

# THINKING ABOUT BANKRUPTCY? THINK ABOUT LEARNING YOUR ABCS

Since 1987, an Assignment for the Benefit of Creditors (“ABC”) has been a business-liquidation device available to insolvent debtors in Florida and serves as what many deem to be an alternative to bankruptcy. In spite of its reputation as a more cost effective and “friendly” alternative to bankruptcy, ABCs have never seemed to garner the same “popularity” as bankruptcy. However, on July 1, 2007, the amendments to Florida’s Assignment for the Benefit of Creditors statute, §727.001, et al. (collectively the “ABC Statute”), went into effect and streamlined various procedures, moving the ABC one step closer to its federal counterpart.

## CHANGES TO THE ABC STATUTE 1. INCREASING THE POOL OF ASSETS

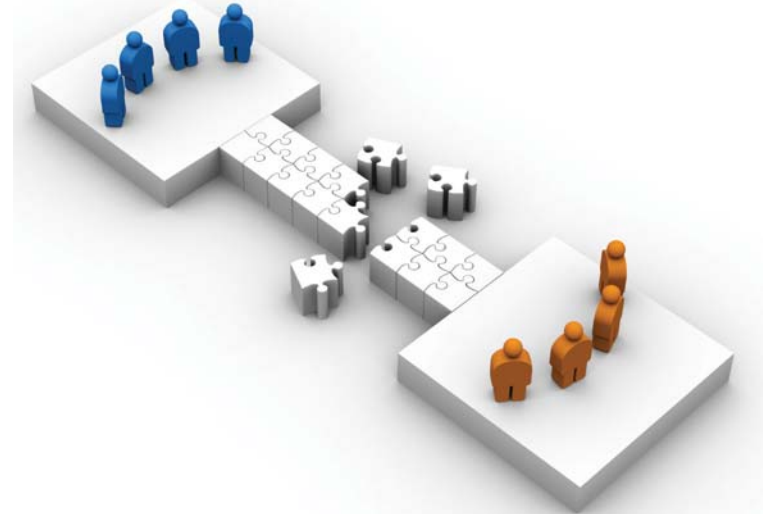
While it is unclear what impact the changes will have at this time, there are noteworthy amendments that have the potential of increasing the pool of assets from which creditors may obtain a recovery on their claims and maximize distributions.

Prior to the amendments, Fla. Stat. §727.103<sup>1</sup> was unclear whether an “asset” encompassed tort claims, such as medical or legal malpractice claims, or even contract based claims. In late 2005, the Florida Supreme Court strained to find that the assignment of a legal malpractice claim is proper where it did not involve personal services and there was no danger of the attorney-client privilege becoming an issue<sup>2</sup>. The amended ABC Statute clarified such issues and included tort claims and contractual causes of action in the definition of “asset”. While, bankruptcy courts, and the United States Supreme Court, have long given the phrase “property of the estate” a broad construction and have included tort claims as assets belonging to the estate<sup>3</sup>, the changes to Fla. Stat. §727.103 shrink the gap between an ABC and bankruptcy, while increasing the responsibilities of an assignee.

Additionally, Fla. Stat. §727.108 now voids any defense against an assignee, or the first immediate transferee of the assignee, to a defense based upon the assignor’s “acquiescence, cooperation or participation in the wrongful act by the defendant which forms the basis of the claim or chose in action.”<sup>4</sup> In other words, the wrongs of the assignor cannot be imputed to the assignee. This change to the ABC Statute stands opposite of recent bankruptcy case law in which the Eleventh Circuit held that “because the doctrine of *in pari delicto* depends on the “personal malfeasance of the individual seeking to recover... the wrongs of the debtors should be imputed to him as bankruptcy trustee.”<sup>5</sup> Therefore, depending on the type of case, this change to the ABC Statute may have great impact on the amount ultimately recovered for creditors.

## 2. PRIORITY OF CLAIMS

Similar to a bankruptcy, an ABC makes distributions to creditors in an order mandated by statute. The amendments to the ABC Statute give increased credence to employees and consumers and echo the recent changes made to the Bankruptcy Code. For example, Fla. Stat. §727.114(d) gives wage, salary and compensation priority going back 180 days before the filing date, rather than 90 days, and up to \$10,000.00 instead of \$2,000.00. In addition, consumer deposits in connection with the purchase, lease or rental of property or services that were never provided or delivered, now have priority of up to \$2,225.00, rather than just \$900.00. By way of comparison, the



increased amount of priority given for wages and compensations mirrors the Bankruptcy Code<sup>6</sup>, while creditors with consumer deposits would actually fare better in an ABC<sup>7</sup>.

## THE “Z” TO THE ABC

While the amendments to the ABC Statute do not change the primary distinctions between an ABC and a bankruptcy, i.e., the availability of a discharge in an individual chapter 7 case and the lack of any automatic stay provisions in ABC proceedings, the changes to the ABC Statute may make it a more viable alternative to bankruptcy.

<sup>1</sup>Fla. Stat. §727.103(1).

<sup>2</sup>Cowan Liebowitz & Latman, P.C., et al v. Kaplan, 902 So. 2d. 755 (Fla. 2005).

<sup>3</sup>See Johnson, Blakeley, Pope, Bokor, Ruppel & Burns, P.A. v. Alvarez (In re Alvarez), 224 F. 3d 1273 (11th Cir. 2000)(holding that legal malpractice claims belonging to debtor as of filing belonged to estate and that only trustee could bring such action in absence of abandonment of same by trustee); Alipour v. Thomas (In re Alipour), 252 B.R. 230 (Bankr. M.D. Fla. 2000)(allowing Chapter 7 trustee to substitute as party in debtor’s legal malpractice action).

<sup>4</sup>Fla. Stat. §727.108(1)(b).

<sup>5</sup>Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145 (11th Cir. 2006).

<sup>6</sup>See 11 U.S.C. §507(4).

<sup>7</sup>11 U.S.C. §507(7) allows priority of a consumer deposit up to \$1,800.00.

<sup>8</sup>The authors note that there are several other distinctions between bankruptcy and the assignment process, most notably the availability of an automatic stay in bankruptcy, but in an effort to streamline this article, have not delved into such. ☺



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