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## Florida's Beefed-up Assignment for the Benefit of Creditors as an Alternative to Bankruptcy

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# FLORIDA’S BEEFED-UP ASSIGNMENT FOR THE BENEFIT OF CREDITORS AS AN ALTERNATIVE TO BANKRUPTCY

*Jeffrey Davis\**

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## I. INTRODUCTION

Two new corporate clients have been referred to you. The owners of both corporations have consulted lawyers about their struggling businesses and now seek second opinions. The first was advised by its attorney to file a Chapter 7 bankruptcy petition, the second was advised to file a Chapter 11 petition. You think both should consider an assignment for the benefit of creditors. Why? Stated simply, an assignment for the benefit of creditors, or an ABC, is normally much simpler and almost always less expensive than a comparable bankruptcy proceeding.<sup>1</sup> The substantial savings in expense results in larger payouts to both unsecured and secured creditors, and the savings in time permits interested parties sooner to get on with whatever is next. Bankruptcy, of course, offers numerous advantages not available in an ABC. However, when, as is often the case, the advantages of bankruptcy are not needed, an ABC is the better choice. Knowing when bankruptcy is not needed is valuable knowledge indeed.

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1. Throughout this Article, I make numerous general factual statements about the way things are, or usually are. These assertions are not based on any statistically verifiable empirical study, nor are they taken from my own experience. Rather, I have arrived at these generalizations after discussing the comparative advantages of ABCs and bankruptcy with a number of experienced Florida debtor-creditor lawyers. I refer to some of those conversations explicitly. I am grateful to all the lawyers for indulging me.

Florida's newly amended ABC statute substantially reduces the number of situations in which the advantages of bankruptcy outweigh those of an ABC.

## II. FLORIDA'S ASSIGNMENT FOR THE BENEFIT OF CREDITORS, AN OVERVIEW

At common law, as today, the unrestrained creditor race to the assets of a nonpaying debtor was chaotic. To quell the chaos, commercial lawyers invented a creative solution by causing the debtor to assign the debtor's assets to a third party.<sup>2</sup> Lacking any claim against the third party, the creditors had no claim to the assets to which the assignee now held title. The transfer was not a fraudulent conveyance because the debtor did not intend to hinder, delay, or defraud creditors, as required by the Statute of Elizabeth.<sup>3</sup> Rather, the intent was to benefit creditors, and this special practice came to be known as an assignment for the benefit of creditors. The benefit to creditors lay in the assignee's agreement to receive the assets in trust for the creditors, assume a fiduciary obligation to liquidate the assets in an orderly manner, and distribute the proceeds equitably to them. The common-law assignee had no extraordinary powers, and the debts were not discharged except to the extent that they may have been partially repaid. Diligent creditors might keep an eye out for future assets of the debtor, but the now penniless debtor's life was simplified, at least for the time being.

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.<sup>4</sup> Today, the typical debtor/assignor for

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2. See, e.g., *Donegan v. Baker & Holmes Co.*, 74 So. 202 (1917). There is evidence that the practice has been codified since Roman times. See David S. Kennedy & R. Spencer Cleft III, *An Historical Analysis of Insolvency Laws and Their Impact on the Role, Power and Jurisdiction of Today's United States Bankruptcy Court and its Judicial Officers*, 9 J. BANKR. L. & PRAC. 165, 167 (2000).

3. The Statute of Fraudulent Conveyances, 13 Eliz. c.5, 1571. Of course, the transfer was made by an insolvent debtor for less than equivalent value, but this was of no moment because the idea of the constructively fraudulent conveyance did not yet exist. See Uniform Fraudulent Transfer Act §§ 4(a)(2) & 5(a) (codified as FLA. STAT. §§ 727.105, 106(1)).

4. The Bankruptcy Clause, located in Article I of the U.S. Constitution, gives Congress the exclusive power to pass bankruptcy laws. However, it has long been recognized that states may also adopt insolvency laws, provided the state law does not discharge the debtor from debt. *Pobreslo v. Joseph M. Boyd Co.*, 287 U.S. 518, 525 (1933); *Sturges v. Crowninshield*, 17 U.S. 122, 203 (1819) (Marshall, C.J.).

the benefit of creditors is a corporation. The lack of discharge is no disadvantage compared to bankruptcy because Chapter 7 also offers no discharge to corporations.<sup>5</sup> Many states continue to utilize the common law assignment, but most have codified the process to some degree. Florida first did so in 1889,<sup>6</sup> enacting a cursory statutory scheme that laid out and added some specificity to the common law rules. In 1987, intending to improve the accessibility of this state-law insolvency proceeding, the Business Section of the Florida Bar sponsored a sweeping amendment to the statute.<sup>7</sup> It laid out the required notices and procedures, articulated and expanded the powers of both the assignee and the court, and specified the order of priority to be followed in distributing the assets of the estate.<sup>8</sup>

Twenty years later, the Business Section of the Florida Bar, under the firm guidance of Mindy Mora, again sponsored a number of amendments to Chapter 727. Twenty years of experience under both the statute and the Bankruptcy Code,<sup>9</sup> as well as the 2005 amendments to the Bankruptcy Code in the Bankruptcy Abuse Prevention and Consumer Protection Act, influenced these amendments, which became effective on July 1, 2007.<sup>10</sup> In some instances, the amendments clarify the effect of an assignment. In other instances, the amendments harmonize the results of an assignment with those of a bankruptcy. But the primary thrust was to strengthen the hand of the assignee and to improve efficiency in gathering and liquidating the assets of the debtor.

One important aspect of the Florida Assignment has long been that the assignee files a petition in circuit court, to which the assignment document along with the schedules of assets and creditors are attached.<sup>11</sup> Because the assignment proceeds as an ongoing case, this greatly simplifies the process of obtaining court assistance. In most instances, court authorizations, approvals of transactions, determinations of bond amounts, orders of cooperation of third parties, and resolutions of disputes are initiated by

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5. A discharge is available in Chapter 7 only to an individual. 11 U.S.C.S. § 727(a)(1) (LexisNexis 2007).

6. Former Chapter 727, as contained in FLA. STAT. §§ 727.01-.08 was derived from Laws 1889, c. 3891, §§ 1-4, 6-9; Rev. St. 1892, §§ 2307-2314; Gen. St. 1906, §§ 2926-2933; Rev. Gen. St. 1920, §§ 4666-4673; Comp. Gen. Laws 1927, §§ 6752-6759.

7. See generally Laws 1987, c. 87-174.

8. See *id.*, comprised of FLA. STAT. §§ 727.101 to 727.116 (1987).

9. See Pub. L. No. 95-598, 92 Stat. 2549 (codified and enacted at 11 U.S.C. §§ 101 to 1501 (1978)).

10. See Pub. L. 109-8, 119 Stat. 23 (2005).

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

motion.<sup>12</sup> In other states in which the assignment proceeds privately, one must initiate an action to obtain the court's assistance.

Typically, before agreeing to take an assignment, the prospective assignee discusses the debtor's circumstances at length with the debtor's principals. The proceeding commences when the assignor and assignee execute an irrevocable assignment,<sup>13</sup> which is immediately effective on delivery to and sworn acceptance by the assignee.<sup>14</sup> The assignor is then required to submit to the assignee's examination under oath concerning the company's prior conduct, financial condition, or any other matter related to the administration of the estate.<sup>15</sup> The assignee may also hire professionals as needed to examine the history and financial condition of the debtor.<sup>16</sup>

Ending the chaotic struggle among creditors trying to snatch a plank from the sinking ship is critical at the outset. This is, of course, one of the key benefits of filing bankruptcy, which imposes the automatic stay against all efforts to collect a claim against the debtor or the debtor's property.<sup>17</sup> The assignment itself, as at common law, stymies the efforts of the unsecured creditors, who now hold no claim against an asset holder.

But what about lien holders? In a Florida ABC, all but consensual lien holders, meaning secured creditors and mortgagees, are prohibited from commencing proceedings against the assignee.<sup>18</sup> Holders of nonconsensual liens, such as judgment, execution, or garnishment liens, must participate in the process. Unless assignees abandon property subject to their claims, they must wait to receive their due at the distribution stage.

If, as is often the case, substantial debtor assets are subject to a consensual lien, and if continued use of the assets is important to the estate, such as where the trustee intends to continue operating the business, the

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12. FLA. STAT. § 727.110(1) provides that all matters requiring court authorization are to be brought by motion except an action to recover money or assets of the estate, an action to determine the validity or priority of a lien, or an action to avoid a conveyance or transfer. These types of actions are brought by "Supplemental Proceeding," which is assigned to the judge to which the main case is assigned, and to which the Florida Rules of Civil Procedure apply. FLA. STAT. § 727.110(2) (2007).

13. FLA. STAT. § 727.104(1)(a) (2007). In the prescribed form, the assignor "grants, assigns, conveys, transfers, and sets over" all of its nonexempt assets to the assignee. *Id.* § 727.104(1)(b).

14. *Id.* § 727.104(1)(e).

15. FLA. STAT. §§ 727.107(3), .108(2) (2007).

16. *See* FLA. STAT. § 727.108(7) (2007).

17. 11 U.S.C. § 362 (2007).

18. *See* FLA. STAT. § 727.105 (2007). Governmental units that enforce police or regulatory powers are able to commence proceedings against the assignee. These actions are also excepted from the bankruptcy automatic stay. 11 U.S.C. § 362(b)(4) (2007).

lack of an ABC automatic stay may be devastating. In this instance, it is imperative that the assignee work with the secured creditor, convincing it to be patient, and to trust that continued operation of the business will result in a greater return to the secured creditor as well as to others. Such patience is not an unrealistic expectation.

Secured creditors are often well aware of the benefits of continued operation and are willing to cooperate, even though they are not strictly required to do so. It is common for the debtor and prospective assignee to arrive at such an agreement with dominant secured creditors before or immediately after executing the assignment. In fact, it is not uncommon for secured creditors, who often will prefer an orderly liquidation outside of a court-supervised process, to suggest the ABC.

Primarily, an ABC facilitates a sale as a going concern, achieves an orderly wind-down, or some of each. Accordingly, the ability to continue operating the business is one of the most important of the assignee's powers. Marketing some or all of the debtor's assets as part of a going concern is sometimes the key to maximizing liquidation value. Assets sold off piecemeal will normally bring a far lower return. Accordingly, the Florida assignee has great flexibility here. If in the best interest of the estate, the assignee may now conduct the assignor's business, without court approval, for at least fourteen days.<sup>19</sup> This important change permits a seamless transition in operation from the assignor to the assignee. No longer is initial court approval required. Operation may continue, without court approval, for up to a total of forty-five days upon notice and until an objection by a party in interest is sustained.<sup>20</sup> Beyond forty-five days, court authorization is required even if no party objects.<sup>21</sup> Of course, hand-in-hand with the assignee's power to operate the business is the power to sell off assets other than in the ordinary course of business. Such sales require court approval on motion.<sup>22</sup> Purchasers of such assets often desire the comfort of a court order approving the sale. For this reason, the amended statute now explicitly authorizes the court to enter an order granting the

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19. 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. *Id.*

20. *Id.*

21. *See id.* One can appreciate the careful balancing of competing needs here. The goal is to permit the seamless continuation of the business, while also providing notice to parties in interest so that they can promptly intervene if they feel the need to do so.

22. FLA. STAT. § 727.109(7) (2007).

motion for approval of the sale, notwithstanding lack of objection, if the assignee reasonably believes that the order is necessary to the sale.<sup>23</sup>

A broadly-expanded panoply of powers, extending well beyond the rights and powers held by the assignor, facilitates the assignee's duty to "collect and reduce to money the assets of the estate."<sup>24</sup> With but a few exceptions, these powers parallel, and in at least one instance exceed,<sup>25</sup> those of a trustee in bankruptcy. First, merely upon notice, any person other than a creditor in possession or control of the estate's assets must turn the assets over to the assignee.<sup>26</sup> Failure to do so, or to obey any court order, is punishable by contempt.<sup>27</sup>

The assignee may now reject leases of both real<sup>28</sup> and personal property under which the assignor is the lessee.<sup>29</sup> To permit the assignee to maximize the assets of the estate, while respecting the interests of lessors, the consequences of a rejection are closely regulated. If the rejection creates a claim for damages, the lessor may claim the back rent plus future rent not to exceed the greater of one year's rent or fifteen percent of the rent for the remaining term, plus attorney's fees, costs, and the cost of reletting.<sup>30</sup> The assignee lacks any comparable power to reject executory leases where the debtor is a lessor, but the assignee could presumably sell the leased asset subject to the lease for its market value.

The assignee may collect any asset by suit in any court of competent jurisdiction.<sup>31</sup> This, of course, envisions suits on contract claims, accounts receivable, or any other of the assignor's causes of action that predated the assignment. The 2007 amendments explicitly expand the assignee's power to enforce tort claims regardless of any generally applicable law concerning

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23. *See id.*

24. FLA. STAT. § 727.108(1) (2007).

25. *See infra* text accompanying note 80.

26. FLA. STAT. § 727.106 (2007). Notice is all that is required to initiate this statutory duty. If a turnover order is needed, the court is empowered to issue one. FLA. STAT. § 727.109(1), (8)(a) (2007).

27. FLA. STAT. § 727.109(14) (2007).

28. Strictly speaking, this power extends only to nonresidential real property. But this limitation is rarely important because corporate assignors do not have personal residences.

29. FLA. STAT. §§ 727.108(5), .109(6) (2007). This power was added in 2007. Exclusion of residential real property will have no meaning to corporate assignors. The amendments did not authorize the assignee as lessee to assume and assign executory leases. This would, of course, be possible under ordinary contract principles if the lessor were to consent to the assignment.

30. FLA. STAT. § 727.112(6) (2007). This section is more generous to the lessor than would be the Bankruptcy Code. The limit on a claim for future rent is the same, but the Bankruptcy Code would not permit a claim for attorney's fees and costs, or the cost of reletting. *See* 11 U.S.C. § 502(b)(6) (2000).

31. FLA. STAT. § 727.108(1) (2007).

the nonassignability of tort claims.<sup>32</sup> Moreover, in derogation of the Fifth DCA holding in *In re: Champaign National Bank v. SOS Industries, Inc.*,<sup>33</sup> which stated that an assignee lacked the power under section 727.108, Fla. Stat., to assign a cause of action to a second assignee, subsection (1)(a) now authorizes the assignee to assign causes of action to a second party pursuant to the assignee's business judgment and subject to notice under section 727.111(4), Fla. Stat.

An additional boon to the assignee is provided by section 727.108(1)(b), Fla. Stat. On occasion, the assignee may want to sue a third party, on behalf of the estate, that has harmed the estate prior to the assignment through conduct in cooperation with the assignor's principals, such as the officers, directors, and managers of the corporation. Participation in a scheme to defraud the public is a common example. Various common law doctrines, such as the unclean hands doctrine or the *in pari delicto* doctrine, seek to prevent persons who have cooperated or participated in such unlawful activities from using the courts to benefit from their wrongful conduct. Thus, if the assignee sues such third parties for the harm done to the assignor corporation, and if the participatory conduct of the principals is attributed to the corporation, these doctrines provide the third parties a defense against the assignee's claim.

Defenses such as these have been asserted effectively against trustees in bankruptcy.<sup>34</sup> However, in a state court proceeding, an assignee who asserts the assignor's rights for the benefit of innocent creditors thereby displaces the managers who have engaged in cooperative wrongful activity. Therefore, these doctrines should not protect either the principals or the third-party participants from liability for the wrongful activity. This is the general rule where a receiver is appointed; the wrongful conduct is not attributed to the receiver.<sup>35</sup> New subsection 727.108(1)(b), Fla. Stat., now insulates the equally innocent assignee. Clearly, where the corporate principals and third parties have cooperatively engaged in conduct harmful to the corporation, the estate, and, therefore, the creditors of the corporation, now stand to benefit greatly from the choice of an assignment over some form of bankruptcy.

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32. This amendment departs explicitly from the rule articulated by the Florida Supreme Court in *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557, 559 (Fla. 1997) ("purely personal tort claims cannot be assigned under Florida law"). Because, for lack of discharge, individuals very rarely execute assignments, this change is probably less momentous than it might first appear. Corporations do not experience purely personal tort injuries.

33. *Champaign Nat'l Bank v. SOS Indus., Inc.*, 815 So. 2d 725, 727 (Fla. 5th DCA 2002).

34. See, e.g., *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1154-56 (11th Cir. 2006).

35. See *Scholes v. Lehman*, 56 F.3d 750, 754 (7th Cir. 1995).



Many of the assignor's pre-assignment transfers may be avoided. Under Article 9 of Florida's Uniform Commercial Code,<sup>36</sup> an assignee for the benefit of creditors, as a lien creditor,<sup>37</sup> receives priority over a security interest in personal property that is unperfected at the time of the assignment.<sup>38</sup> The assignee is also empowered to maintain an action to "[a]void any conveyance or transfer void or voidable by law."<sup>39</sup> Though broadly worded, it clearly contemplates avoidance of transfers under Florida's Uniform Fraudulent Transfer Act, Ch 726, Fla. Stat. (2007). Thus, the assignee may avoid (1) transfers made with actual intent to hinder, delay or defraud creditors;<sup>40</sup> (2) transfers made without receiving reasonably equivalent value, while insolvent;<sup>41</sup> and (3) preferential transfers, within the previous year to insiders while insolvent, if the insider had reasonable cause to believe the debtor was insolvent.<sup>42</sup> Unlike a trustee in bankruptcy,<sup>43</sup> an assignee does not have the power to avoid preferential transfers to creditors unless they are insiders. Oddly, as discussed below,<sup>44</sup> the lack of this power might make an assignment more attractive to a debtor than bankruptcy.

To improve the efficiency of the process and to fairly maximize the distributions to creditors overall, the amendments included a number of devices that regulate the claims process and mitigate against improper claims. First, following expiration of the 120 day bar date,<sup>45</sup> the assignee must create a register of all claims filed against the estate and make it available to all creditors.<sup>46</sup> Resolving an uncertainty that had caused much consternation and litigation, all creditors and parties in interest are now explicitly permitted to challenge the validity, extent, or priority of any claim.<sup>47</sup> This squarely places the real parties in interest, the creditors competing for distributions, in position to compete most effectively. Resolving another source of consternation, the amendments now both

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36. FLA. STAT. Ch. 679 (2007).

37. FLA. STAT. § 679.102(2).

38. FLA. STAT. §§ 679.3171(1)(b), 727.109(8)(b). The assignee does not appear to have the bona fide purchaser power needed to defeat unperfected interests in real property, as does a trustee in bankruptcy. 11 U.S.C. § 544(a) (2000).

39. FLA. STAT. § 727.109(8)(c) (2007).

40. FLA. STAT. § 726.105(1)(a) (2007).

41. FLA. STAT. § 726.106(1) (2007).

42. *Id.* § 726.106(2).

43. 11 U.S.C. § 547(b)(1) (2000).

44. *See infra* text accompanying notes 45-50.

45. FLA. STAT. § 727.112(1), (2) (2007).

46. FLA. STAT. § 727.113(2) (2007).

47. *Id.* § 727.113(3).

facilitate and rein in the deficiency claims of undersecured creditors. Regardless of the general bar date, deficiency claims must be filed on or before the earlier of either sixty days from the date of disposition of the collateral, or ten days from the date of filing and service of the assignee's final report on receipts and disbursements.<sup>48</sup> This provision provides the secured creditor sufficient time to dispose of collateral, while eliminating uncertainty about when such claims are finally disallowed. One final claim-mitigation provision treats the rescission claims of purchasers of the assignor's stock as on par with other shareholders,<sup>49</sup> rather than permitting them to compete with unsecured claims.<sup>50</sup>

### III. ABC OR CHAPTER 7? CLIENT #1

Client #1, Cecilia Craft is the sole shareholder of a closely held corporation, Craft Uniforms, that is insolvent and going downhill. The corporation manufactures commercial uniforms for hotel employees and also makes scrubs for healthcare personnel. Competition from foreign labor has made profitability impossible, and Cecilia is ready to give up trying to make it work. The corporation has some hard assets, in the form of sewing machines and other equipment. It also has a large backlog of inventory in the form of uncompleted uniforms, some accounts receivable from both in-state and out-of-state buyers, and two executory contracts with out-of-state customers. Inventory and accounts are subject to Local Bank's blanket lien. The corporation also has numerous unsecured trade creditors, some unpaid taxes, and back rent due on its premises lease. Last week, Cecilia failed to make payroll because Local Bank cut off her revolving credit line, and at least some of her employees have said they will not continue to work until they get paid.

Because Cecilia has personally guaranteed the Bank debt, she would like the Bank to be as fully paid as possible. Because she hopes to work in the uniform industry in the future, she would like to maintain cordial relations with the trade creditors to the extent possible, some of whom are personal friends. The lawyer she spoke to yesterday advised her to put the corporation into Chapter 7. He said the District panel trustees are experts in liquidating the kinds of assets the corporation has and that the creditors

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48. FLA. STAT. § 727.113(4) (2007).

49. FLA. STAT. § 727.114(3) (2007).

50. This is consistent with the policy of 11 U.S.C. § 510(b)(2000). An unhappy investor, even one who has been defrauded, is treated nevertheless as an investor, and not as a creditor. This amendment explicitly overrules the holding in *Moecker v. Antoine*, 845 So. 2d 904 (Fla. 1st DCA 2003).

will receive top dollar in Chapter 7, which will best mollify the creditors and reduce her exposure on the guaranty.

The back of your neck begins to tingle as you recall the Williamson Rule:<sup>51</sup> “Even though the Bankruptcy Code permits it,<sup>52</sup> with very few exceptions<sup>53</sup> a lawyer should never file a [C]hapter 7 petition for a corporate debtor.” You ask Cecilia a few questions. She tells you that, while she has never done anything “wrong or dishonest,” she may not have observed the corporate formalities as scrupulously as she should have, and she might not have kept the affairs of the corporation entirely separate from her personal affairs. You tell her that she needs to consider an assignment for the benefit of creditors. You begin to explain.

Because Craft Uniforms, Inc., can no longer compete with foreign competitors in the labor intensive uniform industry, sale of the company as a going concern seems unlikely because any buyer would face the same grim labor-market reality. Cecilia hopes to continue working in the industry, utilizing her contacts and her reputation perhaps from a marketing angle, but it has become clear to her that the corporation simply needs a “decent burial”—one that results in maximum payout to creditors. In her opinion, value will be maximized only by completing manufacture of the sizeable inventory of uncompleted goods. Perhaps the unopened bolts of cloth can be resold at near market value, but the hundreds of uniforms that have been cut out need to be completed. If she can keep her people on the job for another month, she is convinced that the market value of the uniforms will exceed the cost of operation.

The problem with Chapter 7, you explain to Cecilia, is twofold. First, most panel trustees are lawyers or accountants who operate independently. They are assigned cases in large numbers. Their task is to efficiently analyze each case to determine whether it is a no-asset case, or,

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51. The rule is so called because it is stated firmly every year to the students in my Advanced Bankruptcy course by Hon. Michael G. Williamson, Federal Bankruptcy Judge, Middle District of Florida. Before appointment to the bench in 2000, Judge Williamson practiced bankruptcy law in Florida for twenty-six years, primarily as a representative of debtors in business reorganizations.

52. 11 U.S.C. § 109(b) (2000) provides that a “person” may be a debtor under Chapter 7 of this title, and 11 U.S.C. § 101(41) (2000) states that the term “person” includes an individual.

53. The primary departure from the rule would be where a corporation that needs to be liquidated has substantial out-of-state assets. The bankruptcy court has jurisdiction in all states, whereas a Florida assignment may not be effective in other states. For example, if a corporation is engaged in multistate operations, management walks out, and there is no hope of continuing operations to realize going concern value, a Chapter 7 would be a better choice than an assignment. On the other hand, where the primary parties in interest are willing to cooperate, simultaneous multistate assignments are possible, but this would be exceptional. Conversation with Mindy A. Mora, Partner, Bilzin Sumberg Baena Price & Axelrod, LLP, in Miami, Fla. (July 20, 2007).

alternatively, whether the debtor has assets that can be readily liquidated for cash. Panel trustees do not maintain staffs of people experienced in operating a business, and rarely do they operate businesses themselves. A trustee looking at Craft Uniforms will be likely to view the uncompleted uniforms as having no meaningful resale value, and abandon the valueless inventory to the Bank. On the other hand, the trustee is likely to view the sewing machines and other equipment as readily saleable assets. As a result, Cecilia's liability on her personal guarantee, not payment on Bank's secured claim, will be maximized. The second problem with Chapter 7, you explain, is that when the trustees take over, Cecilia will be excluded from the liquidation process, whereas in an ABC, the principals can normally participate to whatever extent they choose to, as long as they have not previously engaged in illegal or improper conduct.<sup>54</sup>

Turning to the possibility of an ABC, you explain that in the first instance, your legal fees will be lower than if you were to file a Chapter 7. The required documentation is much simpler. The blanks in the statutorily provided Assignment form must be filled in and the assignee must accept the assignment.<sup>55</sup> A schedule of creditors and a schedule of assets must be verified under oath and attached.<sup>56</sup> The assignee must record the assignment and schedules in the county in which the assignor's principal place of business is located, also in other counties in which assets are located, and must file a petition with the circuit court.<sup>57</sup> And that is it. There is no schedule of executory contracts and unexpired leases,<sup>58</sup> and no Statement of Financial Affairs,<sup>59</sup> which can be extremely complex for even a small business. Only the assignor verifies the schedules under oath.<sup>60</sup>

The primary attraction of an assignment from Cecilia's point of view is that professional assignees are not only expert in liquidating assets, but they are also set up to operate a business as long as need be to maximize

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54. Some of the lawyers I spoke to believe trustees have a greater tendency than do assignees to scrutinize transactions between the assignor corporation and its pre-assignment principals. Others believe assignees are equally aggressive here, as the circumstances demand.

55. FLA. STAT. § 727.104(1)(b), (e) (2007).

56. *Id.* § 727.104(1)(c), (d). The form calls for a listing of both nonexempt and exempt assets. Of course, nearly all assignors are corporations, which do not have exemptions.

57. *Id.* § 727.104(2).

58. Sched. G—Executory Contracts and Unexpired Leases, Official Form 6G (Dec. 2007).

59. Statement of Financial Affairs, Official Form 7 (Dec. 2007).

60. The assignee accepts the assignment under oath, but does not verify the schedules. FLA. STAT. § 727.104(1)(e) (2007).

return by realizing some form of going-concern value.<sup>61</sup> They commonly maintain a staff of people expert in doing so. They are also expert in convincing secured creditors and lessors to be patient. Granted, Local Bank may be weary of having dealt with Cecilia while she was trying unsuccessfully to make a go of Craft Uniforms, but once the assignee takes over, there is a sea of change in the goals of the operator. Rather than hoping to turn the business around and return to profitability, a hope usually held by the owner (sometimes called debtor euphoria) far longer than by the frustrated secured creditor, the goal is simply to continue operating only so long as doing so increases liquidation value. Accordingly, the assignee may well be able to convince the Bank to provide additional operating funds to complete the uniforms.<sup>62</sup> Critical elements in the assignee's pitch to the Bank are the assignee's personal reputation in the community for integrity and the track record for successful liquidations of sometimes complex businesses that required temporary continued operation. Also protecting the Bank are the facts that the assignee must be an individual<sup>63</sup> who must personally post a bond in an amount not less than double the liquidation value of the assets.<sup>64</sup> Clearly, maintaining a reputation for integrity is of utmost importance to anyone who wishes to continue in the assignee business.<sup>65</sup>

By maximizing the value of the inventory, and minimizing the Bank's deficiency claim, Cecilia's guaranty liability will also be minimized. By minimizing the Bank's unsecured claim, the trade creditors are also benefitted, and Cecilia's future business relationships improved. Furthermore, because assignees owe a fiduciary duty to all creditors, they will also look into the prior dealings between the debtor and its principals, but it is not the assignee's first instinct. Negotiations will proceed with respect to the potential liabilities of the principals, and the result of these negotiations will be woven into the overall conclusion—a conclusion

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61. "Assignees usually get some going concern value. Trustees very rarely do." Conversation with Patricia A. Redmond, S'holder, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., in Miami, Fla. (July 17, 2007).

62. If Local Bank is unwilling to finance continued operation, it is not uncommon for the principals of the debtor and assignor, who are usually guarantors, to finance operations for a short time out of their own funds. The return on this investment is, of course, reduced liability on the guaranty. *Id.*

63. FLA. STAT. § 727.103(2) (2007).

64. FLA. STAT. § 727.104(2)(b) (2007).

65. Frequently, secured creditors have sufficient confidence in the assignee to permit posting of a bond of a significantly lesser value, recognizing that the cost of the bond premium will come out of the distribution to the secured creditor. Conversation with John D. Emmanuel, S'holder, Fowler White Boggs Banker, in Tampa, Fla. (Oct. 24, 2007) [hereinafter Emmanuel].

comparable in all respects to that of a bankruptcy, but arrived at through a less litigious and less costly process.

Cecilia is convinced. She authorizes you to get going on an ABC. You make an appointment with an experienced professional assignee, and an appointment with managers of Cecilia's Bank.

#### **IV. ABC OR CHAPTER 11? CLIENT #2**

Client #2, Hugh Roller, is a wealthy entrepreneur who has received disappointing news about a restaurant business he started up four years ago. It was a joint effort between Roller, the financier, and his friend Marty Manager, who was to operate the business. Roller is the majority shareholder, holding sixty percent of the shares of the corporation. With Roller's money, they formed the corporation, called Amelia & Mario, Inc., and bought two related restaurants, Amelia's Restaurant and Mario's Restaurant. Both interiors were refurbished, and modern equipment was ordered. Roller was not to be bothered with day-to-day details, and over the years he had trusted Manager's assurances that things were going well. Manager was even talking about opening a third restaurant. Roller has now discovered that it was all a lie. Roller has taken over management, and his accountant has been looking into the corporate books. It appears the corporation has incurred substantial debt to its suppliers, and the accountant has uncovered a number of questionable transactions. Eight months ago the corporation had written a \$10,000 check to Manager's mother, ostensibly to repay her for payroll checks she had written to various employees at a time when cash was short. Manager had also recently sold off some of the new kitchen equipment at fire sale prices in order to make a \$20,000 payment to Foodco, the restaurants' primary food supplier, which had been threatening to refuse future deliveries unless arrears were made up. One of the restaurants, Mario's, has been operating at a loss for some time, whereas the other, Amelia's, which leases space in an excellent location, is barely profitable. Amelia's is the more up-scale of the two, and serves dinner only.

One of the worst things Roller has discovered is what he calls the cooking-school disaster. With the help of Public Relations Firm, Inc. (PRF), Manager induced ten retirees to invest \$10,000 each in a new business called Amelia's Cooking School. It is unclear precisely what the "investors" thought they were buying. The school was to be operated by Amelia's at lunch time. Customers were to come in the morning, pay a fee to watch the chef cook exotic dishes for their lunch, and then they would eat the lunch they had learned to cook. The invested money went directly

to PRF and to Manager. The cooking school never got off the ground, and the investors sued the corporation for fraud. Manager ignored the law suit, and a default judgment has just been entered against the corporation for \$100,000. You quickly check online and discover that the plaintiffs filed a judgment lien certificate yesterday.<sup>66</sup> Again, the back of your neck begins to tingle, recognizing that an execution levy on a restaurant could be disastrous.

Roller tells you that he wants to get rid of Manager and that Mario's should be razed, but that he would like to continue to own and operate Amelia's, which he believes has good potential. He went to see a bankruptcy lawyer who told him to file a Chapter 11 bankruptcy petition. The attorney told him that the automatic stay would protect against any foreclosure. It would then be possible to close down Mario's, pay something back to the unsecured creditors, and with a modest additional investment, perhaps hold on to Amelia's, either through something called the "new value exception," or by purchasing at a "363 sale." The bankruptcy lawyer also told Roller that the corporation might qualify for a small business Chapter 11, which is less complex than a full-blown Chapter 11.

You tell Roller he should consider an assignment for the benefit of creditors. You begin to explain that a Chapter 11 is much more complicated than an ABC. Typically, an ABC results in about half of the fees and costs of a Chapter 11.<sup>67</sup> This is because an ABC does not involve a U.S. Trustee or any debtor-in-possession reports,<sup>68</sup> which, because they are seen as among the most important of the debtor's duties,<sup>69</sup> must be

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66. This is accomplished simply by going on the Internet to <http://www.sunbiz.org/search.html>.

67. Conversation with R. Scott Shuker, Partner, Latham, Shuker, Eden & Beaudine, LLP, in Orlando, Fla. (July 17, 2007).

68. The debtor in possession is required to perform most of the duties of a trustee. 11 U.S.C. §§ 1107(a), 1106(a)(1) (2000) require the debtor in possession to perform most of the duties explicitly listed in 11 U.S.C. § 704 (2000). If the business of the debtor is to be operated, the debtor in possession must file periodic reports and summaries of the operation of the business with the court, the U.S. Trustee, and any taxing authority. This includes a statement of receipts and disbursements, and such other information as the U.S. Trustee or the court requires, 11 U.S.C. § 704(a)(8) (2000), as well as a final report and final account of the administration of the estate. 11 U.S.C. § 704(a)(9) (2000).

69. Failure to file these reports is cause for conversion or dismissal of the case, or cause for appointment of a trustee. *See, e.g., Roma Group, Inc. v. Office of the U.S. Tr. (In re Roma Group)*, 165 B.R. 779, 780 (S.D.N.Y. 1994); *In re Wilkins Inv. Group, Inc.*, 171 B.R. 194, 195 (Bankr. M.D. Pa. 1994). One court stated, "[t]his statutory obligation to keep creditors and the Court informed regarding the status of its business undergoing reorganization, is perhaps one of the most

taken seriously and can be quite burdensome. Also absent from an ABC are creditors' and equity security holders' committees, which, by employing various professionals,<sup>70</sup> can add greatly to the fees and costs of a Chapter 11 proceeding. You tell Roller that you will need to weigh carefully the relative advantages of a Chapter 11 and an ABC, and that you will need some time to think about it, recognizing that an execution may be looming. You agree to reconvene in the afternoon.

The automatic stay is extremely attractive. Most sheriffs and creditors' lawyers understand automatic stays. A phone call coupled with prompt written notice will normally put a stop to whatever is in process. You recognize that by filing a judgment lien certificate the plaintiffs in the fraud suit have obtained a lien on all leviable personal property of the corporation.<sup>71</sup> However, the lien is not consensual lien, which is the only lien that creditors may assert against an assignee. So, an assignment will require the plaintiffs to hold off on the levy and participate in the administration of the estate. Unfortunately, most creditors, and probably most sheriffs, do not know that an assignee is not a proper defendant in an enforcement action. So, if you decide to recommend an ABC, in order to avert a levy, you may need to obtain a court order instructing the plaintiffs not to proceed to enforce their liens. Fortunately, your call to the Clerk of the Court informs you that no writ of execution has yet been issued to the plaintiffs, so you have some time. Otherwise, as a practical matter, filing bankruptcy might be the only way to avert a levy if time is extremely short.

Turning to the relative advantages of the two processes, you note that a number of transfers might be voidable in bankruptcy: the sale of the equipment at fire sale prices, the \$10,000 payment eight months ago to Manager's mother, and the recent \$20,000 payment to Foodco.

As to the first two, there is no disadvantage in an ABC. If the equipment sale was for less than reasonably equivalent value at a time when the corporation was insolvent, it is equally voidable in both bankruptcy<sup>72</sup> and in an ABC.<sup>73</sup> The preferential payment to an insider, Manager's mother, within the preceding year is also equally voidable in

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important fiduciary obligations placed upon the debtor in possession." *In re UNR Indus., Inc.*, 42 B.R. 99, 101 (Bankr. N.D. Ill. 1984).

70. The U.S. Trustee appoints these committees as deemed appropriate. 11 U.S.C. § 1102(a)(1) (2000). The costs and fees of any professionals hired by these committees are allowed administrative expenses. 11 U.S.C. § 503(b)(3)(F) (2000).

71. FLA. STAT. § 55.202(2)(a) (2007).

72. 11 U.S.C. §§ 548(a)(1)(B), 544(b) (2000).

73. FLA. STAT. §§ 727.109(8)(c), 726.106(1), .105(1)(b) (2007).



both bankruptcy<sup>74</sup> and in an ABC.<sup>75</sup> The recent \$20,000 payment to Foodco, however, presents a conundrum. Preferential transfers to non-insiders within the ninety days prior to bankruptcy are voidable in bankruptcy,<sup>76</sup> but not in a Florida ABC.<sup>77</sup> But permitting Foodco to retain this payment may not be so bad. If Amelia's is to continue operating, it will be desirable to maintain a cordial relationship with the primary food supplier. Surely, avoidance of this payment would put an end to the relationship. Depending on the availability of alternate suppliers, and recognizing that avoiding the payment will add a \$20,000 claim against the estate, the value of the relationship to Amelia's may well enhance the value of the business in an amount comparable to the amount of the payment. Of course, large preferential payments to non-insiders make bankruptcy the clear choice. But smaller payments to critical vendors may present a closer call.

What about the cooking school disaster? Working together, Manager and PRF have caused the corporation to incur a \$100,000 judgment for fraud, enriching themselves in the process. In effect, they have bilked the investors through fraudulent misrepresentation of corporate authority. Obviously, the corporation should sue Manager for breach of his duty of loyalty, and should sue PRF for its knowing assistance in promulgating the fraud.<sup>78</sup> You anticipate that PRF will attempt to defend this suit on the basis of the *in pari delicto* doctrine. By attributing the actions of Manager to the corporation, the corporation itself will be treated as a participant in

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74. 11 U.S.C. § 547(b)(4)(B) (2000).

75. FLA. STAT. §§ 727.109(8)(c), .106(2), .110(3) (2007).

76. 11 U.S.C. § 547(b) (2000).

77. In a number of states, an assignee has the power to avoid preferential transfers comparable to that of the trustee in bankruptcy. See S.C. CODE ANN. § 27-25-20 (2006); N.C. GEN. STAT. § 23-3 (2007). This step in strengthening the assignee's hand was not taken by the Business Section of the Florida Bar. Recent litigation has raised the question of whether the Bankruptcy Code preempts or prohibits states from giving assignees this power. See *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir. 2005). But see *Ready Fixtures Co. v. Stevens Cabinets*, 488 F. Supp. 2d 787 (U.S.D.C. W.D. WI 2007).

78. For example, Florida courts recognize a claim for aiding and abetting breach of fiduciary duty. The elements are 1) a fiduciary duty on the part of the primary wrongdoer; 2) a breach of fiduciary duty; 3) knowledge of the breach by the alleged aider and abettor; and 4) the aider and abettor's substantial assistance or encouragement of the wrongdoing. *In re Caribbean K Line, Ltd.*, 288 B.R. 908 (S.D. Fla. 2002) (applying Florida law); *In re Meridian Asset Mgmt., Inc.*, 296 B.R. 243 (Bankr. N.D. Fla. 2003) (applying Florida Law). See also *Insight Tech., Inc. v. Freight Check, LLC*, 633 S.E.2d 373 (Ga. App. 2006).

the fraud. In case after case, the *in pari delicto* defense has been effectively asserted in bankruptcy against trustees and debtors in possession.<sup>79</sup> In a Florida ABC, however, the defense will fail. Amended section 727.108(1)(b), Fla. Stat., states: "In an action . . . by the assignee . . . to assert a claim or chose in action of the estate, the claim is not subject to[] . . . a defense based on the assignor's acquiescence, cooperation, or participation in the wrongful act by the defendant . . . ."<sup>80</sup> Here, the choice between bankruptcy and a Florida ABC is clear. If the estate has a substantial claim against a solvent defendant that might benefit in bankruptcy by the *in pari delicto* defense, an ABC should be the clear choice over any form of bankruptcy. If there are concerns that this litigation might be protracted, unduly delaying resolution of the case, the assignee is now clearly empowered to sell or assign the action to another person or entity on terms the assignee determines are in the best interest of the estate.<sup>81</sup>

When a debtor chooses an ABC, the debtor always risks an involuntary bankruptcy petition. Clearly, PRF will prefer to see the matter proceed in Chapter 11. However, involuntary petitions may be brought only by persons with undisputed claims against the estate.<sup>82</sup> Even if PRF were to buy a claim or a number of claims against the estate, where a debtor has more than twelve creditors, no single entity can file an involuntary petition.

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79. See Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145 (11th Cir. 2006); Official Comm. of Unsecured Creditors of Color Tile v. Coopers & Lybrand, LLP, 322 F.3d 147 (2d Cir. 2003); Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340 (3d Cir. 2001); Terlicky v. Hurd (*In re* Dublin Sec.), 133 F.3d 377 (6th Cir. 1997), Sender v. Buchanan (*In re* Hedged-Inv. Assocs.), 84 F.3d 1281 (10th Cir. 1996); Grassmuck v. Am. Shorthorn Ass'n, 402 F.3d 833 (8th Cir. 2005). I have argued that these cases are wrongly decided in that they misapply 11 U.S.C. § 541 (2000), but to no avail. See Jeffrey Davis, *Ending the Nonsense: The In Pari Delicto Doctrine Has Nothing To Do With What is § 541 Property of the Bankruptcy Estate*, 21 EMORY BANKR. DEV. J. 519 (2005). See also William McGrane, *The Erroneous Application of the Defense of In Pari Delicto to Bankruptcy Trustees*, 29 CAL. BANKR. J. 275 (2007).

80. FLA. STAT. § 727.108(1)(b) (2007).

81. *Id.* § 727.108(1)(a); 11 U.S.C. § 303(h)(2) (2000) provides that one of the grounds for granting an involuntary petition is appointment of a custodian within the 120 days prior to filing the petition. A "custodian" includes an assignee under a general ABC. 11 U.S.C. § 101(11)(B) (2000). Strictly speaking, an involuntary petition could be filed more than 120 days after an ABC, but it is highly unlikely. An assignee is excused from the duty to cease making disbursements and turn over the property of the debtor if the assignee took possession more than 120 days before the filing of the petition; compliance with those duties is found to be necessary to prevent fraud or injustice. 11 U.S.C. § 543(d)(2) (2000).

82. 11 U.S.C. § 303(b) (2000).

At least three are needed.<sup>83</sup> Therefore, it will be important to convince everybody else that an ABC is the better choice. This is an art form at which assignees and their lawyers are particularly skilled, and the prospect that the estate will benefit from a substantial recovery from PRF will provide cooperative incentive to all others. The key to staying in an ABC when surrounded by skeptics is continued creditor trust borne of complete transparency and regular disclosure.<sup>84</sup> If a group of creditors is particularly skeptical, one effective approach is to encourage them to operate as a *de facto* creditors' committee.<sup>85</sup>

If, during the first 120 days following the assignment, three creditors join in an involuntary petition, the bankruptcy court can abstain from exercising jurisdiction<sup>86</sup> or grant a motion to dismiss<sup>87</sup> on the ground that the interests of creditors and the debtor would be better served by such suspension or dismissal because "another forum is available to protect the interests of both parties or there is already a pending proceeding in a state court (e.g., assignment for benefit of creditors)."<sup>88</sup> Bankruptcy Courts have emphasized that abstention and dismissal are most appropriate in an involuntary case.<sup>89</sup> The debtor's right to costs and attorney's fees in the event of dismissal, plus actual and punitive damages if the creditors filed the petition in bad faith, provide additional deterrent incentive.<sup>90</sup>

By the afternoon, you have decided to advise Roller to execute an ABC rather than filing some form of Chapter 11. You lay out for him the

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83. *Id.*

84. Conversation with Michael Moecker, Chairman and CEO, Michael Moecker & Assoc., Inc., an experienced professional assignee, years ago.

85. Conversation with R. Scott Shuker, Partner, Latham, Shuker, Eden & Beaudine, LLP, in Orlando, Fla. (July 18, 2007).

86. 11 U.S.C. § 305 (2000).

87. 11 U.S.C. § 1112(b)(1) (2000).

88. *In re Mineral Hill Corp.*, 16 B.R. 687, 688 (Bankr. D. Md. 1982). *See also In re M. Egan Co.*, 24 B.R. 189, 191 (Bankr. W.D.N.Y. 1982).

89. For example, in *In re Bailey's Beauticians Supply Co.*, 671 F.2d 1063 (7th Cir. 1982) the Seventh Circuit affirmed dismissal of an involuntary petition, noting that the assignee's administration of the estate was competent and that the creditors as a whole would profit from the continued administration of the estate by the assignee. *Id.* at 1067. *See also In re Pine Lake Vill. Apartment Co.*, 16 B.R. 750, 753 (Bankr. S.D.N.Y. 1982); *In re Artists' Outlet, Inc.*, 25 B.R. 231, 234 (Bankr. D. Mass 1982).

90. 11 U.S.C. § 303(i) (2000). Following dismissal of a petition that had been filed after the debtor filed an ABC, having found that the petitioning creditors were not in fact creditors of the debtor, Judge Paskay suggested that he would have considered awarding actual damages in addition to costs and attorney's fees, but attempting to quantify lost sales as a result of the involuntary petition "would be nothing more than speculation." *In re Ed Jansen's Patio, Inc.*, 183 B.R. 643, 644 (Bankr. M.D. Fla. 1995).

analysis you have just gone through, above. He is inclined to accept your recommendation, but he wants your assurance that he will be able to purchase Amelia's at a reasonable price from the assignee, free of liens and any claim by Manager. He also wonders why an ABC is preferable to proceeding through either the new value exception or a section 363 sale in a regular Chapter 11, or perhaps a small business Chapter 11, as he had been advised.

You explain that both the confirmation of a new value exception plan and completion of a section 363 sale are more cumbersome than execution of an ABC sale, and in both Roller risks having to pay a higher price for Amelia's. To take advantage of the new value exception, Roller, President of the debtor in possession, will have to go through the highly formalized plan confirmation process.<sup>91</sup> In addition to all of the formalities, a court will probably take expert testimony about the value of Amelia's, which will determine the value Roller will have to pay.<sup>92</sup> A section 363 sale is usually preferred because it avoids the lengthy confirmation process, and requires far less documentation.<sup>93</sup>

On notice and hearing, section 363 authorizes a sale of property of the estate outside of the ordinary course of business.<sup>94</sup> However, because Roller is the chief shareholder and President of the debtor in possession, the sale would be subject to heightened scrutiny by the U.S. Trustee. The

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91. This will require that he formulate a plan calling for a sale of Amelia's to himself, draft a disclosure statement that describes the plan, go through a hearing in which the disclosure statement is approved, solicit votes on the plan, and go through another hearing in which the plan is confirmed. On its face, such a plan is not permitted because the Bankruptcy Code states that unless all classes of claims accept the plan, interest holders such as Roller may not receive any property under the plan. 11 U.S.C. § 1129(b)(2)(C) (2000). This is known as the absolute priority rule.

92. The judge-made exception to the absolute priority rule, see *id.*, allows an interest holder to receive property under the plan if he or she contributes new value in the form of cash or a realizable money's worth to the plan that reflects the full value of the opportunity retained. To assure top-dollar value, the opportunity must be tested against some form of market valuation. *Bank of Am. Nat'l Trust & Savings Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 457-58, (1999). This requirement may be satisfied by relinquishing exclusivity and opening the door to proponents of competing plans. More commonly, this requirement is satisfied by introducing expert testimony as to value. The bankruptcy judge would then rule as to whether Roller's proposed purchase price met this standard.

93. Most 363 sales are followed by confirmation and are done in concert with a plan, but the process is largely formal. This avoids arguments that the sale is a *de facto* plan that fails to comply with the requirements of confirmation. See, e.g., *In re Braniff Airways, Inc.*, 700 F.2d 935, 939-40 (5th Cir. 1983). It also carries the substantial benefit of 11 U.S.C. § 1146(a) (2000), which provides that delivery of an instrument of transfer under a confirmed plan may not be taxed under any law imposing a stamp tax or similar tax.

94. 11 U.S.C. § 363(b) (2000).

public will have to be invited to participate in the purchase. Typically, a prospective buyer, called the stalking horse, will make an initial bid after assessing the going concern value of the entity to be sold. Because bankruptcy sales are subject to court approval, and because the court will not approve a price lower than another buyer is willing to pay, an auction will be held. Following the hearing in which the court rules on the bidding procedures to be followed,<sup>95</sup> prospective buyers compete to purchase the business. The debtor will then assess the value of the final bids and choose the highest and best, meaning the one that provides the greatest benefit to creditors. The court must then approve the choice, normally issuing a sale order free and clear of all liens, claims, and interests.<sup>96</sup> Although decidedly simpler than a contested plan confirmation process, a section 363 sale requires at least two hearings, one to approve bid procedures and a second to oversee the auction and approve the sale. As for a small business Chapter 11, which is reputed to provide a simplified reorganization process, you point out that the procedural simplifications are quite modest,<sup>97</sup> the 2005 amendments have made the small business Chapter 11 more complex,<sup>98</sup> and determining eligibility can be difficult and complex.<sup>99</sup>

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95. These procedures may include certain types of bid protection, to compensate the stalking horse for its effort in putting together the initial bid, in the event it is outbid at the auction.

96. See Michael B. Solow & Harold D. Israel, *Buying Assets in Bankruptcy: A Guide to Purchasers*, 10 J. BANKR. L. & PRAC. 87 (2000).

97. The primary simplification for small businesses is that the hearing on the adequacy of the disclosure statement may be merged with the confirmation hearing. 11 U.S.C. § 1125 (f) now provides that the court may determine that the plan contains sufficient information such that no disclosure statement is required. Disclosure statements may now be submitted on standard forms and conditionally approved with final approval to be given at the confirmation hearing. 11 U.S.C. § 1125(f) (2000).

98. Section 308 establishes new reporting requirements for small business debtors. 11 U.S.C. § 308 (2000). They must file periodic reports setting out their "profitability," reasonable approximations of their projected cash receipts and disbursements, comparisons of their actual receipts and disbursements to earlier projections, and stating their compliance with the Bankruptcy Rules, tax and other governmental filing obligations, and the payment of taxes. *Id.* New § 1116 sets out a list of seven duties for the trustee or debtor in possession in small business cases, which include filing financial statements and tax returns within seven days of the order for relief, meeting with the U.S. Trustee prior to the § 341 meeting, timely filing of other documents and tax returns in the case, and permitting the U.S. Trustee to inspect the debtor's premises, books, and records. 11 U.S.C. § 1116 (2000).

99. Section 101(51D) defines "small business debtor" as a person engaged in commercial activities (other than owning and operating real estate) who has no more than \$2,190,000 in noncontingent liquidated debt to noninsiders for a case in which the U.S. Trustee has not appointed a creditors' committee, or if a committee was appointed, it "is not sufficiently active and representative to provide effective oversight of the debtor[.]" 11 U.S.C. § 101(51D)(A) (2000). So a debtor with sufficiently low debt would qualify at the time of filing. Then, if a committee is

In contrast, an assignee has much greater overall freedom and flexibility in selling the assigned property. Oversight is provided by the creditors and other parties in interest, all of whom are entitled to receive notice of and to object to any action by the assignee requiring court approval.<sup>100</sup> Assuming the assignee agrees that the best action to take is to liquidate Mario's and continue operating Amelia's until it can be sold, there is nothing to prohibit Roller from attempting to purchase Amelia's as a going concern. Of course, the judgment lien holders, as secured creditors, will have to agree to a sale free of their judgment liens on all of the corporation's leviable personal property,<sup>101</sup> which consists primarily of the furniture, fixtures, and equipment of the two restaurants. Following sale of the Mario's equipment, an agreement will have to be reached as to the value of the Amelia's equipment, which will define the lower limit of the price Roller will have to pay. Roller and the assignee will then need to arrive at an agreement as to the additional intangible value of Amelia's. One of Amelia's greatest attractions is its location. However, because an assignee lacks the power to assume the lease and sell it to a third party, the best way for creditors to realize the value of the lease is for Amelia's to be sold as a continuing business. This will require the landlord's consent.<sup>102</sup> If Roller and the assignee can arrive at an agreeable figure for the premium to be paid above the value of the hard assets, the assignee can move for court approval of the sale.

Throughout these negotiations, the assignee will exercise his or her business judgment with an eye to the fiduciary obligation to creditors. However, where the assignee has in hand a buyer willing to pay a price the assignee deems fair, the sale will normally be consummated. Although assignees occasionally hold auctions, the assignee's determination that the price is fair will normally be based on the assignee's own test of market value through prior advertisements and solicitations of potential buyers, coupled with notice to creditors and all parties interested in the sale itself.<sup>103</sup> Of course, all proposed ABC sales are subject to creditor objection, and a determined creditor dissatisfied with the agreed price will

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appointed, the debtor would be disqualified, unless the court were to determine that committee is insufficiently active and representative, which would again qualify the debtor as a small business.

100. FLA. STAT. § 727.111 (2007).

101. FLA. STAT. § 55.202 (2007).

102. Throughout the process, the assignee must keep the landlord on board, through a combination of rent payments and assurances that things would work out in the long run. Once the process has progressed as far as a sale, the landlord will normally consent to assignment of the lease, as long as the landlord is adequately assured of continued rent. Emmanuel, *supra* note 65.

103. Conversation with Patricia A. Redmond, S'holder, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., in Miami, Fla. (July 18, 2007).

have an opportunity to insist on an auction. If the assignee does hold an auction, it will still be a more efficient one-step process, compared to the two-hearing process under section 363. However, because ABCs are less structured than bankruptcy sales, it is more likely that an assignee who believes an auction to be unnecessary can avoid that process and sell to the initial sole proposed buyer.<sup>104</sup> Indeed, it is precisely by avoiding unnecessary expense that both the assignee and the creditors receive the maximum payout.

Roller is convinced. You pick up the phone.

## V. SUMMARY AND CONCLUSION

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. Furthermore, the complex bankruptcy processes provide numerous creditor protections coupled with oversight of the U.S. Trustee. However, where a debtor does not need the special bankruptcy powers, the cumbersome creditor protections may also not be needed. By relying instead on the judgment and integrity of experienced assignees who must constantly convince creditors that they are acting in the creditors' best interest, an assignment for the benefit of creditors, where appropriate, will often produce the better outcome for all.

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104. Conversation with Hon. Michael G. Williamson, Fed. Bankr. Judge, Middle Dist. of Fla., in Tampa, Fla. (Sept. 26, 2007).