

# **ABC's of an ABC Proceeding (Assignment for the Benefit of Creditors)<sup>1</sup>**

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When an individual or business entity decides to liquidate or wind-down, there are several alternatives that should be considered: bankruptcy, receiverships, workouts or non-judicial liquidations. However, in Kentucky and many other states, corporations, individuals and other business entities have another underutilized liquidation/wind down option: an assignment for the benefit of creditors proceeding (ABC).

## **What is an ABC?**

Chapter 379 of the Kentucky Revised Statutes provides for a voluntary assignment for the benefit of creditors. Unlike a bankruptcy that is filed in federal court, an ABC proceeding is filed in state district court. To initiate a proceeding, a debtor makes a “deed of assignment” of some, or all, of the debtor’s property to an “assignee.” This process is similar to that followed when deeding real property. The assignee holds the debtor’s property for the benefit of all of the debtor’s creditors to be distributed in proportion to the creditors’ respective allowed claims, after payment of the expenses of administering the ABC proceeding.

An ABC proceeding is similar to a bankruptcy filing in many ways. Both provide for an “estate” that is created upon the beginning of such proceeding; reports detailing the assets of, and allowed claims against, the debtor; preferred claims to lien holders (secured creditors), pro rata distribution of remaining funds to unsecured creditors; remedies for avoidance and recovery of preferences or fraudulent transfers and exemptions of certain property.

However, what makes an ABC proceeding different than a bankruptcy is what makes it most appealing. First, an ABC will usually progress much more quickly than a bankruptcy proceeding involving numerous or non-liquid assets. The ABC statute contemplates that the entire proceeding be concluded within nine months. Bankruptcies, even those that are not complicated, can take years. Second, the ABC statute says that all orders and proceedings shall be ex parte (meaning only one party appears before the judge – a practice which is otherwise almost always forbidden in legal practice). While creditors would obviously need to be given notice if their rights in specific property or if their filed claims were to be impaired, this provision cuts down on unnecessary notice to creditors (which results in cost savings and expediency of the proceeding).

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## **Benefits of ABC**

Why an ABC proceeding is not often utilized is unknown (2006 was the first time that one was filed in 18 years in Jefferson County, Kentucky's most populated county), but an ABC has many benefits. First, an ABC proceeding is most likely to be less expensive than a bankruptcy. This is due to the fact that an ABC proceeding does not have as many hoops to jump through as a bankruptcy proceeding does. Second, while a bankruptcy case can drag on for several years, an ABC should be completed in less than a year. Unlike the bankruptcy system, where the court may have thousands of cases each year, the assignee to whom the Debtor's property is assigned has the sole duty of ensuring that the proceeding is completed in a timely manner. Third, because an ABC is to be completed in a shorter time frame than a bankruptcy, creditors can get paid much quicker than in a bankruptcy. Finally, due to the dearth of Kentucky case law referencing an ABC proceeding, filing an ABC proceeding gives the assignee a great amount of freedom to be creative as to how the ABC should proceed.

## **Negatives of ABC**

While there are several benefits of an ABC, there are also several issues that every individual or business entity should consider before electing to file an ABC. First, as opposed to the filing of a bankruptcy, there is no automatic stay in an ABC. Thus, the ABC will not immediately stop pending litigation. Many creditors may be unfamiliar with the ABC process and it may be difficult to get such creditors to cease collection efforts. Second, many contracts and leases may have anti-assignment provisions and the filing of an ABC may violate these provisions. The filing of the ABC may destroy the value of these contracts and leases and could bring liability upon those responsible for making the decision to file an ABC. All contracts and leases should be reviewed for anti-assignment provisions to ensure that the ABC will not have a negative impact on the assignor or its creditors. If they do, the assignee should resolve any potential issues with counterparties to the contracts and leases prior to the filing of the ABC. Unlike a bankruptcy, where assets can be sold "free and clear" of liens, an ABC may not be an appropriate option if the assets of the corporation are encumbered with certain liens, such as tax liens. Finally, because the ABC is seldom used, creditors, and perhaps the district court, may be uneasy with the procedure.

An ABC proceeding is a lost-cost, expedient solution that should be considered in addition to bankruptcy, receiverships or traditional liquidations.

For more information about this topic or any other debt restructuring opportunity, please contact Mike Gartland (mgartland@dlgfir.com), Kent Barber (kbarber@dlgfir.com) or one of our other Insolvency attorneys.