

**THE BUSINESS LAW SECTION OF THE FLORIDA BAR
SUPPORT FOR PROPOSED AMENDMENTS TO CHAPTER 727 –
ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.**

Summary

The proposed amendments seek to clarify and/or streamline certain procedures applicable to an assignment for the benefit of creditors (“ABC”) pursuant to Chapter 727, Florida Statutes (the “Statute”). Several members of the Business Law Section of The Florida Bar (the “Section”) who participated in the substantial re-draft of the Statute in 1987 also participated in the Section committee (the “Committee”) that drafted the proposed amendments. The Committee utilized its members’ historical knowledge, together with contributions from current participants in all facets of a typical ABC, to draft proposed revisions which will, if enacted, leave the intent of the Statute fully intact while modifying certain procedures to better accommodate current practices and conditions.

Statutory Background

An ABC is a state law procedure for the administration of an insolvent estate. An ABC allows a debtor to voluntarily assign its assets to a third party of the debtor’s choosing. That third party (the “Assignee”) is charged with the duty of liquidating the debtor’s assets for the purpose of satisfying creditors’ claims against the debtor. Many ABC cases are filed with the consent of some or all of the debtor’s creditors.

Though the practice has been codified since Roman times, ABCs originally existed at common law in the United States.¹ In Florida, the original ABC act was enacted in 1889 (chapter 3891, Laws Fla.), but was substantially re-drafted in 1987 (chapter 87-174, Laws Fla.) (“1987 Amendments”) and further amended in 1989, 1991, 1997, 1998, 1999, 2007, and 2008 (as amended, “ABC Statute”). The constitutionality of an ABC was affirmed by the Florida Supreme Court in 1896² and has been upheld in subsequent cases.³

ABCs are similar to federal bankruptcy liquidation proceedings in that they ensure full reporting to creditors and require equal distribution of a debtor’s assets according to the priorities established in the Statute. An ABC is primarily distinguishable from the federal bankruptcy process in that (1) it does not impose an automatic stay in favor of the debtor,⁴ (2) it does not

¹ See *Moecker v. Antoine*, 845 So.2d 904, 910 (Fla. 1st DCA 2003).

² See *Dorr v. Schmidt*, 38 Fla. 354, 359 (Fla. 1896).

³ See *Pobreslo v. Joseph M. Boyd Co.*, 287 U.S. 518, 526 (1933) (“[I]t is apparent that Congress intended that such voluntary assignments, unless so put aside, should be regarded as not inconsistent with the purposes of the federal act.”); *In re Mader’s Store for Men, Inc.*, 77 Wis.2d 578, 592 (Wis. 1977).

⁴ Although there is no automatic stay in favor of the debtor, the Statute does preclude creditors from commencing proceedings against the Assignee, except as provided therein, and from levying, executing, attaching, or similarly pursuing assets of the estate in the possession, custody, or control of the Assignee, unless the creditor is a consensual lienholder. See § 727.105(13).

grant an Assignee special authority to recover pre-filing transfers as a result of the ABC,⁵ and (3) unlike most types of bankruptcy proceedings, it does not provide a discharge of any debt.

Proposed Amendments

In recent years, several disputes have arisen in ABC cases concerning some of the ABC Statute's more "practically difficult" procedures, inconsistent procedural requirements, and the applicability of other state procedural rules to ABC proceedings. Some of those disputes have been settled by the courts under fact-specific rulings, but results have not been consistent on a statewide basis. Accordingly, both practitioners and judges alike desire additional statutory guidance and/or clarification regarding the appropriate procedures for an ABC proceeding.

Notice

There is currently a subtle conflict in the statute between s. 727.108(4), which allows an Assignee to conduct the business of the assignor for a limited period of time (up to 14 days) or longer upon notice, and s. 727.111(4), which requires not less than 20 days' notice of an assignee's continued operation of the assignor's business for longer than 14 calendar days. Common sense displays that an Assignee's compliance with both provisions is impossible unless the notice required by s. 727.111(4) is sent before the assignment has even occurred.

To remedy the conflict, the Committee proposes an extension of the time within which an Assignee may conduct the business of the assignor under s. 727.108(4) from 14 days to 45 days.⁶ The additional time is a more realistic window within which an Assignee can assess the business, determine a strategy for liquidation, and, if necessary, give notice of intent to operate the business for an additional period of time. To streamline the deadlines set forth in the statute into multiples of 7 days, the Committee also proposes to extend the minimum amount of time for notice under the statute from 20 days to 21 days.⁷ The Committee leaves intact the condition that such operation of the business must be in the best interest of the estate.

Additionally, the proposed amendments introduce a negative notice procedure in ABC cases.⁸ The purpose of such a procedure is to reduce both the administrative burden on the court and the administrative cost for the estate necessitated by the conduct of hearings for relief which is neither contested nor opposed. Negative notice is a common procedural tool in federal bankruptcy court, and attorneys and creditors are generally familiar with the requirements for utilizing such notice. For example, under the proposed amendments, in the case of an Assignee's notice that it will conduct the business of the assignor for a period longer than the prescribed period of time, such notice could be served on negative notice ("Negative Notice") by including a specific form "warning" in the document (as set forth in s. 727.111(4)) that –

- 1) the Assignee proposes to take the actions described therein without further

⁵ Certain other state laws allow such recovery under some circumstances, such as Florida's Fraudulent Transfer Act (Ch. 726, Fla. Stat.), but those laws are independent of the ABC process.

⁶ This extended timeframe also requires amendment of § 727.109(3).

⁷ See §§ 727.103(13) & 727.111(4).

⁸ The proposed amendments define "Negative Notice" as the notice procedure set forth in s. 727.111(4).

notice or a hearing unless a party in interest files an objection within 21 days of service of the notice;

- 2) any such objection must be filed with the clerk of court and served on the Assignee's attorney and any other appropriate person(s);
- 3) if an objection is filed and served, the court may schedule a hearing; and
- 4) if no objection is filed, the Assignee and the court will consider the proposed relief unopposed.

If no objection is filed within the time prescribed, the Assignee may continue to operate the assignor's business for an additional 90 days. Such Negative Notice procedure would also be available for a proposed sale of assets of the estate other than in the ordinary course of business, the compromise or settlement of a controversy, and the payment of fees and expenses to an Assignee or professional persons employed by the Assignee.

Assignee Bond

Much like a receiver in a receivership, Assignees are required to file a bond with the clerk of court to ensure the faithful discharge of their duties. The purpose of the bond is to protect the assignor's creditors from potential loss in the event of the Assignee's improper and irreparable disposition of the assignor's assets.⁹ Section 727.104(2)(b) currently requires the court to set the bond "in an amount not less than double the liquidation value of the assets of the estate." "Liquidation value" is defined in s. 727.103(12) as "the value in cash obtainable upon a forced sale of assets after payment of valid liens encumbering said assets." The reason for deducting the value of liens encumbering the assets when calculating "liquidation value" is that a debt secured by a lien against the debtor's asset does not need the protection of a bond. It is already protected by the lien, which attaches to the asset and may be enforced despite disposition by the Assignee.

In addition to assets secured by liens, unliquidated assets are also less susceptible to immediate and irreparable disposition by an Assignee. The difficulty of valuing the asset consequently increases the difficulty of selling the asset. As a result, in cases where a significant portion of the debt is secured and/or unliquidated, some courts have been requiring a bond that is too high. An unnecessarily high bond requirement causes an estate to incur needless additional cost and may even discourage otherwise qualified Assignee candidates from serving as Assignees.

To clarify the Statute, the Committee proposes to amend s. 727.104(2)(b) to provide that the Assignee's bond must not be less than \$25,000.00 or double the liquidation value of the unencumbered and liquid assets of the estate, whichever is higher. The amendment would guarantee a minimum bond amount, yet ensure that the bond amount is not substantially and artificially inflated by a large amount of secured and/or unliquidated debt.

Discovery

Disputes have recently arisen among practitioners concerning the applicability of the

⁹ See *Williamson v. Leith*, 36 F.2d 643, 644 (Fla. 5th DCA 1929).
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discovery provisions in the Florida Rules of Civil Procedure to ABC cases. As Assignees are statutorily charged with the duties to (a) determine whether or not prosecution of the estate's claims and causes of actions is in the best interest of the estate,¹⁰ (b) examine the validity and priority of claims against the estate,¹¹ and (c) conduct due investigation of the estate's assets' value and benefit to the estate,¹² discovery capabilities are imperative. An Assignee must be able to conduct discovery related to claims and potential causes of action in order to properly discharge his obligations to an estate. The Committee proposes to amend s. 727.108(1)(a) and s. 727.113 to clarify and confirm an Assignee's right to conduct discovery (as provided for in the Florida Rules of Civil Procedure) in the following circumstances:

- 1) In order to determine whether to prosecute claims and causes of action on behalf of the estate; and
- 2) Concerning objections to claims.

Rejection of Unexpired Leases

The statute currently allows an assignee to reject unexpired leases of non-residential real property or personal property.¹³ However, it sets forth little guidance regarding the proper procedure for such rejection. In the interest of establishing consistent practices, the Committee proposes amendments to s. 727.110 that would clarify and/or codify the procedure for such rejection, specifically (a) the parties entitled to notice of the rejection, (b) the information that should be included in the notice of such rejection, and (c) the effective date of the rejection. The amendments also confirm the termination of an estate's rights, obligations, and liability concerning the property in the event a lessor fails to take possession thereof upon rejection.

Objections to Claims

In an ABC, creditors of an assignor file claims with the Assignee, who is charged with determining the validity and priority of such claims before distributing the assignor's assets in accordance with statutory requirements. The Assignee or any other party in interest may object to a creditor's claim. The Committee proposes procedural amendments to s. 727.113(1) to clarify (a) which parties are entitled to service of any such objection, and (b) the service address of the claimant. As noted above, this provision would also be subject to the Negative Notice procedure.

¹⁰ See § 727.108(1)(a).

¹¹ *Id.* at (10).

¹² *Id.* at (11).

¹³ See §§ 727.108(5) & 727.109(6).