

IN practice



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ABC IS ALTERNATIVE TO BK

Solvency options other than bankruptcy, such as an assignment for benefit of creditors, often work well for clients and counsel

By David R. Haberbusch

Assignments for Benefit of Creditors (ABC) are not for everyone. Sometimes a company's individual circumstances do warrant a Chapter 7 or Chapter 11 bankruptcy filing. The best way to determine the merit of an individual case is to consult a firm with the experience to understand when bankruptcy is advisable, and will clearly lay out the clients options, providing solutions that offer a transition from insolvency to something less harsh, less time-consuming and less costly.

Small firm business lawyers often see clients with great ideas, the right team, a solid infrastructure, a hot product or service ready to take off. But, for any number of reasons, the client has insufficient capital to get ahead of the research and development curve and get that product or service to market to generate needed revenue. Or internal bick-

ering or succession issues threaten to derail years of hard work and decades of dreams. Clients arrive in counsel's offices to discuss the inevitability of bankruptcy. But less messy, less costly, and less harsh options exist.

A legal, but often underutilized option, an ABC, is one such alternative. An ABC offers a distressed business owner a way to keep the business running, and employees employed, while assets are liquidated, claims settled and various restructurings discussed.

An ABC is not rocket science. In fact, it's this relative ease of execution that makes ABCs, when appropriate, an attractive alternative to a protracted, complicated bankruptcy proceeding.



THE PROCESS

In general, an ABC is a four-step process:

Step One - Assignment

- Company X (Assignor) legally confers all rights, interests, and control of all assets to an independent third party trustee (Assignee).

Step Two - Liquidation

- Assignee liquidates the assets to distribute them pro rata to the creditors of the company. Assets include but are not limited to machinery, equipment and furniture, as well as less tangible items, such as patents, copyrights, intellectual property and accounts receivable.

Step Three - Settlement

- Assignee first evaluates and determines the amount and validity of creditor claims.
- Assignee distributes funds to creditors in the following priority:
 - Secured creditors
 - Administrative creditors, including the Assignee
 - Tax and wages claims
 - Salaries or commissions earned within 90 days of the Assignment date, but only to the extent of \$4,300
 - Claims for consumer deposits up to \$900
 - All other unsecured claims

Unsecured creditors can not follow sold assets. The formal claim process allows Assignee to limit and control ongoing liabilities.

Step Four - Closure

- Assignee reviews, controls, cleans up, and works toward closure of corporate situation before and during the asset sale
- Assignee issues Final Report and closes out assignment process

THE BENEFITS

Financially, bureaucratically and emotionally, the benefits of an ABC are numerous.

Clients can often realize some or all of the following five benefits while working with a qualified third party firm that undertakes an ABC:

Continued Operation of the Business as an On-Going Concern

- During an ABC, the business can continue to function, maintaining continuity, preserving jobs and producing greater options for final disposition

Better Return on Liquidated Assets

- Assets not sold in haste under duress of bankruptcy and as a stabilized operating company generally retrieve higher values
- Assets not sold under bureaucracy of bankruptcy retrieve higher values

More Expediency

- Lower administrative expenses because the process is more streamlined than bankruptcy
- Less time-consuming
- Contractual obligations can be negotiated and resolved efficiently

Limited Court Interference

- An ABC does not require court adjudication or consent in California

Less Personal Liability

- In general, the challenges faced by the Assignor become the problems of the Assignee
- Uncertainty of outcome is virtually eliminated
- Professional employees in effect consult to their own company with respect to operation and liquidation issues, preserving core knowledge and expertise
- Personal liability of directors and officers stops once assignment of assets begins. This is significant because in the case of start-up companies, the principals nearly always guarantee lender obligations of the company

Fewer Stigmas

- The corporate entity's negative publicity is minimized