



ABCs IN RESTRUCTURING: A NEW ACT FOR AN OLD TOOL POISED FOR BROAD ADOPTION

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The Uniform Assignment for Benefit of Creditors (ABC) Act seeks to modernize and standardize a debtor-initiated, state-law liquidation mechanism commonly known as a general assignment for the benefit of creditors (ABC). In an ABC, a financially distressed debtor (the “assignor”) voluntarily transfers all its assignable assets to an independent fiduciary (the “assignee”), who collects, liquidates, and, in appropriate circumstances, temporarily operates the business and distributes proceeds to creditors.

Today, state ABC statutes, if they exist at all, vary significantly. Some states, such as Illinois, lean on common law to regulate the ABC process, while others, such as Delaware, provide for a more rigid in-court process regulated by an aged statute. Many states, some of which have frustratingly underdeveloped ABC law, exist in the middle with varying degrees of court oversight, disclosure and notice requirements, powers and duties of assignors and assignees, and wind-down requirements to close the ABC.

The two central themes of the ABC Act are process and predictability—it supplies a clear statutory roadmap for commencing an ABC, establishing eligibility requirements for the assignee, setting notice and reporting expectations, defining duties and powers, and creating a claims allowance/dispute process.

The prefatory note explains that the ABC Act is designed to reduce the wide variation among states, which has historically created uncertainty, particularly for cost-conscious businesses operating across state lines.

Significantly, the ABC Act is structured to work as a streamlined alternative to bankruptcy or receivership while preserving flexibility. It does not mandate routine court supervision, but it expressly permits court involvement when needed. The act also addresses interstate recognition and ancillary administration to reduce friction when the assignor’s footprint spans multiple states.

(Notably, this article does not discuss every facet of the ABC Act, but merely a few key provisions which are likely to help small to mid-market companies as they transition to and through a possible wind-down scenario.)

The following are summaries of key advances related to the ABC Act and the impact of its implementation.

1 Clear Jurisdictional Anchors

The ABC Act applies based on the assignor’s principal place of business or internal affairs nexus (i.e., state of incorporation/organization) and extends to certain controlled entities that are essentially part of the same enterprise structure. This approach

is meant to prevent forum shopping based solely on the assignee’s location and to align the ABC with meaningful ties to the enacting state. The benefit is predictability. Gone are the days of jurisdictional gymnastics to try to justify an assignee’s or assignor’s preferred state.

2 Independence & Eligibility Requirements for the Assignee

The assignee must be independent. This means the assignee is:

- Generally not a creditor, insider, affiliate of the assignor, or otherwise conflicted.
- Must not hold a material financial interest in the outcome beyond agreed fees/expenses.
- Cannot have certain equity interests in the assignor (with a narrow carveout for noncontrolling interests in publicly traded companies).

The independence requirement is foundational to creditor confidence and the fiduciary model followed by the ABC Act.

As a purely practical matter, lenders, customers, and trade creditors are more likely to cooperate (e.g., consent

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to the use of cash collateral, grant releases, consent to sales, and continue transacting business) with an ABC process when the assignee's fiduciary independence is clearly outlined at the beginning of the process.

3 Clearly Defined Duties of Assignee & Assignor

The ABC Act expressly contemplates the duties of the assignee and assignor. Specifically, the assignor must cooperate to enable the administration of the ABC by turning over assets, providing information, executing necessary documents, designating a representative to work with the assignee throughout the ABC process, and providing verified lists of assets, employees, and creditors.

Similarly, the ABC Act provides that the assignee owes fiduciary duties to the assignment estate for the benefit of creditors. These duties include the duty of loyalty, good faith, reasonable care to maximize distributions, and timely winding up consistent with best interests. Operationally, the assignee must keep a separate deposit account, maintain records, establish a proof-of-claim methodology, examine claims (where meaningful), provide periodic creditor summaries, handle tax compliance, and send a final accounting in accordance with section 19(a) of the ABC Act.

The clear delineation of these duties helps reduce the "black box" problem that sometimes plagues out-of-court liquidations and gives both assignees and assignors the comfort of knowing their statutory obligations with respect to the process well in advance.

4 Broad Statutory Powers

Unless limited by the assignment agreement, the assignee may operate the business as needed to preserve value, incur debt, hire professionals, prosecute or defend litigation, sell/dispose of assets whether encumbered or unencumbered, settle disputes, abandon assets, and invest funds prudently. Critically, the assignee can also wield a creditor-like avoidance power, allowing the assignee to avoid transfers/obligations that a proof-of-claim creditor could have avoided under other law.

Notwithstanding the assignee's specific avoidance power, the ABC Act also

Figure 1. The ABC Act's Distribution Waterfall

1. PROTECTED SECURED CREDITORS § (15(A)-(C))
Paid first from their collateral and/or proceeds in accordance with lien priorities (unless otherwise agreed).
Paid up to value of secured interest, less reasonable preservation and disposition expenses (with consent or acquiescence of creditor).
Deficiency becomes general unsecured claim (Tier 5.2).
Oversecured creditors may receive interest and reasonable fees as permitted.
↓
2. ADMINISTRATIVE COSTS OF ASSIGNMENT ESTATE § (15(D))
Assignee and professional fees and expenses.
Post-assignment taxes.
Post-assignment rent.
Post-assignment personal property lease payments.
Wind-up expenses under the assignment agreement.
↓
3. Federal Priority Claims § (15(e))
Claims entitled to priority under federal law (including 31 U.S.C. § 3713).
↓
4. Employee Wage Claims § (15(f))
Wages, salaries, and commissions earned within 180 days before the effective date or cessation.
Paid up to the greater of the Bankruptcy Code priority wage cap or other applicable non-bankruptcy law.
↓
5. Unsecured Claims § (15(g)-(h))
(5.1) Unsecured claims with priority under other law.
(5.2) General unsecured claims.
*Distributions within a level are pro rata if assets are insufficient.
↓
6. Residue/Surplus § (15(i))
After all prior tiers are paid in full, pay allowed late-filed claims.
Any remaining surplus is distributed per the assignment agreement or other law.

Notes:

- A protected secured creditor is a secured creditor with a perfected lien which is not avoidable by assignee and is not subordinate to assignee's lien.
- Claim subordination agreements may alter payment order.
- Interim distributions are permitted, subject to reserves for expenses and disputed claims.

limits avoidance in financial contract safe-harbor areas consistent with Bankruptcy Code concepts. These provisions equip the assignee with adequate, specified powers to settle or otherwise resolve claims with respect to the assets of the assignment estate, as necessary, in accordance with the assignee's duties. The goal is for the assignee to use these powers for the benefit of creditors of the assignment estate and for the efficient administration of the same.

5 Claims Allowance/Dispute Framework

The assignee must set a single deadline for filing proofs of claim within a statutory range. (The ABC Act directs states to pick a number or range, but in all cases, it must be not fewer than 90 and not more than 210 days after the effective date.) Furthermore, the ABC Act requires that proofs of claim contain certain information similar to a proof of claim in the bankruptcy context and be signed under penalty

of perjury. A compliant proof of claim is prima facie evidence of the validity of the underlying claim, and the filing constitutes consent to the relevant court's jurisdiction and assigns to the assignee the creditor's voidable-transaction rights related to the claim. Disputes are handled by notice, reserves, and, if unresolved, a court proceeding that must be filed before final distribution.

6 Clearly Defined Statutory Distribution Waterfall

Distribution and claims reconciliation mechanics in practice have often been ill-defined and rarely disclosed. The ABC Act provides a set distribution waterfall, increasing transparency and reducing confusion across parties. See **Figure 1** for a general summary of the ABC Act's distribution waterfall.

7 Creditor Protections Around Sales & Transferees

Under the ABC Act, a transferee for value of assets of the assignment estate takes the assignee's rights and liens, and subordinate liens are discharged in a manner conceptually similar to Uniform Commercial Code Article 9 disposition effects. Good-faith transferees are protected even if the assignee later is alleged not to have complied with procedural requirements. These safeguards support marketability of title and sale value but also support the involvement of secured creditors who can have more confidence that their assets will not be sold at significantly depressed values due to the opaque nature of the proceeding and potential issues with otherwise subordinate liens affecting potential bona fide purchasers.

8 Interstate Recognition & Ancillary Administration

According to the ABC Act, Assignments made under another state's law must be recognized and enforced on an issue if the result would be "substantially similar" under that state's ABC law and courts may appoint an ancillary assignee to obtain/control/turnover assets located in-state. It is no secret that mid-market companies often have multi-state assets (such as inventory, receivables, and equipment) and multi-state creditor bodies. In the past, underdeveloped state ABC statutes and local practice meant significantly increased uncertainty, transaction costs, deal friction, and litigation risk where other, even neighboring, states were involved in the enterprise. The ABC Act includes provisions



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that effectively encourage states to coordinate with one another where multi-state enterprises are involved and provides for broad recognition of one state's court decisions in other states that have adopted the ABC Act.

To give a concrete example of this, if an ABC was underway in State X where the assignors held some assets located in State Y and an issue is decided in State X that effects the sale of those assets located in State Y, the decision in X would control unless Y's law provides for a significantly dissimilar result. Moreover, the act provides a mechanism for the assignee in State X to seek appointment—either for itself or through a nominee—as an "ancillary assignee" in State Y to effect the administration or sale of such property.

If widespread adoption of the ABC Act is achieved, many businesses forced to evaluate bankruptcy and other insolvency options will be able to take advantage of this comparatively nimble tool. Further, professionals that in previous years might have balked at the prospect of recommending clients consider an ABC process due to lack of familiarity or to fears about statute inconsistency can now add another arrow to their insolvency quiver as they advise troubled clients.

Conclusion

The ABC Act creates a consistent, creditor-respecting liquidation framework that can be implemented quickly and can leverage multi-state coordination tools. These key features of the ABC Act track well to common mid-market distress constraints like limited liquidity, need for expedited sale processes, and eroding stakeholder trust. Equally important, the ABC Act allows much of the ABC administration process to occur out of court, with a pre-designated, competent court on standby should issues arise that may benefit from judicial oversight.

ABCs provide an attractive alternative to bankruptcy for many small to mid-market companies dealing with distress. The ABC Act allows businesses with a need for a going concern sale or liquidation involving multi-state operations to benefit from a more streamlined and predictable process. Although an ABC would not be suitable for a company with a significant, immediate need for automatic stay-like relief or that requires a cramdown as a means of resolving highly contentious issues in their capital structure, this tool remains an effective option for exiting a troubled business. ■