

WHITE PAPER
ANALYSIS OF PROPOSED REVISIONS TO CHAPTER 727
(ASSIGNMENTS FOR THE BENEFIT OF CREDITORS)

*Prepared by the ABC Statute Revision Subcommittee of
The Business Law Section of The Florida Bar*

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I. Background

The Business Law Section of The Florida Bar formed the Assignment for the Benefit of Creditors Statute Revision Sub-Committee (the “ABC Study Group”) in 2021 to analyze so-called “glitches” and other issues identified through case development relating to Chapter 727 of the Florida Statutes (the “ABC Statute”) and the need for potential related revisions thereto.

The ABC Study Group was comprised of nearly thirty experienced insolvency professionals located throughout the state of Florida. Shortly after its formation, the ABC Study Group met and identified potential issues arising in case law and/or through practice. They grouped such issues into four smaller sub-study groups according to common themes:

Court Authority

Assignor & Assignee Duties

Actions Against Assignee

Litigation

Each sub-study group examined the issues assigned to them and submitted reports for the ABC Study Group’s consideration. Those reports were discussed by the larger Study Group and narrowed down to proposed revisions deemed necessary and beneficial to practice in the state of Florida. Such proposed amendments are the subject of this White Paper.

II. Summary of the Issues and Proposed Revisions

After multiple meetings and careful analysis, the ABC Study Group proposes a total of six (6) revisions to the ABC Statute. The ABC Study Group is confident that each revision will streamline practice, clarify ambiguities in the statute, and/or minimize the potential for litigation over those ambiguities. The text of each revision is included in the Appendix hereto.

A. Intent of the Statute

Section 727.101, Florida Statutes, sets forth the intent of assignment for the benefit of creditors proceedings in Florida. The ABC Study Group considered whether the current statutory language should be revised or updated and determined that adding “and orderly liquidation” to the intended purpose of administering insolvent estates would bring the purpose of the statute more in line with the current usage of assignment proceedings. Thus, the ABC Study Group proposes that § 727.101 be amended accordingly, as set forth in the Appendix hereto.

B. Recording Assignments

The ABC Study Group evaluated concerns raised with respect to the assignee’s obligation to record assignment documents under § 727.104(2)(a), Florida Statutes, specifically in out-of-state counties. Unlike in Florida, where virtually any document can be recorded, some counties out-of-state are not set up to accept assignment documents for recording in the public records. Additionally, in larger assignments, the assignment documents and schedules can be extremely voluminous, resulting in expensive administrative expenses for recording fees.

Upon weighing the need for notice with the need for practicality, the ABC Study Group determined that § 727.104(2)(a) should be amended to provide the assignee with discretion in determining whether to record full schedules with the assignment and to allow an alternative recording procedure in counties where recordation in the public records is not possible. Additionally, the proposed revision makes it clear that a good faith effort by the assignee to comply

with the recording requirement will be sufficient. The ABC Study Group therefore recommends revision of § 727.104(2)(a) as set forth in the Appendix hereto.

C. Case Management Conferences and/or Status Reports

The Supreme Court recently amended Florida Rule of Civil Procedure 1.200 to require courts to convene case management conferences to better manage their case dockets. Such amendment has led to a practice of requiring monthly conferences in some courts, which can be costly and ineffective in assignment cases, or even lead to premature closure of an assignment case where the parties are waiting on supplemental action, mediation, a large sale closing, etc. Conversely, though assignment cases are designed to progress quickly for the benefit of creditors, cases occasionally linger without much creditor communication as to the status of liquidation. To correct both problems, the ABC Study Group recommends adding subsection (3) to § 727.104 as set forth in the Appendix hereto to allow courts discretion to set status conferences and/or require status reports by an assignee only as warranted, governed by the circumstances of the particular assignment case.

D. Actions Against Assignees

Section 727.105 addresses proceedings against an assignee and protects the assets of the estate in the possession of the assignee from levy, execution, attachment, or similar collection procedure. The ABC Study Group considered this provision in the context of personal liability of an assignee in the performance of his or her statutory duties. Though an assignee is required to post a bond to ensure the “faithful discharge of his or her duties” pursuant to § 727.104(2)(b), the ABC Statute does not directly address the scope of an assignee’s personal liability.

Upon considering the statutory and common law protections afforded to similar fiduciaries and their professional agents, especially bankruptcy trustees who perform a very similar statutory and practical role akin to assignees in an assignment case, the ABC Study Group

determined that an amendment to the ABC Statute is necessary in this regard, but must be narrowly tailored to adopt the majority position that the fiduciary is liable only for acts taken outside his or her authority or that constitute gross negligence or malfeasance. The Study Group agrees that this standard adequately balances the need for protections for professionals acting as assignees, on the one hand, and the rights of creditors or other parties-in-interests to seek a remedy for inappropriate actions by an assignee, on the other hand. Similarly, the proposed amendment requires that leave to sue an assignee must be sought and obtained from the assignment court, which is a reasonable codification of the long-standing Barton doctrine within assignment proceedings.

For these reasons, the ABC Study Group recommends amendment of § 727.105 to include a new subsection (b), which would address the matters on which an assignee may rely in good faith, an assignee’s personal liability for actions taken in an official capacity, and the remedy of a party who believes they have been damaged by such actions. The proposed amendment further addresses the need for leave of court and the timely assertion of claims, and is set forth in its entirety in the Appendix hereto.

E. Turnover of Estate Property

The ABC Study Group also identified § 727.106, Florida Statutes, as an area requiring revision due to an unexpected “glitch.” The statute currently provides that “[a]ny person or entity, *other than a creditor*, in possession, custody, or control of assets of the estate shall...promptly turn such assets over to the assignee or the assignee’s duly authorized representative.”¹ § 727.106, Fla. Stat. (emphasis added). However, the mirror provision of the Bankruptcy Code provides that “...an entity, *other than a custodian*, in possession, custody, or control, during the case, of property that

¹ The ABC Statute broadly defines a “creditor” to mean “any person having a claim against the assignor, whether such claim is contingent, liquidated, unliquidated, or disputed.” § 727.103(8), Fla. Stat.

the trustee may use, sell, or lease under section 363 of this title...shall deliver to the trustee, and account for, such property or the value of such property..." 11 U.S.C. § 542(a) (emphasis added).²

The two statutory schemes have a common purpose, but they differ in that the ABC statute broadly exempts "creditors" from the requirement to turnover property to the assignee, while the Bankruptcy Code exempts only "custodians" (which typically refers to a receiver or a similar fiduciary acting on behalf of the debtor's creditors) from turning over estate property to a trustee.

This distinction could potentially cause problems for assignees in assignment proceedings because a person holding an unliquidated or disputed claim could refuse to turn over estate property based on their status as a "creditor," and a plain reading of the ABC statute would appear to support the creditor's position. That is not the intended result of § 727.106. One potential justification for the differing language between the two types of insolvent estate administration is that the Bankruptcy Code generally requires a trustee to provide "adequate protection" of a creditor's interest in property before the estate can use, sell, or lease such property, while there is no similar concept in the ABC statute. As a practical matter, members of the ABC Study Group at large had not encountered situations where the language of § 727.106 was used to oppose a turnover demand from an assignee. Rather, this situation is categorized by the Group as a glitch awaiting litigation.

The ABC Study Group proposes an amendment to § 727.106 that would modify the exempted "creditor" to only those creditors holding a lien or right of set off or recoupment against the asset being held. Such amendment narrowly tailors the exemption to its intended target without

² The Bankruptcy Code generally defines "custodian" to mean "(a) receiver or trustee of any property of the debtor, appointed in a case or proceeding not under this title; (b) assignee under a general assignment for the benefit of the debtor's creditors; or (c) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors." 11 U.S.C. § 101(11).

unnecessarily limiting the exemption to traditional secured creditors. The full text of the proposed amendment is set forth in the Appendix hereto.

F. Lease Rejection & Landlord/Lessor Administrative Expense Accrual

Section 727.110, Florida Statutes, provides that lease rejection is effective on the date of entry of an order authorizing the rejection. Unfortunately, even when a motion is uncontested, state courts often schedule hearings months after a motion is filed, which results in a gap period between the filing of a motion to reject and entry of the order. Landlords or lessors (i.e., equipment lessors) could pursue post-assignment administrative rent claims as a result of such delays, even if an assignee has vacated the premises or has abandoned the leased equipment as of the filing of the motion.

To correct this situation, the ABC Study Group concluded that an assignment court must have flexibility in setting the effective date of assignment and in approving lease rejection procedures. The Group also determined that explicitly allowing lease rejection to be done on negative notice would promote judicial economy, save assignment estate resources from unnecessary administrative claims, and avoid unnecessary hearings because lease rejection is rarely objected to. For these reasons, the ABC Study Group recommends amending § 727.110 to grant assignment courts more flexibility with respect to lease rejection procedures, as set forth in the Appendix hereto.

III. Conclusion

The foregoing summary does not address the majority of the issues and discussions had by the ABC Study Group with respect to the ABC Statute and potential opportunities for amendment. It reflects solely those issues where the ABC Study Group believes amendment is necessary to effect the intent of the statutory scheme and which should not be controversial amongst the various

legal constituencies and members of the Business Law Section. The Study Group unanimously supports and advocates for enactment of the amendments proposed in the Appendix hereto.

IV. Appendix³

- A. Proposed amendment to § 727.101
- B. Proposed amendment to § 727.104(2)(a) and addition of § 727.104(3)
- C. Proposed addition of § 727.105(b)
- D. Proposed amendment to § 727.106
- E. Proposed amendment to § 727.110

³ Words that are ~~stricken~~ represent proposed deletions, and words that are underlined represent proposed additions.

APPENDIX A: Proposed Amendment to § 727.101

727.101 Intent of chapter.—The intent of this chapter is to provide a uniform procedure for the administration and orderly liquidation of insolvent estates, and to ensure full reporting to creditors and equal distribution of assets according to priorities as established under this chapter.

APPENDIX B: Proposed Amendment to § 727.104

727.104 Commencement of Proceedings.—

(2) Within 10 days after delivery of the assignment to the assignee, the assignee shall:

(a) Record the original assignment, with or without schedules, in the public records of the county in which the assignor had its principal place of business and shall thereafter promptly record, or if recording in a county outside the state of Florida is not possible, file or publish in a manner reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the assignment, a certified copy of the assignment, with or without schedules, in each county where assets of the estate are located. Good faith effort to record, file, or publish in accordance with this section shall be effective even in the presence of minor errors or omissions rendering recording efforts incomplete or seriously misleading.

Add as new subsection (3) to 727.104:

(3) The Court shall have discretion to determine proper compliance with Fla. R. Civ. P. 1.200 in cases filed under this Chapter, including but not limited to scheduling of case management conferences and/or requiring periodic status reports as warranted by the circumstances of the case.

APPENDIX C: Proposed Amendment to § 727.105

Add as new subsection (b) to 727.105:

(b) The assignee (i) may rely on any and all outstanding court orders, judgments, decrees and rules of law, and shall not be liable to anyone for his or her own good faith compliance with any such order, judgment, decree or rule of law; (ii) may rely on, and shall be protected in any action upon, any resolution, certificate, statement, opinion, report, notice, consent, or other document believed by the assignee to be genuine and to have been signed or presented by the proper parties; (iii) shall not be liable to anyone for his or her good faith compliance with the assignee's duties and responsibilities as an assignee; and (iv) shall not be liable to anyone for his or her acts or omissions, except upon a finding by the court presiding over the assignment proceeding under this chapter that such acts or omissions were outside the scope of the assignee's duties or were grossly negligent or constitute malfeasance. Except for matters set forth in subsection (iv) of the preceding sentence, persons dealing with the assignee shall only look to the assignment estate assets and any bond posted by the assignee to satisfy any liability, and the assignee shall not have any personal liability to satisfy any such obligation. Any creditor or party in interest seeking to assert a claim against the assignee under subsection (iv) of this paragraph must first obtain leave of the court presiding over the assignment proceeding, based upon a finding that the alleged acts or omissions were outside the scope of their duties and responsibilities or were grossly negligent or constitute malfeasance. Any such claim against the assignee, as well as any claim against agents of the assignee assisting in the administration of the assignment estate (including professionals retained by the assignee) must be asserted prior to the discharge of the assignee under section 727.116 of this chapter, at which point any and all such claims are deemed released and forever barred. Nothing in this section alters or limits any other immunity otherwise held by the Assignee, or its agents and professionals assisting the Assignee in the administration of the estate.

APPENDIX D: Proposed Amendment to § 727.106

727.106 Turnover.—Any person or entity, ~~other than a creditor~~, in possession, custody, or control of assets of the estate, other than a creditor holding a lien or a right of setoff or recoupment with respect to the subject asset, shall, upon notice by the assignee of the assignment proceeding, promptly turn such assets over to the assignee or the assignee’s duly authorized representative.

APPENDIX E: Proposed Amendment to § 727.110

727.110 Actions by assignee and other parties in interest.—

(3) As to an assignee's rejection of an unexpired lease of nonresidential real property or of personal property, as provided under ss. 727.108(5) and 727.109(6):

(a) The assignee shall file a notice of rejection with the court and serve a copy, by negative notice, on the owner or lessor of the affected property and, for personal property, on the landlord of the premises on which the property is located. A notice of rejection relating to personal property must identify the affected property, the address at which the affected property is located, the name and telephone number of the person in possession of the affected property, and the deadline for removal of the affected property.

(b) The effective date of the rejection is the date of entry of a court order authorizing such rejection, unless the court orders otherwise.

(c) If the lessor of the affected property fails to take possession thereof after notice of the rejection, the estate's rights and obligations to and liability for the property terminate upon the effective date of the rejection.