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Assignments for the Benefit of Creditors

The State Q&A guides on Practical Law provide common questions and answers from local practitioners on state-specific content for a variety of topics and practice areas. This excerpt from the Assignments for the Benefit of Creditors (ABCs) State Q&A addresses the process by which assignments are generally administered, including the commencement of an ABC and the duties of assignees, in Delaware, Florida, Michigan, and New York. For the complete versions of these resources and information on ABCs in other jurisdictions, visit Practical Law.

Practical Law State Contributors

WHAT DOCUMENTS AND CORPORATE ACTIONS OF APPROVAL ARE REQUIRED TO FILE AN ABC IN YOUR JURISDICTION?

DELAWARE

Documents

In Delaware, an assignment agreement is the main document in which the assignor assigns its property to the assignee in trust for the assignor's creditors. The Delaware Code does not have a prescribed form of an assignment agreement, so general principles of contract and trust law apply. However, an assignment may be deemed void if its provisions either:

- Prefer any creditor to another.
- Secure or pay any creditor a greater proportion of the creditor's debt or demand than must be secured or paid to other creditors.

(10 Del. C. § 7387.)

Therefore, assignment documents typically include express language making the assignment for the general benefit of all creditors, without preference, according to their respective priorities at law.

In practice, the following documents are often used to commence an ABC proceeding in the Delaware Court of Chancery:

- **A verified petition for recognition of the ABC (Del. Ch. Ct. R. 3), which includes a copy of the contractual assignment.** Depending on the practitioner or the judge's preference, the petition may request that the Chancery Court enter a proposed form of order recognizing and taking jurisdiction over the ABC.
- **An inventory or schedule of assets of the ABC estate, together with an affidavit from the assignee attesting that the inventory list is complete and accurate to its knowledge (10 Del. C. § 7381).** The Delaware Code and court rules do not require a specific form for the inventory list. However, because the court and court-appointed appraisers use the inventory list to value the ABC estate and set the amount of the assignee's bond, the inventory is typically listed in balance sheet format that:
 - identifies the property by general category (for example, cash, inventory, accounts receivable, property/plant/equipment, and real property);
 - includes book values at or near the assignment agreement execution date; and
 - contains any explanatory footnotes as may be appropriate.

The assignee may either file:

- All of these documents together within 30 days after executing the assignment agreement.
- The petition first followed by the inventory list no later than 30 days after execution of the assignment agreement (see 10 Del. C. § 7381 (requiring inventory to be filed within 30 days after execution of the assignment)).

Corporate Actions of Approval

The required action for commencing an ABC in Delaware by an assignor that is a corporation or other entity depends on:

- The relevant state's statutory law governing the assignor's specific type of entity.
- The company's bylaws, partnership agreement, or operating agreement, as applicable.

The commencement of an ABC typically requires approval from any one or more of the following:

- The board of directors or a similar body, in the case of an entity other than a corporation.
- Shareholders, members, or partners, as applicable.
- Managers, managing members, or general partners, as applicable.

In deciding what governance actions must be taken, the assignor must consider whether the applicable law treats an ABC as a sale or disposition of all of the assignor's assets, which may trigger additional or more stringent governance requirements.

FLORIDA

Documents

The Florida Statutes contain a form assignment for an ABC (§ 727.104(1)(b), Fla. Stat.). The assignment agreement must substantially conform to this form and:

- Be in writing.
- Contain the assignor's and assignee's names and addresses.

- Provide for an equal distribution of the estate according to the priorities of Section 727.114 of the Florida Statutes (§ 727.104(1)(a), Fla. Stat.).

Corporate Actions of Approval

The required corporate action for commencing an ABC in Florida depends on either:

- The relevant law governing the assignor's specific type of business.
- The company's organizational documents.

The commencement of an ABC typically requires approval from any one or more of the following:

- The board of directors.
- Shareholders.
- Managing members.

MICHIGAN

Documents

In Michigan, an assignment agreement is a form of writing that conveys title to all the assignor's non-exempt property to an assignee.

The following must be filed within ten days after an assignment:

- The assignment agreement.
- A list of creditors.
- A list of the inventory.
- A bond by the assignee for the faithful performance of the trust.

(MCL 600.5201(1).)

The assignor must swear to the accuracy of the list of creditors and inventory to the best of its knowledge, information, and belief (MCL 600.5201(4)).

While the form of the written instrument may vary, the assignment agreement should grant broad powers to the assignee so that it has absolute dominion and control. The assignee's powers may otherwise be open to a later challenge. A conveyance of only a portion of the debtor's non-exempt assets for the benefit of the debtor's creditors may also result in the assignment being deemed void (MCL 600.5201(1); see also *Fitzgerald v. McCandlish*, 50 N.W. 860, 861 (Mich. 1891) (holding that the failure to convey absolute title creates a simple lien and is not a common law assignment)).

Corporate Actions of Approval

The required corporate action for commencing an ABC in Michigan depends on either:

- The relevant statutory law governing the assignor's specific type of business.
- The company's bylaws.

The commencement of an ABC typically requires approval from any one or more of the following:

- The board of directors.
- Shareholders.
- Managing members.

NEW YORK

Documents

In New York, an assignment agreement is the main document in which the assignor assigns its property to the assignee in trust for the assignor's creditors. It has both formal requirements and practical provisions.

Formally, the assignment agreement is for the creditors of the assignor and must:

- Be in writing and accepted by the assignee either on:
 - the assignment agreement; or
 - a separate document attached to it.
- Contain the assignee's signature and be notarized.
- Specifically state the address and type of business conducted by the assignor.

(N.Y. Debt. & Cred. Law § 3.)

In practice, the assignment agreement should also contain:

- **Granting language to the assignee.** Language granting authority for the assignee to act may be broad and begin

with a provision that generally grants all of the assignor's property and then continues with a non-exhaustive list of what that property entails, including all:

- tangible real and personal property;
- insurance policies;
- equity;
- intellectual property;
- goodwill;
- algorithms and artificial intelligence, for example, source codes and software; and
- causes of action.

- **Authorization to conduct the business and sell assets.** This includes language granting authority for the assignee to:

- receive the property;
- conduct the business;
- sell and dispose of the property on terms it may see fit;
- pay priority creditors;
- pay reasonable fees and expenses of the assignee and its professionals; and
- pay creditors their pro rata shares from the net proceeds of conducting the business and asset sales.

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- **A list of any potential or existing claims and causes of action and the right to prosecute those claims and causes of action.** The language should identify with specificity any claims and causes of action that are assigned and grant the assignee a power of attorney to prosecute and defend the identified claims and causes of action. If there are existing claims against the assignor at the time of the assignment, the assignee does not accede to the status of defendant in place of the assignor. However, the assignee may choose to intervene as a party in interest to the extent the determination of the claims against the assignor affects the assigned assets or claims against them.

Depending on the nature of the assignor's business, the assignment agreement may also:

- Include a grant of any other authority or power that may be necessary for the assignee to effectively administer the estate.
- Specifically refer to marketing and sales materials developed by the assignor before the assignment to assist the assignee in liquidating the assets.

Corporate Actions of Approval

Absent special statutory or bylaw provisions, the corporate authority to make a general ABC in New York resides with the company's board of directors, which may authorize an officer to execute the appropriate documents.

Additionally, the consent of all general partners is typically required for a general partnership to make an ABC unless either:

- The partnership agreement provides otherwise.
- The partners have abandoned the business.

(N.Y. P'ship Law § 20(3)(a).)

WHAT ARE THE MAIN STATUTORY DUTIES AND RESPONSIBILITIES FOR ASSIGNEES IN YOUR JURISDICTION?

DELAWARE

In Delaware, the only duties of an assignee for the benefit of creditors that are specifically prescribed by statute are to:

- File a verified inventory of the assets constituting the assignment estate (10 Del. C. § 7381).
- Post a bond as may be ordered by the Chancery Court (10 Del. C. § 7383).
- Provide annual reports of the assignee's trusteeship and a final report, and give notice as directed by the Chancery Court (10 Del. C. § 7385).

FLORIDA

In Florida, the assignee's duties are prescribed by statute. These duties include, but are not limited to:

- Collecting and liquidating the assets of the estate. This can be done by:
 - bringing a suit in any court of competent jurisdiction;
 - conducting a public or private sale; or
 - prosecuting any causes of action previously held by the assignor.

- Within 30 days after the filing date, examining the assignor under oath concerning the acts, conduct, assets, liabilities, and financial condition of the assignor.
- Giving notice to creditors of all matters concerning the administration of the estate, according to Section 727.111 of the Florida Statutes.
- Conducting the assignor's business for a limited period of no more than 45 calendar days if it is in the best interest of the estate, or for a longer period if it is in the best interest of the estate, on notice and until the time that an objection, if any, is sustained by the court.
- Exercising the assignee's business judgment to reject any unexpired lease of non-residential real property or personal property under which the assignor is the lessee.
- Paying reasonable and necessary administrative expenses of the estate, subject to Section 727.114(1) of the Florida Statutes.
- At the expense of the estate, employing one or more appraisers, auctioneers, accountants, attorneys, or other professional persons to assist the assignee in carrying out their duties.
- Keeping regular accounts and providing information concerning the estate reasonably requested by creditors or other parties in interest.
- Within six months after the filing date, filing an interim report of receipts and disbursements with the court.
- Examining the validity and priority of all claims against the estate.
- Abandoning assets to duly perfected secured or lien creditors, where the assignee determines that:
 - the estate has no equity in the assets; or
 - the assets are burdensome or of inconsequential value to the estate.
- Paying dividends to creditors and closing the estate as expeditiously as possible.
- Filing a final report with the court of all receipts and disbursements.
- Filing an application for the assignee's discharge according to Section 727.116 of the Florida Statutes.

(§ 727.108, Fla. Stat.)

MICHIGAN

In Michigan, the assignee's duties are prescribed by statute. These duties include, but are not limited to, the following:

- As soon as practicable after receiving the assignment, the assignee must:
 - have the property appraised by two disinterested competent persons; and
 - file the appraisal with the clerk of the court.
 (MCL 600.5215.)
- Within ten days after the appraisal, the assignee must apply to the circuit court requesting that the court exercise its power to direct the disposition of the assets. Notice of this application must be mailed to all creditors known to the assignee at least ten days before the hearing on the application. (MCL 600.5215.)

- Within ten days after the assignment, the assignee must give notice to all creditors of the assignment and request that creditors file a proof of claim with the assignee within 90 days after receiving the notice (MCL 600.5221).
- Within ten days after the expiration of the 90-day period to file claims, the assignee must serve on all creditors a complete list of all creditors that filed a proof of claim, including the amount claimed (MCL 600.5221).
- Within three months after receiving the assignment, the assignee must file a report in the clerk's office regarding the condition of the estate and containing:
 - a statement of all property received by the assignee;
 - the disposition of the property; and
 - a statement of all money received, disbursed, and on hand.
 The assignee must file an updated report each quarter. (MCL 600.5245.)

In Michigan, an assignee also has certain specific powers enumerated in MCL 600.5211. These powers include the ability to:

- Sue and recover all assets or monies belonging to or due to the assignor.
- Take possession of all of the assignor's property and related books, vouchers, and papers.
- Sell the assets at a public auction or private sale.
- Redeem all mortgages and conditional contracts or other encumbrances and pledges of personal property or sell the property subject to the encumbrances, contracts, or pledges.
- Settle all matters and accounts between the assignor and its debtors and creditors.
- Examine under oath any person on matters and accounts between the assignor and its debtors and creditors.
- Settle a claim of any person indebted to the assignor, under order of the court.
- Prosecute or defend suits pending in favor of or against the assignor.

NEW YORK

In New York, the assignee's duties are prescribed by statute. These duties include, but are not limited to:

- Preserving property to the fullest extent possible (see *Matter of Rauth*, 10 Daly 52 (N.Y.C. Com Pl. 1880)).
- Keeping regular accounts.
- Collecting and liquidating the property of the estate, including hiring appraisers, liquidators, and auctioneers when appropriate. An assignee has broad discretion when choosing an appraiser, an auctioneer, or a liquidator, and that choice must be respected absent a finding of incompetence or impropriety (see *Arutt v. Multer*, 348 N.Y.S.2d 157, 159 (2d Dep't 1973)). However, the assignee must carefully choose professionals with appropriate skills given that the assignee is charged with maximizing the value of the estate for creditors.
- Promptly reporting any undisputed and disputed claims to the court.

- Providing information to parties in interest.
- Providing an accounting to the court.
- Making distributions to creditors.
- Filing an interim report within six months after taking the assignment and a final report 15 days before the final hearing closing the accounts. If an assignee fails to file an interim accounting within six months after filing the assignment, the assignee and its attorneys may forfeit their commissions and fees and the inaction is grounds for their removal (22 NYCRR § 202.63(d)(2)).
- Closing the estate as expeditiously as possible. The assignee is expected to file its account within 15 months from execution of the assignment agreement unless the assignee can show good cause for greater delay and obtain an extension by court order (22 NYCRR § 202.63(d)(9)). (N.Y. Debt. & Cred. Law § 14.)

The assignee is considered a trustee for the benefit of creditors. If necessary to protect the estate from spoliation or dissipation, the assignee can borrow funds but should seek prior court approval (see *Standard Audit Co. v. Robotham*, 115 N.Y.S. 152, 154 (App. Term. 1909)). If the assignee advances its own funds, the assignee should seek advance court approval to ensure that the amount is allowed (N.Y. Debt. & Cred. Law §§ 14 and 21).

While creditors are entitled to expeditious payment of dividends, the assignee is also charged with making the best possible sale under the circumstances and should attempt to determine whether a public or private sale or an auction:

- Is the most effective means for liquidating the assets.
- Can obtain the best possible price under the circumstances.

The assignee has the power, on application to the court, to sell or compromise claims or debts belonging to the estate or assignor. To carry out this duty, the assignee may:

- Employ agents, employees, and attorneys (see *Matter of Rauth*, 10 Daly 52 (N.Y.C. Com Pl. 1880)).
- Execute security agreements, mortgages, deeds of trust, and leases of the assignor's property necessary to accomplish the assignment.
- Maintain and defend suits and actions.
- Collect and sell the assignor's assets.

If the assignee intends to operate the assignor's business, it must make an application to the court for approval. The application must be made by petition with notice given to, or by order to show cause served on:

- The assignor.
- The assignee's surety.
- All creditors, secured, general, or otherwise, of the assigned estate.

(22 NYCRR § 202.63(h).)

The assignee must keep detailed accounts of all receipts, payments, and expenditures when performing its duties (22 NYCRR § 202.63(c)(5)).

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