good faith effort to obtain insurance at a reasonable price. An assignee is empowered to take these actions under Section 10(b)(1) and (2). The assignee also has a fiduciary duty with respect to funds in its custody, consistent with a trustee's fiduciary obligations under the Uniform Trust Code or other applicable trust law.

The reference to a "separate deposit account" in subsection (b)(1) means an account solely for funds related to the assignment.

The act leaves to other law the process of abandonment of an asset under subsection (b)(2); however, abandoning an asset under subsection (b)(2) does not invalidate the assignment or convert the assignment into a partial assignment of assets.

To comply with its duty under subsection (b)(9), the assignee must use the appropriate IRS form, currently IRS Form 56, Notice of Fiduciary Relationship, which must be filed at the IRS office where the assignor filed its tax returns, to notify the IRS of the assignment.

Section 6-103(3)(f) of the Uniform Commercial Code exempts an assignee's disposition of assets from the scope of Article 6's bulk transfer laws if otherwise applicable.

An assignee's duties may include the retention of documents as required under other law.

Section 10. Powers of Assignee

(a) An assignee has the powers necessary or appropriate to perform the assignee's duties.

(b) Unless the assignment agreement expressly provides otherwise, the assignee has power to:

(1) operate an existing business that uses an assigned asset, including preservation of the asset and collection on, or the sale, lease, license, or other disposition of, the asset;

(2) incur secured or unsecured debt and pay expenses incidental to the exercise of the power under paragraph (1);

(3) assert a right, claim, cause of action, or defense the assignor could have asserted that relates to the assignment estate;

(4) engage professionals, including a professional previously engaged by the assignor, to give advice, to prosecute or defend litigation, or for other purposes as the assignee considers appropriate, and pay professionals reasonable fees for services from the assignment estate;

(5) collect on, or sell, lease, license, or otherwise dispose of, an asset of the assignment estate regardless of whether the asset is subject to a lien or other encumbrance;

(6) exercise a right to redeem an asset of the assignment estate that is subject to a mortgage, deed of trust, security interest, or other encumbrance;

(7) settle a matter involving a debtor of the assignor;

(8) prosecute or defend a litigation pending on the effective date of the assignment agreement in favor of or against the assignor in the manner and with the same effect as the assignor could have done if the assignment had not been made;

(9) recover an asset in the manner and with the same effect as the assignor could have done if the assignment had not been made;

(10) settle claims against the assignment estate;

(11) abandon an assigned asset;

(12) subject to subsections (c) and (e), avoid a transfer or the incurrence of an obligation which a creditor that has filed a proof of claim could have avoided under other law if the assignment had not been made; and

(13) invest funds, subject to applicable prudent investor standards under other law.

(c) The power under subsection (b)(12) is exclusive to the assignee with respect to a creditor that submits a proof of claim. A recovery by the assignee in the exercise of this power must be for the benefit of the assignment estate but may not exceed the amount, asset, or other value the creditor could have obtained by the avoidance.

(d) For the purpose of exercising the assignee's power under subsection (b)(12), exercising a voidable-transaction remedy, or otherwise establishing the priority of the assignee's interest, an assignee has a lien on the assignment estate and the status of:

(1) a lien creditor under [cite to Uniform Commercial Code Section 9-102(a)(52)(B)] as to an asset that is a legal or equitable interest in personal property or fixtures;

(2) a bona fide purchaser under [the recording statute of this state] as to an asset that is a legal or equitable interest in real property, other than fixtures, located in this state; and

(3) a bona fide purchaser under the law of another state as to an asset that is a legal or equitable interest in real property, other than fixtures, located in the other state.

(e) An assignee's power under subsection (b)(12) to avoid a transfer made before the effective date of the assignment agreement, under or in connection with a swap agreement, securities contract, commodity contract, forward contract, repurchase agreement, or master netting agreement, is limited to the extent a trustee would not have the power to avoid the transfer under the Bankruptcy Code, 11 U.S.C. Section 101 et seq.[, as amended].

(f) An assignee shall exercise the powers under this section consistent with the assignee's fiduciary duty under Section 9(a).

Legislative Note: *It is the intent of this act to incorporate future amendments to the federal law cited in subsection (e), Section 15(e) and (f), and Section 25. A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase ", as amended". A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

Comment

The exercise of the assignee's power is subject to the assignee's fiduciary duties except as permitted in this act to be modified by the terms of the assignment agreement. See Section 23.

This act takes no position on whether an assignee is authorized to commence a bankruptcy case. However, this act does not preclude such authorization, whether in the assignment agreement or elsewhere, if consistent with the assignor's constituent documents and the statute under which the assignor was formed. *See* In re N2N Commerce, Inc., 405 B.R. 34 (Bankr. D. Mass. 2009) (finding no case in which a court authorized an assignee to commence a bankruptcy case but concluding that authorization could come from assignment agreement).

Although the assignment agreement may limit the assignee's powers, the assignment agreement, like any other contract, is subject to the requirement under applicable state law that the parties to the contract act in good faith in the performance and enforcement of the contract.

An assignee's power to collect on or dispose of an asset under subsection (b)(5) is subject to the assignee's fiduciary duty under Section 9(a). This duty may or may not be equivalent to the standard of commercial reasonableness applied to dispositions under Article 9 of the Uniform Commercial Code.

Although subsection (b)(8) gives the assignee the power to defend a litigation claim, the act does not require the assignee to defend a claim if the assignee decides not to do so, as long as the decision is consistent with the assignee's fiduciary duty.

Because an assignee is an Article 9 "lien creditor," the assignee's interest will ordinarily not be subject to unperfected Article 9 security interests and non-Article 9 unperfected liens. The assignee's lien secures the claims of creditors entitled to distributions from the assignment estate under Section 15.

By submitting a claim against the assignment estate, a creditor agrees not to independently pursue any voidable transaction remedies the creditor may have against any transferee of the assignor or assignee.

An assignment under this act would rarely itself be considered a voidable transaction. A voidable transaction is an act that is detrimental to creditors as a group. An assignment under this act is for the benefit of creditors as a group.

Previously, a "voidable transaction" was known as a fraudulent transfer. This act uses the term "voidable transaction" for consistency with the Uniform Voidable Transactions Act and in accordance with modern usage.

Prudent investor standards, as referenced in subsection (b)(13), have been codified in the Uniform Prudent Investor Act. The assignee may look to the Uniform Prudent Investor Act or other applicable state prudent investor standards for guidance.

An assignee has standing to bring claims of the assignor, or to defend claims against the assignor for which creditors have recourse to the assignment estate, under this section because the assignee becomes the real party in interest on the claims upon the assignment being made. Claims of the assignor are assets included in the assignment estate. Although the assignee does not generally assume liability for claims against the assignor, a claim against the assignor for which the creditor has recourse to an assigned asset risks dilution of distributions to other creditors from the assignment estate.

The effective date of the assignment agreement referenced in subsections (b)(8) and (e) is addressed in Section 5(f).

Section 11. Allowed Claim

(a) An assignee shall allow a creditor's claim if:

(1) the creditor submits a proof of claim in compliance with Section 13; and

(2) the assignee does not dispute the claim under Section 12 before final distribution.

(b) An assignee may:

(1) allow a claim, pay a known liquidated claim, or accept a notice to the assignee of a claim received by the date established by the assignee under Section 9(b)(6) even if the

creditor does not submit a proof of claim; or

(2) allow and pay a claim evidenced by a late-filed proof of claim, if the assignee determines there is a reasonable basis for excusing the late filing.

(c) Any unsecured portion of an allowed claim shall be valued as of the effective date of the assignment agreement.

(d) A creditor's claim is allowed if the creditor succeeds in a dispute under Section 12(b).

(e) Subject to subsection (f), after expiration of the time for submitting a proof of claim, the assignee shall create a complete list of creditors that have submitted a proof of claim in compliance with Section 13. For each creditor's claim, the list must state:

(1) the amount of the claim, if the amount is known to the assignee; and

(2) whether the claim is secured or unsecured and, if secured, describe the collateral for the claim.

(f) If a class of creditors will receive no distribution on account of allowed claims, the assignee shall send a notice in a record to each creditor in that class that the creditor will receive no distribution instead of the list required in subsection (e).

(g) If requested by a creditor or other party with an interest in the assignment estate, the assignee shall provide the list created under subsection (e) to the person making the request to the extent permitted by privacy laws and subject to any privacy safeguards the assignee determines in the assignee's business judgment are reasonably necessary.

Comment

Sections 11, 12, and 13 address the claims allowance process. Section 11 explains when an assignee must and may allow a creditor's claim, as well as how unsecured claims are valued and how the assignee communicates to creditors with respect to allowed claims. Section 12 provides the process for the assignee to dispute, disallow, or reconsider claims. Section 13 provides the requirements for the content of a proof of claim and outlines the consequences of submitting a proof of claim to the assignee.

When the assignee creates a list of creditors under subsection (e), the assignee may need to anonymize names or take other reasonable steps to comply with privacy laws.

The list of creditors in subsection (e) does not constitute an admission by the assignee that those claims are valid or allowed. The assignee may dispute the claims on the list and need not note any dispute on the list itself. The claims listed may be unliquidated.

The assignee may comply with its obligation under subsection (g) by any reasonable means, including by posting the list on a website.

The effective date of the assignment agreement referenced in subsection (c) is addressed in Section 5(f).

Section 12. Disputed and Disallowed Claims

(a) An assignee may dispute a creditor's claim before final distribution by sending notification in a record stating the nature of the assignee's dispute to the creditor.

(b) If a dispute cannot be resolved consensually, the assignee may commence a proceeding under Section 21 to disallow the claim. The assignee must commence the proceeding before final distribution under Section 15. If the proceeding is not filed before final distribution, the assignee shall allow the claim under Section 11.

(c) An assignee shall create a dollar-for-dollar reserve for the estimated amount of the potential distribution on a disputed claim.

(d) Subject to subsection (b), an assignee shall disallow a claim for reimbursement or contribution of a person that is liable with the assignor on, or that has secured, the claim, to the extent:

(1) the claim against the assignment estate is disallowed;

(2) the claim for reimbursement or contribution is contingent as of the time of allowance or disallowance; or

(3) the person asserts a right of subrogation to the rights of a creditor.

(e) A claim for reimbursement or contribution of a person liable with the assignor on, or that has secured, the claim that becomes fixed after the effective date of the assignment agreement shall be determined, and shall be allowed or disallowed, subject to subsection (b), as if the claim had become fixed before the effective date of the assignment agreement.

(f) An assignee may reconsider the assignee's decision to allow or disallow a claim for cause. If a reconsidered claim is allowed under Section 11, before the assignee makes additional payments or transfers to other creditors that are equal or junior in priority under Section 15 to the reconsidered claim, the creditor with the reconsidered claim shall receive a payment or transfer in an amount proportionate in value to the payments or transfers already received by the other creditors. This subsection does not modify the assignee's right under other law to recover from a creditor an excess payment or transfer made to the creditor. If a reconsidered claim is disallowed, the assignee shall comply with subsections (b) and (c).

Comment

This act takes no position on whether a dispute resolution clause in a contract between the assignor and a creditor is binding on the assignee.

The effective date of the assignment agreement referenced in subsection (e) is addressed in Section 5(f).

Although subsection (f) permits an assignee to reconsider a claim, it does not provide an independent cause of action by the creditor with the reconsidered claim against the assignee.

This act does not preclude an assignee from seeking court approval under Section 21 for the estimation of an unliquidated or contingent claim as part of the claim dispute process.

Section 13. Proof of Claim

(a) A proof of claim must:

(1) state the name, address, and other contact information reasonably necessary to communicate with the creditor;

(2) state the amount of the claim;

(3) briefly state the nature of the claim;

(4) identify any asset of the assignment estate securing the claim;

(5) be signed by the creditor under penalty of perjury;

(6) include a copy of a record, if any, on which the claim is based;

(7) be submitted using the method established under Section 9(b)(5); and

(8) be submitted by the date established by the assignee under Section 9(b)(6).

(b) A proof of claim submitted in compliance with this section is prima facie evidence of the validity and amount of the claim.

(c) The submission by a creditor of a proof of claim in compliance with this section constitutes the creditor's:

(1) consent to the jurisdiction of the court under Section 21; and

(2) assignment to the assignee of any right of the creditor to bring a voidable transaction action relating to the creditor's claim.

Comment

This act does not preclude the use of electronic means for filing a proof of claim.

Although a secured creditor is not exempt from the requirement of submitting a proof of claim, other law may require the secured creditor to receive the value of the property secured by the creditor's security interest, regardless of whether a proof of claim is submitted. Furthermore, Section 11(b)(1) gives the assignee discretion to waive the formal proof of claim requirement for a secured creditor in exchange for that creditor's consent to the use of cash collateral and the subordination of its lien to certain administrative expenses of the assignment.

Employees are similarly not exempt from the requirement of submitting a proof of claim. However, Section 11(b)(1) gives the assignee discretion to waive the formal proof of claim requirement or accept a less formal notification of claim, and the assignee may wish to do so in some circumstances for employee claims.

Government entities are similarly not exempt from the requirement of submitting a proof of claim. However, the assignee should be aware of governmental claims that in some circumstances could subject the assignee to personal liability under federal or other state law. This act does not address whether the bar date is a sufficient defense to a late-filed claim by a government entity.

Subsection (c)(1) provides that a creditor that submits a proof of claim consents to the jurisdiction of the court. This rule is derived from the rules stated in *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) ("[B]y filing a claim against a bankruptcy estate the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power.") and subsequent bankruptcy decisions applying that rule to personal jurisdiction.

Section 14. Rights of Transferees

(a) An assignee's disposition of an asset:

(1) transfers to a transferee for value all of the assignee's rights in the asset;

(2) discharges the assignee's lien and, to the extent the assignment creates a security interest in favor of the assignee, the assignee's security interest; and

(3) discharges any subordinate security interest or other lien subordinate to the assignee's lien.

(b) A transferee that acts in good faith takes free of the rights and interests described in subsection (a), even if the assignee fails to comply with this [act] or the requirements of a judicial proceeding.

(c) If a transferee does not take free of the rights and interests described in subsection (a), the transferee takes the asset subject to:

(1) the assignee's rights in the assets of the assignment estate;

(2) the assignee's lien and, if applicable, security interest; and

(3) any other security interest or other lien.

(d) Unless otherwise provided in a record, any warranty arising by operation of other law is disclaimed to the extent permitted by other law.

(e) If a subordinate security interest or other lien is discharged under this section, the assignee may file a record with the official or office responsible for maintaining an official filing, recording, registration, or certificate-of-title system covering the asset secured by the security interest or other lien. The record must state that the security interest or other lien is discharged as a subordinate security interest or other lien in connection with a disposition under an assignment for the benefit of creditors of the assignor whose asset is subject to the security interest or other lien.

Comment

If an asset is transferred by the assignee with the consent of the lienholder free of the lien, the lien attaches to the proceeds of the transfer and retains for the proceeds the priority that the lien would have had had the lien remained on the original collateral.

The provisions in this section are intended to reference similar provisions in Section 9-617 of the Uniform Commercial Code. Accordingly, as used in this section, the term "discharge" is used in the same sense as it is used in Section 9-617 of the Uniform Commercial Code.

Section 15. Distributions

(a) In this section, "protected secured creditor" means a secured creditor whose lien:

(1) is a perfected lien;

(2) cannot be avoided by the assignee under Section 10(b)(12); and

(3) is not subordinate to the assignee's lien.

(b) Except as provided in Section 16, the assignee shall pay claims from the assignment estate allowed under Section 11 in the order of priority stated in this section.

(c) Unless otherwise agreed between the assignee and a protected secured creditor, before distributions under subsections (d), (e), (f), and (g), and in accordance with the priorities of creditors with liens under other law, the protected secured creditor shall receive the asset or the proceeds from the collection on or disposition of the asset to the extent of the value of the protected secured creditor's interest in the asset, less the assignee's reasonable and necessary expenses of preserving or disposing of the asset to the extent the expenses benefit the protected secured creditor and are incurred with the protected secured creditor's consent or acquiescence. The protected secured creditor has an unsecured claim under subsection (g)(2) for the amount of the claim that remains after deducting the amount or value of an asset the protected secured creditor receives under this subsection. To the extent a claim is secured by an asset the value of which, after the deductions provided under this subsection, is greater than the amount of the claim, the protected secured creditor may receive interest on the claim and any reasonable fees, costs, or charges provided for under the agreement or other law under which the claim arose.

(d) After the distributions under subsection (c), the assignee shall pay the necessary costs of the administration of the assignment estate. The costs include:

(1) fees and reimbursements of the expenses of the assignee and any professionals engaged by the assignee;

(2) post-assignment taxes incurred by the assignee;

(3) post-assignment rent incurred by the assignee in occupying premises on which assets of the assignment estate are located or the business of the assignor is conducted;

(4) post-assignment lease payments incurred by the assignee in renting personal property used in the business of the assignor; and

(5) amounts required to be paid under the assignment agreement for expenses of winding up the assignment under Section 19.

(e) After the distributions under subsections (c) and (d), the assignee shall pay claims entitled to priority under federal law including under 31 U.S.C. Section 3713[, as amended] from the assignment estate.

(f) After the distributions under subsections (c), (d), and (e), the assignee shall pay claims from the assignment estate for wages, salaries, or commissions earned not more than [180] days before the earlier of the effective date of the assignment agreement or the cessation of the assignor's business. Payment shall be limited to the greater of:

(1) the amount of the claim allowed as a priority claim ahead of claims of other unsecured creditors under the Bankruptcy Code, 11 U.S.C. Section 101 et seq.[, as amended]; or

(2) the amount allowed as a priority claim ahead of claims of other unsecured creditors under applicable non-bankruptcy law.

(g) After the distributions under subsections (c), (d), (e), and (f), each creditor shall receive a distribution of the assets of the assignment estate in the following order of priority:

(1) unsecured claims entitled to priority ahead of claims of other unsecured creditors under other law; and

(2) unsecured claims not entitled to priority.

(h) If the assets available for distribution to claims with equal priority under subsection (g) are insufficient to pay the total amount of the claims with that priority, each creditor with a claim with that priority shall receive a pro rata distribution of the available assets based on the proportion the amount of the creditor's claim bears to the total amount of the claims with that priority.

(i) If the claims entitled to the distribution under subsections (c), (d), (e), (f), and (g) are paid in full, the residue shall be distributed to allowed claims evidenced by a late-filed proof of claim, other than a late-filed claim allowed by the assignee under Section 11(b)(2), and, after the allowed claims evidenced by a late-filed proof of claim have been paid in full, as provided in the assignment agreement.

(j) An assignee may make interim distributions after considering future expenses and the reserves for disputed claims established under Section 12(c).

Comment

A creditor whose lien is junior to the status of the assignee as a lien creditor or bona fide purchaser under Section 10(d) or is otherwise subject to avoidance by the assignee under Section 10(b)(12) would not be a "protected secured creditor."

The reference in subsection (c) to "reasonable and necessary expenses" refers to expenses incurred that directly benefit the protected secured creditor. If the preservation of the asset in fact conveys a direct benefit on the protected secured creditor, and if the expenses in fact are reasonable and necessary for the preservation of the collateral, the secured creditor need not explicitly consent to those expenses being incurred and paid so long as the creditor is aware of the incurrence of the expenses and does not object to the incurrence.

The act takes no position on whether unsecured creditors of a solvent estate are entitled to post-assignment interest.

The effective date of the assignment agreement referenced in subsection (f) is addressed in Section 5(f).

This act does not preclude the assignee from creating reserves for contingent claims in addition to the reserve it creates for disputed claims under Section 12(c).

Subsection (i) provides that any residue is applied as provided in the assignment agreement. Accordingly, the parties should provide for the distribution of any surplus funds in the assignment agreement itself. If the assignment agreement does not provide for the distribution of surplus funds, the assignee should apply any surplus as provided under other law.

Section 16. Claim Subordination

(a) A subordination agreement is enforceable under this [act] to the same extent the agreement is enforceable under other law.

(b) Subject to subsection (c), the following claims are subordinate to a claim or interest that is senior or equal in priority to a claim or interest represented by a security or other equity interest in the assignor or an affiliate of the assignor:

(1) a claim arising from rescission of a purchase or sale of the security or other equity interest;

(2) a claim for damages arising from the purchase or sale of the security or other equity interest; and

(3) a claim for reimbursement or contribution allowed on account of the rescission or damage claim.

(c) If the security is common stock or another common equity interest, a claim subject to subordination under subsection (b) has the same priority as common stock or another common equity interest.

Section 17. Liability

(a) An assignor is not personally liable for an act or omission by the assignee.

(b) An assignee is not personally liable for an act or omission by the assignor.

(c) A representative designated by an assignor under Section 8(b)(4) is exculpated to the same extent as a person acting on behalf of the assignor under other law had there been no assignment, except for an act or omission resulting from the representative's gross negligence or willful misconduct.

(d) A term of an assignment agreement relieving the assignee of liability is unenforceable to the extent the agreement relieves the assignee of liability for an act or omission committed in bad faith or with reckless indifference to the purposes of the assignment or the interests of the creditors of the assignment estate.

(e) Subject to subsection (f), an assignee is personally liable for breach of a fiduciary duty under Section 9(a). If the assignee is liable:

(1) the assignee is personally liable to a creditor for an individualized harm to the creditor if the harm is not shared by all creditors or a class of creditors; and

(2) the assignee is personally liable to the assignment estate for a harm shared by all creditors or a class of creditors.

(f) An assignee is not liable if, in the performance of the assignee's duties and exercise of the assignee's powers, the assignee relies in good faith on:

(1) a record of the assignor;

(2) information, an opinion, a report, or a statement presented to the assignee by the assignor's officer or employee, a committee of the assignor's board of directors, an independent director or manager of the assignor, or another representative of the assignor; or

(3) information, an opinion, a report, or a statement presented to the assignee by another person that has been selected with reasonable care by or on behalf of the assignee as to a matter the assignee reasonably believes is within the other person's professional or expert competence.

Comment

The assignment agreement may specify details about indemnification requirements and other limitations on the assignee's liability. *See* Section 23(c).

The assignee is not liable for the claims of creditors against the assignor, even if a creditor has recourse to an assigned asset. *See* Section 10, cmt; *see* Sherwood Partners Inc. v. EOP-Marina Business Center, L.L.C., 153 Cal. App. 4th 977 (2007) (finding that an assignee was not liable for attorney's fees and costs under a tenant-assignor's lease because the assignee did not assume the tenant-assignor's obligations under the lease).

Individualized harm to a creditor is harm that is specific to rights that creditor has that are separate from the rights of all creditors.

Section 18. Assignee Removal; Successor Assignee

(a) The assignor or a creditor may request [a court of competent jurisdiction in this state] [specify the court in the enacting state] to remove the assignee, if the assignor or creditor has a reasonable belief grounds for removal exist under subsection (b).

(b) After a request under subsection (a) or on the court's initiative in an action pending before the court under Section 21, the court may remove an assignee:

(1) for cause, including the assignee's fraud, dishonesty, incompetence, gross

mismanagement, or failure to comply with this [act]; or

(2) if removal of the assignee best serves the interests of the creditors.

(c) After an assignee resigns, or is removed, dies, or becomes incapacitated, a successor assignee provided for in the assignment agreement becomes the assignee, unless the successor assignee is not eligible to be an assignee under Section 4(a) or is subject to removal under subsection (b). A court shall appoint a successor assignee if:

(1) the assignment agreement does not provide for a successor assignee; or

(2) the successor assignee provided for in the assignment agreement is ineligible to be an assignee under Section 4(a) or is subject to removal under subsection (b).

(d) Subject to Section 17, an assignee that resigns, or is removed, dies, or becomes incapacitated, is discharged from the assignee's duties under this [act] when the assignee, or a representative of a deceased or incapacitated assignee:

(1) accounts for and turns over to the successor assignee all assets of the assignment estate; and

(2) submits to creditors a report summarizing the receipts and disbursements made during the service of the assignee.

(e) Subject to an applicable privilege, a court may order an attorney, accountant, or other person that has information in a record relating to the assignment estate or the assignor's financial affairs to turn over or disclose the record to the successor assignee.

Legislative Note: *This act does not specify a particular court within a state to oversee assignee removal under this section, hear and resolve matters under Section 21, or appoint an ancillary assignee under Section 22. For each of these sections, a state may wish to specify a business court, or a court with a business docket, if one is available. Otherwise, a state may specify another court in the state or use the more general language of "a court of competent jurisdiction in this state".*

Comment

This act does not displace other legal or equitable remedies available under other law. If an assignee has breached its fiduciary duties under other law, the assignee may be removed or subject to litigation for breach of fiduciary duty.

"Cause" under subsection (b)(1) does not include compliance with the assignment agreement or with this act. "Cause" does not include an assignee making a judgment consistent with its fiduciary duties. "Cause" may include breach of fiduciary duty and fraud.

The phrase "best serves the interest of the creditors" in subsection (b)(2) is intended to be understood similarly to the concept of the best interest of the creditors under bankruptcy law.

This act does not address whether an assignee may succeed to any applicable privileges of an assignor with respect to the information referred to in subsection (e); the resolution of that issue should be determined under other law. *See* Assignment for Benefit of Creditors of Miami Perfume Junction, Inc. v. Osborne, 314 So. 3d 604 (Fla. Ct. App. 2020) (denying petition for certiorari on grounds that circuit court's decision determining that privileges passed to assignee did not depart from the essential requirements of law).

Section 19. Winding Up

(a) On completion of an assignee's duties, the assignee shall send a creditor whose claim is allowed under Section 11, and not satisfied in full, a final accounting sufficient to inform the creditor of all material aspects of the assignment, including:

(1) a description of the actions taken by the assignee under the assignment;

(2) a summary of the assets received by the assignee at the commencement of the assignment and the assets received by the assignee during the assignment;

(3) a summary of disbursements made by the assignee during the assignment for the purpose of administering the assignment estate, including the fees charged by the assignee, and payments to professionals, for rent, and for business purchases;

(4) a summary of collections and dispositions of assets by the assignee;

(5) a summary of distributions made or proposed to be made by the assignee for creditor claims;

(6) a description of additional work to be done by the assignee to complete the

administration of the assignment estate and the distributions under Section 15; and

(7) other information considered reasonably necessary by the assignee.

(b) Except as otherwise provided in the final accounting or if the assignee has not fulfilled the assignee's duties under this [act], the assignee is discharged from the assignee's duties under this [act] when the assignee sends the final accounting and distributes all the assets of the assignment estate.

(c) If the final accounting describes additional work under subsection (a)(6), the assignee shall exercise the powers appropriate to complete the work.

Comment

This act does not set a time limit for completion of the assignment, in recognition of the fact that assignments vary, and setting a deadline could work against the interest of creditors in some cases. The assignee's duty to act in a manner compatible with the best interests of the assignment estate and creditors in Section 9(a)(3) is designed to require the assignee to conclude its work in a timely fashion and to address any concerns about undue delay on the part of the assignee.

The assignee should send the final accounting in subsection (a) to all creditors with allowed claims.

Section 20. Interstate Matters

(a) Subject to subsection (b), an assignment made under the law of another state must be recognized and enforced on an issue if the result for the issue would be substantially similar to the result for the issue if the assignment had been made under this [act].

(b) If a claim for wages, salaries, or commissions or a claim of a governmental unit exists in another state, for the purpose of determining the priority of the claim under Section 15(f)(2), the assignee shall use the amount asserted or determined under the law of the other state.

(c) If an assignee determines that a creditor should receive the treatment the creditor would receive under an assignment made under the law of another state, the assignee may treat the creditor as the creditor would be treated in the other state.

Comment

This act encourages coordinated assignments of multiple assignors in the same enterprise group, even if they are not all formed under the laws of the same state or have a principal place of business in the same state. This act promotes coordination among the states and their respective courts for the benefit of each of the assignor's creditors; however, this act does not substantively consolidate estates. This act does not preclude joint administration, whether in a state or across states under court-to-court protocols.

The term "governmental unit" is derived from Section 101(27) of the Bankruptcy Code, and the concept of a governmental unit is intended to be understood as that term is understood under bankruptcy law.

Section 21. Court Action

(a) [A court of competent jurisdiction in this state] [specify the court in the enacting state] may hear and resolve a matter involving the administration of an assignment or the exercise of an assignee's powers and duties, including a request for instructions or approval or to declare rights.

(b) Without limiting the rights of the assignee or a creditor or other interested person to request the court to hear or resolve a matter under subsection (a), on request of the assignee, the court may issue an order relating to the administration of the assignment or the exercise of the assignee's powers and duties, including an order for disposition of an asset or the incurrence of an obligation.

(c) Acceptance of the assignment by the assignee constitutes the assignee's consent to the jurisdiction of the court.

Comment

This section contemplates that an appropriate court will be available to the extent its jurisdiction is invoked by interested persons. Such a court may hear disputes and authorize declaratory actions relating to assignments. An assignee may also go to an appropriate court for instructions or to obtain a confirmatory sale order, as provided by subsection (b). Except as provided in this section, this act does not contemplate an assignment with judicial supervision. Although this act does not create a system of routine or mandatory court supervision, it does not preclude states with judicially supervised assignments from adopting other provisions of the act, whether by statute or rules of civil procedure.

If a creditor files a claim in a court other than the court specified in this section, the court where the claim was filed may consider declining to exercise its jurisdiction under the doctrine of *forum non conveniens*.

Subsection (c) provides that an assignee that accepts an assignment consents to the jurisdiction of the court. This rule is derived from the rules stated in *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) ("[B]y filing a claim against a bankruptcy estate the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power.") and subsequent bankruptcy decisions applying that rule to personal jurisdiction.

Section 22. Ancillary Assignee

(a) Subject to other law of this state governing a person from another state serving as a fiduciary in this state, [a court of competent jurisdiction in this state] [specify the court in the enacting state] may appoint a person serving as an assignee in an assignment in another state, or the person's nominee, as an ancillary assignee relating to assigned assets located in this state or subject to the jurisdiction of a court in this state, if:

(1) the person or nominee would be eligible to serve as an assignee under Section 4; and

(2) the appointment furthers the person's possession, custody, control, or disposition of an assigned asset under the assignment in the other state.

(b) The court may issue an order that implements an order entered in another state appointing or directing an assignee or otherwise concerning an assignment in the other state.

(c) Unless the court orders otherwise, an ancillary assignee appointed under subsection (a) has the rights, powers, and duties of an assignee appointed under this [act].

(d) A person in possession, custody, or control of an assigned asset in this state, other than a creditor holding a lien or a right of setoff or recoupment relating to the asset, shall, on notification in a record by an ancillary assignee appointed under subsection (a), turn over the asset to the ancillary assignee.

Comment

To invoke full faith and credit or comity, a relevant court may enter an order that recites and implements any portion of this act and may retain appropriate jurisdiction to enforce the order.

A court may appoint a person as an ancillary assignee under subsection (a) even if the primary assignee has not been appointed by a court.

Section 23. Provisions Variable by Agreement

(a) Except as provided in this section and Section 10(b), the provisions of this [act] may not be varied by agreement.

(b) The duties under Sections 8(a) and 9(a) may not be disclaimed by agreement. An assignor and the assignee may determine by agreement the standards measuring the fulfillment of the duties of the assignor under Section 8 and the assignee under Section 9 if the standards are not manifestly unreasonable.

(c) Except as provided in Section 17(d), the assignment agreement may limit the assignee's liability under Section 17 and may require the assignee be indemnified by the assignment estate.

(d) Except as provided under Section 7(a), whenever this [act] requires an action to be taken within a reasonable time, a time not manifestly unreasonable may be fixed by agreement.

(e) The assignment agreement may provide for duties of the assignee in addition to those in this [act].

Comment

This act permits variation of its express provisions by agreement except as stated in the act. However, any variation should be subject to the requirement of good faith under applicable state law.

Standards that are "manifestly unreasonable" include standards that are patently unreasonable, as well as standards that are an unreasonable means to measure the fulfillment of the assignor's or assignee's duties. If standards result in unfair dealing or a situation outside the reasonable expectations of creditors of the assignment estate as a whole, the standards may be manifestly unreasonable.

Section 24. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among states that enact it.

Section 25. Relation to Electronic Signatures in Global and National Commerce Act

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

Section 26. Transitional Provision

This [act] applies to an assignment made on or after [the effective date of this [act]].

[Section 27. Severability]

[If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state adopting a general rule of severability.*

[Section 28. Repeals; Conforming Amendments]

[(a) . . .

(b) . . .]

Legislative Note: *A state should examine its statutes to determine whether conforming revisions are required by provisions of this act relating to the effect of an assignment, including the taxation of the transfer of assets. See Section 6, Legislative Note.*

Section 29. Effective Date

This [act] takes effect […]

This page intentionally left blank

About the Panelists…

John M. August is a Member of Saiber LLC in the firm's Madison, New Jersey, office. A creditor's rights attorney with an emphasis on asset recovery and judgment collection for secured and unsecured creditors, he has aggressively pursued claims covering the gamut of collection practice, from garnishing wages to seizing a Boeing 747 aircraft from McGuire Air Force Base. In addition to collections, Mr. August defends lender liability actions, prosecutes foreclosure actions and pursues deficiency judgments for creditors. He is also experienced with, and represents clients in, less common insolvency proceedings including Assignments for the Benefit of Creditors and Receivership Actions.

Admitted to practice in New Jersey and New York, and before the United States District Court of the District of New Jersey and the Southern and Eastern Districts of New York, Mr. August is Chair of the New Jersey State Bar Association Bankruptcy Law Section and a member of the American Bankruptcy Institute. He is a member of the Bankruptcy American Inn of Court, regularly lectures and publishes articles on collection and bankruptcy topics, and is the recipient of several honors.

Mr. August received his B.A. from Rutgers University-Camden and his J.D., *cum laude*, from Georgetown University Law Center.

Marc D. Miceli is Of Counsel to S. Mitnick Law, P.C. in Oldwick, New Jersey, where he concentrates his practice in insolvency law, with a special emphasis on state court general assignments for the benefit of creditors' proceedings, federal bankruptcy proceedings, corporate liquidations, asset recovery and creditors' rights. He has represents court-appointed fiduciaries including assignees, receivers and chapter 7 bankruptcy trustees in state and federal court proceedings, where he has served as counsel in complex litigation involving contract disputes, debt collection, fraud, and preference and fraudulent transfer litigation.

Mr. Miceli is admitted to practice in New Jersey, New York and Massachusetts, and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York; the United States Tax Court and the United States Supreme Court. He is a member of the Essex County Bar Association's Board of Trustees, the Business Law and Litigation Law Sections of the American Bar Association and the Equity Jurisprudence Law Committee of the New Jersey State Bar Association. He is also a member of the Turnaround Management Association, the Commercial Law League of America, the Association of the Federal Bar of New Jersey, the National Association of Federal Equity Receivers and the Union Internationale des Avocats (UIA/International Association of Lawyers).

Mr. Miceli received his B.A., B.M. and M.M. from the University of Illinois at Urbana-Champaign, his J.D. from Case Western Reserve University School of Law and his LL.M. in Taxation from Boston University School of Law.

Sari B. Placona is a Partner in McManimon, Scotland & Baumann, LLC in Roseland, New Jersey, where she concentrates her practice in corporate restructuring, bankruptcy, debtor-creditor rights, assignments for the benefit of creditors, and commercial litigation. She represents a broad range of clients including Chapter 11 and Chapter 7 debtors, trustees, receivers, assignees and creditors, and her work includes the prosecution and defense of preference and fraudulent conveyance actions. She also serves in fiduciary capacities including Plan Administrator and Assignee.

Admitted to practice in New Jersey, Ms. Placona has served as Co-Chair of the Bench-Bar Committee for the Gindin Conference and is a Trustee of the Association of the Federal Bar of New Jersey. She is also a Trustee of Partners for Women and Justice and serves as Co-Chair of the New Jersey Network of the International Women's Insolvency & Restructuring Confederation. She has been a frequent lecturer for the New Jersey State Bar Association, the Essex County Bar Association, the New York Institute of Credit, the Turnaround Management Association and the Annual William H. Gindin Bankruptcy Bench-Bar Conference.

Ms. Placona received her undergraduate degree from Rutgers University and her J.D. from Rutgers School of Law-Newark. During law school, she gained experience as a paralegal at Walder Hayden, P.A., served as a member and editor of the *Women's Rights Law Reporter*, received the Eric R. Neisser *Pro Bono* Program Certificate and participated in both the Newark Bankruptcy *Pro Bono* Project and the domestic violence court advocacy program. She began her legal career as a law clerk to the Honorable Ned M. Rosenberg, J.S.C., (Ret.), Superior Court of New Jersey, Essex Vicinage, Civil Division.