

ABC Statute Revision Subcommittee Report

After the 2021 Winter Meeting, the ABC Statute Revision Subcommittee met and identified potential issues within the statute and possible areas for revision. The Subcommittee categorized the issues and assigned them to four Study Groups:

- Court Authority
- Assignor & Assignee Duties
- Litigation
- Actions Against Assignee

The Study Groups then met individually and determined that the following issues require further discussion within the full Subcommittee:

Purpose or mission of the statute.

The Court Authority study group discussed the existing Section 727.101 and whether it should be revised or updated. The group also discussed whether an interpretation provision could be warranted, analogous to 11 U.S.C. § 1508,¹ but ultimately determined that such a provision was not necessary. The study group determined that adding “orderly liquidation” to Section 727.101 would bring the purpose of the statute more in line with the current usage of ABC’s.

Ability to compel occupancy of premises if rent is paid.

The study group discussed whether a provision could be incorporated into Chapter 727 that would explicitly allow an assignee to occupy a leased premises as long as post-assignment rent is paid. The California ABC statute contains such a provision. Such provision would allow the assignee a period of time to administer assets at the leased premises or operate the assignor’s business without facing pressure from landlord related to pre-assignment defaults under the lease. The group supports incorporating a provision analogous to the provision in the California ABC statute. The study group proposed a 90-day statutory period, which mirrors the California statute.

Provisions akin to the automatic stay.

The study group discussed whether Chapter 727 could include a provision allowing a “breathing spell” period, during which no party could take any action against the assignor, assignee, or assets of the assignment estate. The study group discussed the possibility of a TRO or other similar provision that could facilitate this. Some attorneys may already routinely seek temporary injunctions in ABC cases under traditional injunction principles (similar to a receivership order in an equity receivership case). The study group generally

¹ 11 U.S.C. § 1508 provides: “In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.”

agreed that a true “automatic stay” may not be tenable due to jurisdictional and preemption concerns.

The parties further discussed the issue of lawsuits against the assignor. Typically, an assignee will just allow the plaintiff to obtain a judgment, with the provision that the plaintiff cannot collect against the assignment estate. The group discussed whether there was a way to address a situation where a plaintiff obtains an “empty chair” verdict or default judgment against an assignor because the assignee does not see the need to spend money defending the lawsuit. The plaintiff then tries to use that inflated judgment to establish a claim against the assignment estate, which could result in dilution of other unsecured creditors’ claims. The study group determined that the addition of a statutory provision to address this issue is advisable.

Lease rejection and landlord/lessor administrative expense accrual.

The study group discussed an additional issue in the statute raised by the operation of the current lease rejection provisions. Current law states that lease rejection is only effective upon entry of the order approving rejection. State courts often schedule hearings months later, which could result in a gap period between which a motion to reject is filed and the order is entered. Landlords or other lessors (i.e. equipment lessors) could pursue post-assignment administrative rent claims even if an assignee has vacated the premises or has abandoned the leased equipment as of the filing of the notice. The study group concluded that allowing the assignment court flexibility in setting the effective date of assignment would address this issue and allow flexibility to obtain approval of lease rejection procedures. The group also decided that explicitly allowing lease rejection to be done on negative notice would serve to save assignment estate resources and avoid unnecessary hearings, because lease rejection is rarely objected to.

Requirement to record copy of assignment in all counties where property located.

The study group considered Section 727.104(2)(a) and issues relating to recording documents in out-of-state counties. Not every county out-of-state is set up to accept assignments recorded in the public records (unlike Florida, where virtually anything can be recorded). Additionally, in larger assignments, the assignment documents and schedules can be voluminous, resulting in very expensive recording fees. The group supported a proposed revision to the statute providing the assignee with flexibility on the manner of recordation. Additionally, the proposed revision provides that the assignee can record the assignment without the assignment schedules, which are the most voluminous component of the documents when recorded.

Attorney-client privilege.

Recently, in the context of an ABC proceeding, assignors (through their former principals who are targets of various claims) asserted that former counsel for the assignors could not turn over documents to the assignee based upon the application of the attorney-client privilege. The assignors took the position that the attorney-client privilege remained with,

and was not transferred to, the assignee. In response, the assignee filed a motion with the trial court to deem the assignee the owner of the attorney-client privilege. In so doing, the assignee could point to no specific language in Chapter 727 of the Florida Statutes.

The trial court ruled in favor of the assignee. In response, assignors sought review by the District Court of Appeal through a Petition for Writ of Certiorari. The DCA denied the petition. Assignors sought reconsideration, which was also denied. The mandate has been issued, but the assignors sought to invoke the jurisdiction of the Florida Supreme Court, which has since been denied.

As a result of this issue, the study group believes it has become necessary to include language in Chapter 727 and the standard assignment document to address this issue.

Outstanding issues:

- Turnover
- Discovery by creditors
- What discovery a creditor can obtain by subpoena from the assignee or assignor in assignment cases, and whether a creditor should conduct discovery in its own proceeding without using estate time and assets
- Assignee liability
- Whether an assignee and assignor have the right to negotiate the assignment contract for a focused closing of a business with limited assets and limited responsibility for the assignee
- Enforceability of non-assignment provisions against an assignee
- Landlords seeking eviction of assignee upon appointment

The Study Groups determined that the following issues do not require revision at this time:

- Avoidance of landlord liens
- Ability to borrow/grant liens
- Electronic information
- Abandonment/abandonment rights
- Tax returns
- Venue (does selection of venue for a claim that arose pre-assignment constitute a corporate act)
- Under UCRERA, does a receiver keep the case if there is a later filed ABC