

# BUYING TROUBLE

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## Assignment for the Benefit of Creditors

Bankruptcy is not always the best solution for the distressed business seeking to liquidate. Rather than following the traditional path of bankruptcy liquidation, distressed companies are increasingly utilizing an old, common law tool to liquidate - an Assignment for the Benefit of Creditors.

An Assignment for the Benefit of Creditors, or ABC, is a state law alternative to bankruptcy. In an ABC, a financially distressed company or individual, the Assignor, transfers all of its assets to a custodian, the Assignee, through an instrument called a Deed of Assignment. The Assignee takes control of the assets, collects amounts owing to the Assignor, and investigates potential claims against third parties before liquidating the assets and distributing the proceeds to the Assignor's creditors according to the scheme set forth in the Deed of Assignment. Much like a trustee in bankruptcy, the Assignee is paid a reasonable fee as compensation for its efforts and may retain counsel if necessary.

The mechanics of an ABC under Georgia law are relatively straightforward. The most important document involved in the ABC process is the Deed of Assignment, which conveys all the Assignor's assets to the Assignee and sets forth the manner in which creditors are to be paid. The Deed of Assignment must include a list of each asset conveyed as well as a schedule of all creditors and the amounts they are owed. Once the Deed of Assignment is recorded, the Assignee works to collect and liquidate the assets for the benefit of creditors. Within fifteen days of the assignment, both the Assignor and the Assignee must file an affidavit stating that they have reviewed the books and records of the Assignor and that both the list of assets and schedule of creditors are accurate. Within thirty days of the assignment, all the Assignor's creditors must be given notice of the assignment. Finally, sixty days after the Deed of Assignment is recorded, the Assignee may make a distribution to creditors according to the schedule set forth in the Deed of Assignment. Any surplus remaining after all creditors have been paid in full is returned to the Assignor.

ABC's have some disadvantages when compared to the bankruptcy process. For example, in an ABC, there is no automatic stay to protect the assignor as there would be for a debtor in bankruptcy. Because legal title to the assets passes from the Assignor to the Assignee at the time the Deed of

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Assignment is recorded, however, creditors will be unable to execute on the assets and therefore have little reason to seek recourse from the Assignor. Another disadvantage of an ABC is that, unlike a trustee in bankruptcy, an Assignee does not enjoy immunity from suits by creditors. Further, if the creditors are unhappy with the ABC upon learning of it, they may file an involuntary bankruptcy petition against the Assignor. If the involuntary petition is successful, the bankruptcy court may order the Assignee to turn over the assigned assets to the bankruptcy estate, thereby nullifying the assignment.

While disadvantages do exist, ABC's also offer numerous advantages over the bankruptcy process. First and foremost, ABC's are efficient. There is no public trustee system, no judge, no court, and no reporting system or court costs. The assets can be sold quickly with little or no oversight. ABC's are also discreet. Although the Deed of Assignment must be recorded in the county real estate records and the creditors given individual notice of the assignment, there are no motions filed on a public docket and publicity can be kept to a minimum. Finally, ABC's are flexible. The Assignor is free to select the Assignee of its choice, without input from creditors. The Assignee chosen is typically highly sophisticated and able to market and sell the assets quickly and at a higher price than that which could be achieved in bankruptcy. Also, unlike a Chapter 7 bankruptcy trustee, an Assignee can operate a business while trying to sell it to a third party. The Assignee's fee is determined by the Deed of Assignment; it can be a fixed fee, a percentage of sales, or a combination of both. Moreover, once the assets are sold, the Deed of Assignment can specify a distribution scheme that treats creditors differently than they would be under the bankruptcy code. For these reasons, an Assignment for the Benefit of Creditors is a viable state-law alternative to bankruptcy worthy of consideration.

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