

**ASSIGNMENTS FOR THE BENEFIT OF CREDITORS<sup>1</sup>****I. INTRODUCTION**

1. An assignment for the benefit of creditors (“ABC”), unlike federal bankruptcy proceedings instituted under 11 U.S.C.A. §101 *et seq.*, is a liquidation of a debtor’s property pursuant to state statutes. The assignment statutes generally will codify common law rights of a debtor for the benefit of all of the debtor’s creditors. The basic purpose of an ABC is to benefit the creditors of the debtor (“assignor” or “debtor”) and the interests of the creditors, under all circumstances. This basic purpose is paramount. ABC’s have been codified throughout the United States and is governed by state statute. Attached is a table prepared for previous ABI conferences entitled “Assignment for the Benefit of Creditors” prepared by Neil D. Colton of the law firm of Cozen O’Connor setting forth references to the various state statutes in New York, New Jersey, Pennsylvania, Delaware, Ohio, Maryland, Virginia and West Virginia. ABC’s have been in existence for close to 200 years. For example the first assignment act adopted in New Jersey was passed in 1820, and remained unchanged in theory until 1899. It was based upon the idea of a judicial regulation of a trust created by the assignor/debtor and impressed upon the debtor’s property. Generally, the ABC statutes will permit an individual, a corporation, partnership or other legal entity to make a voluntary general assignment for the benefit of its creditors.

2. While the law in each state will differ, generally an ABC empowers the assignee who serves in a capacity similar to a federal bankruptcy trustee. However, it is important to note

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<sup>1</sup> These materials were prepared by Walter J. Greenhalgh of Duane Morris LLP.

that ABC's are governed by the laws of the state where the ABC was instituted. Therefore, procedural and statutory differences between each state must be noted.

3. Typically, the ABC is initiated by the issuance of a "deed of assignment" executed by the assignor/debtor to an assignee. The deed transfers all of the assignor/debtor's assets to the assignee. The deed of assignment typically attaches a schedule of inventory of all real and personal property and will list all of the known creditors and amounts of their respective claims.

## **II. POWER AND OBLIGATION OF THE ASSIGNEE**

4. Once the assignee has accepted the deed of assignment, the assignee is required to provide a public notice to all creditors and normally to mail out a notice of the assignment. Title to the assignor/debtor's property vests in the assignee subject to all valid liens and mortgages. The assignee has authority to sell and dispose of all property of the assignor/debtor. The assignee also has the power to sue on behalf of the debtor/assignor's estate, to settle or compromise all claims and disputes and to take all other actions that an assignor could have taken including collection of accounts receivable and other causes of action.

5. The assignee will normally seek authorization to employ legal counsel and other professionals. In certain instances, subject to authorization by the appropriate state court, the assignee will have the right to continue to operate temporarily a business. Typically the assignee must seek court confirmation of public or private sales of personal or real property.

6. The assignee is a representative of all creditors. The assignee will typically have the power to set aside conveyances as a judgment creditor. An assignee may under certain state statutes avoid and recover preferential transfers. Each state statute will normally provide for a priority of claims such as, tax claims, wage claims, and general unsecured claims.

7. In order to close a particular case the assignee is required to file a final accounting. In the course of the final accounting the assignee will seek permission from the applicable court to issue dividends to creditors. For example, a secured creditor will first be paid out of collateral subject to the liens of a secured creditor. Thereafter payment to other creditors will follow the state statute priority scheme.

8. The assignee will file a fee application on behalf of his professionals. An assignee will be paid normally based upon a commission calculated as a percentage of all sums received by the assignee during the course of the ABC.

### **III. GENERAL COMPARISON OF THE PROS AND CONS OF THE ABC VERSUS A FEDERAL BANKRUPTCY PROCEEDING**

9. An assignee has the power to examine and depose persons regarding the assignee's affairs. This is similar to the authority vested in a bankruptcy trustee pursuant to U.S.C. §341 and Federal Bankruptcy Rule of Procedure 2004.

10. The assignee cannot sell assets free and clear of liens if secured creditor does not consent. Compare to 11 U.S.C. §363(f).

11. As noted above an assignee may continue the assignor/debtor's business upon order of the court. Compare to the authority of a Chapter 7 Trustee pursuant to 11 U.S.C. §721 and §363.

12. Preference claims: Compare the trustee in bankruptcy authority pursuant to 11 U.S.C. §547, avoidance powers. Preference avoidance powers for an assignee vary by state.

13. Equitable subornation: Bankruptcy trustee powers pursuant to 11 U.S.C. §510. Typically, there is no similar provision under the ABC statutes.

14. Fraudulent conveyances: bankruptcy trustee causes of action outlined under 11 U.S.C. §548. State statutes will permit an assignee to pursue such a claim.

#### **IV. DISADVANTAGE OF ABC**

- a. Jurisdiction of the Bankruptcy Court extends throughout the entire United States. ABC may only be enforceable with regards to property that only is within the jurisdiction in which the assignment is made and not for property in other jurisdictions. The ABC is given only such effect as the laws of that particular state will permit.
- b. For an individual a federal bankruptcy proceeding provides for a discharge of debt. There is no similar discharge provision for an individual in an ABC.
- c. As noted above a federal bankruptcy trustee may sell assets “free and clear” of liens. Typically, ABC’s will not permit a sale free and clear of liens.

#### **V. ADVANTAGES OF ABC VERSUS FEDERAL BANKRUPTCY PROCEDURE**

- a. The ABC cost factor is typically far less than a federal bankruptcy procedure.
  - The cost associated with a bankruptcy liquidation proceeding may be prohibitive to a small or medium sized company versus the cost of an ABC.
- b. The time and length of an ABC is typically much shorter than a federal bankruptcy proceeding.
- c. ABC’s are more flexible than a federal bankruptcy proceeding. The federal bankruptcy proceedings have detailed procedures formulated by both the United

States Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. There appears to be more flexibility for an assignee in the typical ABC.