

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** PCS for HB 833 General Assignments

**SPONSOR(S):** Civil Justice Subcommittee

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1098

<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR or BUDGET/POLICY CHIEF</b>
Orig. Comm.: Civil Justice Subcommittee		Ward	Bond

**SUMMARY ANALYSIS**

An assignment for the benefit of creditors (ABC) is a state law procedure for the administration of an insolvent estate. It is somewhat analogous to federal bankruptcy, in that there is a liquidation of the debtor's property through a third person, but the debtor is not discharged from debt, and there is no automatic stay of collection efforts. The debtor is called the assignor. The debtor makes a general assignment of the estate assets to an assignee. This document is recorded in the public records, and then claims of creditors can be filed. Claims are paid by priorities set out in the statute, and the entire process is supervised by the circuit court. Hearings are held as necessary to process payment of claims.

Practitioners have reported a need to amend the general assignment statute based upon experience and a lack of consistency in the way the law of general assignments for the benefit of creditors is interpreted throughout the state. The bill provides:

- "Negative notice" as a procedure to allow an assignee to give notice to interested parties of an action to be taken. In the absence of objection, the assignee may proceed without a hearing.
- The assignee's bond must not be less than \$25,000 or double the liquidation value of the unencumbered and liquid assets of the estate, whichever is higher.
- An assignee may conduct discovery as provided for in the Florida Rules of Civil Procedure.
- An assignee may conduct the business of the assignor for 45 days without an extension, instead of the current 14 days.
- Identification of the parties entitled to notice and the contents of the notice, when an assignee rejects a current lease of the assignor.
- Procedural amendments to clarify which parties are entitled to service of objections to claims, and the service address of the claimant.
- A form for deeds to be used by assignees in the sale of real property.
- A form for providing notice of certain acts to be taken by the assignor.

The bill does not appear to have a fiscal impact on the state or local governments.

The bill is effective upon becoming law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

##### Summary

The bill standardizes and streamlines certain procedures applicable to an assignment for the benefit of creditors ("ABC") pursuant to Chapter 727, Florida Statutes.

##### Statutory Background

An assignment for the benefit of creditors (ABC) is a state law procedure for the administration of an insolvent estate.<sup>1</sup> An ABC allows a debtor to voluntarily assign its assets to a third party of the debtor's choosing. That third party (the "assignee") is charged with the duty of liquidating the debtor's assets for the purpose of satisfying creditors' claims against the debtor. Many ABC cases are filed with the consent of some or all of the debtor's creditors. It is commenced with an assignment recorded in the public records<sup>2</sup>, and the proceedings are conducted under the court's supervision.<sup>3</sup>

An ABC is similar to federal bankruptcy liquidation proceedings in that it requires full reporting to creditors and an equal distribution of a debtor's assets according to the priorities established in the statute.<sup>4</sup>

An ABC is primarily distinguishable from the federal bankruptcy process in that:

- It does not impose an automatic stay in favor of the debtor;<sup>5</sup>
- It does not grant an assignee special authority to recover pre-filing transfers as a result of the ABC;<sup>6</sup> and
- It does not provide a discharge of any debt.<sup>7</sup>

Practitioners report that in recent years, confusion has arisen in ABC cases over some of the statute's inconsistent procedural requirements, and the applicability of other state procedural rules to ABC proceedings. There is also a need for consistency on a statewide basis at the trial court level. Accordingly, both practitioners and judges alike report the need for additional statutory guidance and clarification regarding the appropriate procedures for an ABC proceeding. The bill addresses 8 areas of concern reported by practitioners.

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<sup>1</sup> "Estate" in this sense is a body of property, not to be confused with procedures for handling a decedent's estate upon death of the owner.

<sup>2</sup> Section 727.104, F.S.

<sup>3</sup> Section 727.102, F.S.

<sup>4</sup> Section 727.114, F.S.

<sup>5</sup> Although there is no automatic stay in favor of the debtor, the Statute does preclude creditors from commencing proceedings against the assignee, except as provided therein, and from levying, executing, attaching, or similarly pursuing assets of the estate in the possession, custody, or control of the assignee, unless the creditor is a consensual lienholder. See s. 727.105(13), F.S.

<sup>6</sup> Certain other state laws allow such recovery under some circumstances, such as Florida's Fraudulent Transfer Act (ch. 726, F. S.), but those laws are independent of the ABC process.

<sup>7</sup> *Moecker v. Antoine*, 845 So.2d 904 (Fla. 2003).

## Effect of Proposed Changes

### Negative Notice

The bill introduces a "negative notice" procedure for ABC cases.<sup>8</sup> A negative notice provides that unless an objection is filed within 21 days of receiving the notice, the requested action will be taken. Such a procedure reduces both the administrative burden on the court and the cost to the estate necessitated by a hearing for relief which is neither contested nor opposed.

Negative notice is a common procedural tool in federal bankruptcy court. Attorneys and creditors are generally familiar with the requirements for utilizing such notice.<sup>9</sup> Under the bill notice may be served by negative notice by including a specific form "warning" in the document (as set forth in s. 727.111(4), F.S.) that:

- The assignee proposes to take the actions described therein without further notice or a hearing unless a party in interest files an objection within 21 days of service of the notice;
- Any such objection must be filed with the clerk of court and served on the assignee's attorney and any other appropriate person(s);
- If an objection is filed and served, the court may schedule a hearing; and
- If no objection is filed, the assignee and the court will consider the proposed relief unopposed.

If no objection is filed within the time prescribed, the assignee may take the action described in the notice. The negative notice procedure will be available for a continuation of the assignor's business for an extended period, a proposed sale of assets of the estate other than in the ordinary course of business, the compromise or settlement of a controversy, the payment of fees, and the payment of expenses.

### Assignee Bond

Much like receivers, assignees are required to post a bond with the clerk of court to ensure the faithful discharge of their duties. The purpose of the bond is to protect the assignor's creditors from potential loss in the event of the assignee's improper and irreparable disposition of the assignor's assets.<sup>10</sup> Section 727.104(2)(b), F.S., currently requires the court to set the bond "in an amount not less than double the liquidation value of the assets of the estate." "Liquidation value" is defined in s. 727.103(12), F.S., as "the value in cash obtainable upon a forced sale of assets after payment of valid liens encumbering said assets." The reason for deducting the value of liens encumbering the assets when calculating "liquidation value" is that a debt secured by a lien against the debtor's asset does not need the protection of a bond. It is already protected by the lien, which attaches to the asset and may be enforced despite disposition by the assignee.

In addition to assets secured by liens, unliquidated assets are also less susceptible to immediate and irreparable disposition by an assignee. The difficulty of valuing the asset consequently increases the difficulty of selling the asset. As a result, in cases where a significant portion of the debt is secured or unliquidated, practitioners report that some courts have been requiring a bond that seems too high. An unnecessarily high bond requirement causes an estate to incur additional cost and may discourage otherwise qualified assignee candidates from serving as assignees.

The bill amends s. 727.104(2)(b), F.S. to provide that the assignee's bond must not be less than \$25,000 or double the liquidation value of the unencumbered and liquid assets of the estate, whichever is higher. The amendment to the statute guarantees a minimum bond amount, yet provides that the

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<sup>8</sup> The bill defines "negative notice" as the notice procedure set forth in s. 727.111(4), F.S.

<sup>9</sup> It is also used in the Florida Probate Code and the Florida Trust Code in a similar manner. See, ss. 731.201 and s. 736.0206, F.S., where this analogous provision is called "formal notice."

<sup>10</sup> See *Williamson v. Leith*, 36 F.2d 643, 644 (Fla. 5th DCA 1929).

bond amount is not substantially and artificially inflated by a large amount of secured or unliquidated debt.

## Discovery

An area of obscurity in the present statute revolves around the applicability of the discovery provisions in the Florida Rules of Civil Procedure to ABC cases. Assignees are statutorily charged with the duty to:

- Determine whether or not prosecution of the estate's claims and causes of actions is in the best interest of the estate;<sup>11</sup>
- Examine the validity and priority of claims against the estate;<sup>12</sup> and
- Conduct due investigation of the estate's assets' value and benefit to the estate.<sup>13</sup>

Discovery is necessary for the assignee to fulfill its duties. An assignee must be able to conduct discovery related to claims and potential causes of action in order to properly discharge its obligations to an estate.

The bill amends s. 727.108(1)(a), F.S., and s. 727.113, F.S., to confirm an assignee's right to conduct discovery as provided in the Florida Rules of Civil Procedure in the following circumstances:

- In order to determine whether to prosecute claims and causes of action on behalf of the estate; and
- Concerning objections to claims.

## Conducting the Business of the Assignor

There currently exists a subtle conflict between s. 727.108(4), F.S., which allows an assignee to conduct the business of the assignor for up to 14 days (or longer upon notice), and s. 727.111(4), F.S., which requires not less than 20 days' notice of an assignee's continued operation of the assignor's business for longer than 14 calendar days. Thus, an assignee's compliance with both provisions is impossible unless the notice required by s. 727.111(4), F.S., is sent before the assignment has occurred.

To remedy the conflict, the bill provides an extension of the time within which an assignee may conduct the business of the assignor under s. 727.108(4), F.S., from 14 days to 45 days.<sup>14</sup> The additional time is a larger window within which an assignee can assess the business, determine a strategy for liquidation, and, if necessary, give notice of intent to operate the business for an additional period of time. The assignee may continue to operate the business for up to 90 days if there is no objection to a negative notice given to interested parties. This period may also be extended. The bill leaves intact the condition that such operation of the business must be in the best interest of the estate.

## Rejection of Unexpired Leases

The statute currently allows an assignee to reject an unexpired lease of non-residential real property or personal property.<sup>15</sup> However, it provides little guidance regarding the proper procedure for such rejection. In the interest of establishing consistent practices, the bill changes s. 727.110, F.S., to codify the procedure for such rejection.

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<sup>11</sup> See s. 727.108(1)(a), F.S.

<sup>12</sup> *Id.* at (10).

<sup>13</sup> *Id.* at (11).

<sup>14</sup> This extended timeframe also requires amendment of s. 727.109(3), F.S.

<sup>15</sup> See ss. 727.108(5) and 727.109(6), F.S.

The bill provides:

- Identification of the parties entitled to notice of the rejection;
- The information that should be included in the notice of such rejection; and
- The effective date of the rejection.

The bill also confirms the termination of an estate's rights, obligations, and liability concerning the leased property in the event a lessor fails to take possession upon rejection and the assignor may use the negative notice procedure for the notice of rejection.

### **Notice to Creditors**

Currently, s. 727.111, F.S. provides for notice to be mailed not less than 20 days prior to a proposed sale of assets, a payment of fees, or settlement of a case which might be an asset of the estate. To streamline the deadlines set forth in the statute into multiples of 7 days, the bill extends the minimum amount of time for notice under the statute from 20 days to 21 days.<sup>16</sup>

The bill adds that the address on the claim is the address for service, and that service will also be made upon the designated registered agent listed with the Division of Corporations. The bill creates a notice form.

### **Objections to Claims**

In an ABC, creditors of an assignor file claims with the assignee who is charged with determining the validity and priority of such claims before distributing the assignor's assets in accordance with statutory requirements. The assignee or any other party in interest may object to a creditor's claim. The bill adds procedural amendments to s. 727.113(1), F.S., to specify which parties are entitled to service of any such objection, and the service address of the claimant. This provision is also subject to the negative notice procedure.

### **Assignee's Deed**

The bill creates s. 727.117, F.S., adding a form deed to the ABC statute. The deed is in substantially the same form as the warranty deed set forth in s. 689.02, F.S., without the warranties of title. Instead, the assignee states that the grantor executes the instrument in its capacity as assignee of the estate, and is not personally liable under the instrument.

## **B. SECTION DIRECTORY:**

Section 1 amends s. 727.103, F.S., relating to definitions.

Section 2 amends s. 727.104, F.S., relating to commencement of proceedings.

Section 3 amends s. 727.108, F.S., relating to duties of an assignee.

Section 4 amends s. 727.109, F.S., relating to power of the court.

Section 5 amends s. 727.110, F.S., relating to actions by assignee and other parties in interest.

Section 6 amends s. 727.111, F.S., relating to notice.

Section 7 amends s. 727.113, F.S., relating to objections to claims.

Section 8 creates s. 727.117, F.S., relating to the assignee's deed form.

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<sup>16</sup> See ss. 727.103(13), 727.111(4), F.S.

Section 9 provides the bill is effective upon becoming law.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

#### **2. Expenditures:**

The bill does not appear to have any impact on state expenditures.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

The bill does not appear to have any impact on local government revenues.

#### **2. Expenditures:**

The bill does not appear to have any impact on local government expenditures.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill does not appear to have any direct economic impact on the private sector.

### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

#### **1. Applicability of Municipality/County Mandates Provision:**

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

#### **2. Other:**

None.

### **B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

The deed form created in section 8 does not include a space for the parcel identification number, which would make the form more analogous to the usual form of deed. Line 282 also does not refer to 'real property,' but only 'property.' The addition of the word 'real' would clarify the meaning of the change.

## **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

n/a.

