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## Better than Bankruptcy?

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# BETTER THAN BANKRUPTCY?

*Andrew B. Dawson\**

## *Abstract*

*According to many in the bankruptcy field, small business debtors are increasingly turning to state debtor-creditors laws as an alternative to federal bankruptcy relief. One particularly popular state law is the assignment for the benefit of creditors. The conventional wisdom is that these procedures provide a state law alternative to liquidate a business.*

*This article reports the results of an original empirical study that challenges this conventional wisdom. Gathering data from every assignment for the benefit of creditors in a major metropolitan area over a three-year period, this study shows that debtors and their secured creditors are using these procedures not just to liquidate a business but also to sell the business as a going concern, free and clear of interests. These going concern sales, particularly when sold to insiders of the debtor, are actually more like corporate reorganization than liquidation.*

*These findings raise important questions about the role of these state law alternatives and the way they interact with the federal bankruptcy laws. These questions, in turn, may help inform debates about reforming the bankruptcy laws, particularly as applied to small business debtors.*

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## I. INTRODUCTION

Small businesses collectively comprise an integral part of the national economy, whether measured in terms of job creation, capitalization, or contributions to the gross domestic product.<sup>1</sup> These businesses are frequently described as the “backbone of America’s economy,”<sup>2</sup> and they are credited with replacing the many jobs lost during the Great Recession.<sup>3</sup> But there is a growing concern that one-

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1. See KATHRYN KOBE, ECON. CONSULTING SERVS., L.L.C., *SMALL BUSINESS GDP: UPDATE 2002-2010*, at 1, 4, [https://www.sba.gov/sites/default/files/rs390tot\\_1.pdf](https://www.sba.gov/sites/default/files/rs390tot_1.pdf); Kelly Edmiston, Fed. Reserve Bank of Kan. City, *The Role of Small and Large Businesses in Economic Development*, 92 *ECON. REV.* 73, 77–80 (2007), <https://www.kansascityfed.org/~media/files/publicat/econrev/econrevarchive/2007/2q07edmi.pdf>

2. See e.g., President Barack Obama, Remarks on the Economy at Industrial Support, Inc., Buffalo, N.Y. (Mar. 13, 2010), <https://www.whitehouse.gov/the-press-office/remarks-president-economy>.

3. Jared Hecht, *Are Small Businesses Really the Backbone of the Economy*, INC. (Dec. 17, 2014), <http://www.inc.com/jared-hecht/are-small-businesses-really-the-backbone-of-the-economy.html> (citing 2010 Census Report). But see Jason Wiens & Chris Jackson, *The Importance of Young Firms for Economic Growth*, ENTREPRENEURSHIP POLY DIG.

size-fits-all federal regulatory programs are failing to support this critical sector of the market.<sup>4</sup> Some regulations may impose disproportionately higher costs on small businesses.<sup>5</sup> For example, the cost of compliance with federal securities laws may impede small businesses from accessing the capital markets.<sup>6</sup> Other regulatory programs may fail to achieve their ends because they lack the flexibility to address variations in local markets. For example, federal patent laws arguably fail to promote innovation in the same way that state level patents would be able to do.<sup>7</sup>

Federal bankruptcy laws raise both of these concerns. These laws purport to promote the reorganization of viable businesses, with the goal of minimizing the costs of business failure on owners, their creditors, employees, and local communities.<sup>8</sup> These policies, in turn,

(Kauffman Found., Kan. City, Mo.), Sept. 25, 2014, at 1, [http://www.kauffman.org/~media/kauffman\\_org/resources/2014/entrepreneurship%20policy%20digest/september%202014/entrepreneurship\\_policy\\_digest\\_september2014.pdf](http://www.kauffman.org/~media/kauffman_org/resources/2014/entrepreneurship%20policy%20digest/september%202014/entrepreneurship_policy_digest_september2014.pdf) (arguing that it new and young firms are the drivers of job creation, regardless of business size).

4. NICOLE V. CRAIN & W. MARK CRAIN, LAFAYETTE COLL., *THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS 6–11* (2010), [https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20%28Full%29\\_0.pdf](https://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20%28Full%29_0.pdf); Stephen M. Bainbridge, *Legislate in Haste, Repent at Leisure*, HOOVER INST.: HOOVER DIG. (July 30, 2006), <http://www.hoover.org/research/legislate-haste-repent-leisure> (discussing disproportionate cost of Sarbanes Oxley compliance borne by smaller public firms).

5. Bainbridge, *supra* note 4.

6. David R. Burton, *Reducing the Burden on Small Public Companies Would Promote Innovation, Job Creation, and Economic Growth*, HERITAGE FOUND. (June 20, 2014), <http://www.heritage.org/research/reports/2014/06/reducing-the-burden-on-small-public-companies-would-promote-innovation-job-creation-and-economic-growth>; Gary J. Ross, *Small Business Capital Raises: Legal, Practical, and Market Factors*, 2015-DEC BUS. L. TODAY 1, 1–2 (2015), <http://www.americanbar.org/content/dam/aba/publications/blt/2015/12/capital-raises-201512.authcheckdam.pdf>.

7. Camilla A. Hrdy, *State Patents as a Solution to Underinvestment in Innovation*, 62 U. KAN. L. REV. 487, 488 (2013).

8. See *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 514, 527 (1984) (“[T]he policy of Chapter 11 is to permit successful rehabilitation of debtors . . . .”); Matthew Bruckner, *The Virtue in Bankruptcy*, 45 LOY. U. CHI. L.J. 233, 275 (2013) [hereinafter Bruckner, *The Virtue*] (“Chapter 11 is biased toward the rehabilitation of financially distressed companies and their reorganization into viable, going concerns.”); Nathalie D. Martin, *Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In*, 59 OHIO ST. L.J. 429, 439 (1998) (“Chapter 11’s rehabilitative goals run not merely to the reorganizing company, its creditors, and shareholders, but also to third party interests.”); Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 343–44 (1993) (“The [bankruptcy] system aims . . . toward four principal goals: (1) to enhance the value of the failing debtor; (2) to distribute value according to multiple normative principles; (3) to internalize the costs of the business failure to the parties dealing with the debtor; and (4) to create reliance on private monitoring.”).

play an important role in encouraging and facilitating innovation and entrepreneurship.<sup>9</sup> Entrepreneurs, it has been noted, may start multiple businesses over the course of their professional careers only to see many or most of them fail—that is, these owners are “serial entrepreneurs.”<sup>10</sup> This serial entrepreneurship cycle requires a regulatory program to balance the risks of business failures, allowing entrepreneurs to save viable businesses or walk away from nonviable ones, while at the same time protecting creditors that invest in these ventures.<sup>11</sup>

Bankruptcy law, in theory, serves this function, permitting viable but financially distressed businesses to reorganize their liabilities while liquidating nonviable businesses.<sup>12</sup> But, bankruptcy law has been criticized as providing ineffective relief for small businesses.<sup>13</sup> First, bankruptcy is expensive, and for small and medium-sized enterprises, it may simply be cost-prohibitive.<sup>14</sup> Second, the small-business-specific bankruptcy laws raise the costs of bankruptcy and limit its effectiveness.<sup>15</sup> Small businesses face higher reporting requirements,

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9. See generally Douglas G. Baird & Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcies*, 105 COLUM. L. REV. 2310 (2005) (considering whether bankruptcy law, as currently constructed actually facilitates entrepreneurship). See also Wei Fan & Michelle J. White, *Personal Bankruptcy and the Level of Entrepreneurial Activity*, 46 J.L. & ECON. 543, 544 (2003), and John Armour & Douglas Cumming, *Bankruptcy Law and Entrepreneurship*, 10 AM. L. & ECON. REV. 303, 337 (2008), which both identify the role of personal bankruptcy relief as a predictor of entrepreneurship rates.

10. Baird & Morrison, *supra* note 9, at 2329 (“Many small businesses fail each year. Indeed, over 30% of new startups close within two years; over 50% close within four years.”).

11. *Id.* (arguing that Chapter 11 currently creates an incentive for owner-operators to stay with a failed ventured and that the reorganization law needs to be re-thought in order to better support serial entrepreneurship).

12. See Alan Schwartz, *A Normative Theory of Business Bankruptcy*, 91 VA. L. REV. 1199, 1200–01 (2005) (describing the former as “financial distress” and the latter as “economic distress,” and positing that “[s]ocial welfare is maximized when economically distressed firms are liquidated but financially distressed firms are continued”).

13. See *infra* notes 14–21.

14. See Matthew Adam Bruckner, *Crowdsourcing (Bankruptcy) Fee Control*, 46 SETON HALL L. REV. 361, 365–94 (2016) (discussing general concern that bankruptcy may be too expensive); see also D.J. BAKER ET AL., AM. BANKR. INST., FINAL REPORT AND RECOMMENDATIONS 277 n.985 (2014), <https://abiworld.app.box.com/s/vvircv5xv83aav14dp4h> (noting the particular impact of high cost of bankruptcy on small businesses).

15. Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 638 (2009) (“[T]he new small business provisions imposed inflexible deadlines and several other burdens on Chapter 11 businesses with less than \$2 million in debt.” (citing 11 U.S.C. §§ 101(51D), 1121(e) (2012))).

and they enjoy less flexibility in the plan confirmation process.<sup>16</sup> And third, the bankruptcy confirmation requirements may impose a particularly high cost on owner-operators.<sup>17</sup> Under the absolute priority rule, a business owner cannot retain her equity interest in the debtor unless all creditors consent or are paid in full.<sup>18</sup> This imposes a risk for business owners in all cases, but particularly so on owner-operators whose interest in their company is likely their primary source of income.<sup>19</sup>

Without an effective bankruptcy law for small businesses, there is a fear that small businesses may lack the ability to reorganize and thereby preserve going concern value for creditors and investors alike.<sup>20</sup> If these businesses cannot reach a consensual workout plan with their creditors, they may be forced to liquidate.<sup>21</sup> This concern about federal bankruptcy law's ineffectiveness for small business debtors has prompted a number of proposals to amend the bankruptcy laws as applied to small- and medium-sized enterprises.<sup>22</sup> Such amendments are perceived as necessary because bankruptcy alone offers many of the powers necessary for a successful reorganization, for example, including the power

to decide unilaterally (for the most part) to assume or reject contracts and leases, to obtain financing that primes existing liens (thus providing a source of capital not available outside of bankruptcy), to sell some or all of its assets free and clear of all liens and claims, and to delay the payment of and restructure its prepetition obligations while continuing to operate the

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16. *See id.* at 638–39.

17. Donald R. Korobkin, *Vulnerability, Survival, and the Problem of Small Business Bankruptcy*, 23 CAP. U. L. REV. 413, 425–26 (1994) (describing the impact of the “absolute priority rule” on small businesses).

18. 11 U.S.C. § 1129(b)(2)(B). Although this statute nowhere uses the word “absolute priority rule,” this is the term of art described in this provision. *See* Anthony J. Casey, *The Creditors’ Bargain and Option-Preservation Priority in Chapter 11*, 78 U. CHI. L. REV. 759, 763 n.16 (2011) (briefly summarizing the rule and collecting and synthesizing the vast literature on this provision).

19. Korobkin, *supra* note 17, at 425.

20. Michelle M. Harner, *Are Small- and Medium-Sized Companies Worth Saving?*, 34 AM. BANKR. INST. J. 8, 8–9 (July 2015) (expressing concern that bankruptcy may be practically unavailable to small and medium enterprises and that state laws may not provide an opportunity to reorganize failing businesses).

21. *Id.*

22. The most recent proposal is that of the ABI Commission to Study the Reform of Chapter 11, *see supra* note 14. *See generally* Anne Lawton, *An Argument for Simplifying the Code’s “Small Business Debtor” Definition*, 21 AM. BANKR. INST. L. REV. 55 (2013).

business.<sup>23</sup>

This article reports the results of an original empirical study that challenges this conventional wisdom, showing that debtors were able to use state law to reorganize without the need of federal bankruptcy protection. This study examines one particular state debtor-creditor law, the assignment for the benefit of creditors (ABC), in South Florida over a three-year period, from 2012 to 2014.<sup>24</sup> Data gathered from court filings in these ABC cases shows that businesses—in particular, but not limited to, small- and medium-sized enterprises—are using this state law procedure to reorganize. Debtors were able to do so using tools generally thought to be bankruptcy-specific: rejecting contracts, obtaining post-petition financing, and selling assets free and clear of interests.<sup>25</sup>

While prior studies on ABCs have examined the availability and popularity of ABCs as a liquidation option,<sup>26</sup> this study shows that ABCs may be used to permit business owners to retain their equity interests and restructure their liabilities. These findings raise important legal, systemic, and empirical questions about the interaction of state debtor-creditor laws and the federal Bankruptcy Code. They may also provide an important perspective on efforts to reform the

23. Michelle M. Harner & Jamie Marincic Griffin, *Facilitating Successful Failures*, 66 FLA. L. REV. 205, 210 n.11 (2014) (listing these as example of the “tools not otherwise available outside of bankruptcy”); see also William Choslovsky & Eric Walker, DLA Piper, *An Alternative to Bankruptcy: The ABCs of ABCs*, in THE AMERICAS RESTRUCTURING AND INSOLVENCY GUIDE 2008/2009, at 90, 92–93 (2008), [http://www.americasrestructuring.com/08\\_SF/p90-95%20An%20alternative%20to%20bankruptcy.pdf](http://www.americasrestructuring.com/08_SF/p90-95%20An%20alternative%20to%20bankruptcy.pdf) (“ABCs are not limited to liquidations. Just as in bankruptcy, an ABC can be used to facilitate a going-concern sale of the debtor’s assets to a third party. However, an ABC does not provide for the reorganisation of a troubled business, as that relief is provided exclusively by Chapter 11 of the Bankruptcy Code. Furthermore, only corporate entities, not individuals or sole proprietors, are eligible to commence an ABC.”).

24. As explained *infra*, South Florida consists of the tri-county metropolitan area of Miami-Dade, Broward, and Palm Beach counties. The Office of Management and Budget identifies Miami-Fort Lauderdale-West Palm Beach as a single “metropolitan area,” see OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 15-10, REVISED DELINEATIONS OF METROPOLITAN STATISTICAL AREAS, MICROPOLITAN STATISTICAL AREAS, AND COMBINED STATISTICAL AREAS, AND GUIDANCE ON USES OF THE DELINEATIONS OF THESE AREAS 41 (2015), <https://www.whitehouse.gov/sites/default/files/omb/bulletins/2015/15-01.pdf>, and these three counties are the largest of the nine counties in the United States District for the Southern District of Florida.

25. Harner & Griffin, *supra* note 23, at 218–21.

26. See generally Ronald Mann, *An Empirical Investigation of Liquidation Choices of Failed High Tech Firms*, 82 WASH. U. L.Q. 1375 (2004) [hereinafter Mann, *Liquidation Choices*]; Edward R. Morrison, *Bargaining Around Bankruptcy: Small Business Workouts and State Law*, 38 J. LEGAL STUDIES 255 (2009). Both are discussed in Part II, *infra*.

corporate bankruptcy laws, particularly as applied to small and medium enterprises.

This article begins by providing a background on ABCs. Part I describes ABCs generally and then examines Florida's ABC statute in particular. It then summarizes previous studies on ABCs, which have largely focused on ABCs as a liquidation alternative. As explained in this part, this project is the first of its kind to report data on actual ABC proceedings, a feat made possible because Florida's procedures are conducted through state courts, whereas other state systems are conducted extra-judicially.

Part II describes the study design and data collection methodology, and Part III presents the findings. The findings are broken down into three sections. The first reports the case outcomes, categorizing each case as either a liquidation or a going concern sale. The going concern sales are then categorized as sales to former insiders of the assignor or to third parties. The second section presents findings as to distributions made to creditors. And the third presents data on how these cases interacted with the bankruptcy laws, reporting examples of cases in which creditors commenced an involuntary bankruptcy proceeding against the debtor and in which the assignee was able to use the bankruptcy laws to supplement its statutory powers.

Part IV then examines the implications of these findings. It first examines the legal questions that arise from having a dual system of bankruptcy relief. Namely, to what extent do the Constitution and the federal bankruptcy laws leave room for states to legislate in this field? The Contracts Clause prohibits state from enacting laws that impair the obligation of contracts, and the Supremacy Clause would preempt any state laws that conflict with the federal Bankruptcy Code.<sup>27</sup> While the Supreme Court has found the federal bankruptcy laws preempt state "insolvency" laws, state ABC laws have largely survived preemption challenges.<sup>28</sup> But the more these ABC law approximate federal bankruptcy law, the more likely they may conflict with those federal laws.<sup>29</sup> There is very little guidance in this field, and the Court

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27. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."); *id.* art. VI, cl 2. ("This Constitution and the Laws of the United States . . . shall be the supreme Law of the Land . . .").

28. See *infra* notes 56–60 and accompanying text.

29. This issue arose in the litigation concerning the Puerto Rico Public Corporation Debt Enforcement and Recovery Act ("Recovery Act"), which purported to grant bankruptcy-type relief to Puerto Rican public corporations. The First Circuit Court of Appeals held the Recovery Act preempted, both explicitly and under principles of conflict preemption. *Franklin Cal. Tax-Free Tr. v. Puerto Rico*, 805 F.3d 322, 343 (1st Cir.), *cert. granted*, 136 S. Ct. 582 (2015), *cert. granted sub nom. Acosta-Febo v. Franklin Cal. Tax-*



has declined to define the scope of Congress's bankruptcy power.<sup>30</sup> But if ABCs continue to be used as bankruptcy reorganization alternatives, it is likely that courts will soon have to address the constitutionality of these state law alternatives to bankruptcy.

It then proceeds to consider the systemic costs and benefits of having state law alternatives to bankruptcy. State law alternatives might permit states to support financially distressed small businesses; however, they may come at the expense of increasing the cost of credit to the extent they are too debtor-friendly.<sup>31</sup>

Next, this section highlights some of the empirical questions raised by these findings. To the extent that business owners may be able to reorganize their business under state law—without the attendant costs, stigma, and legal challenges—this would help explain our understanding of bankruptcy outcomes. We know that small businesses fare poorly in chapter 11 of the Bankruptcy Code, and we have understood this “failure” to be a function of the bankruptcy laws—in particular those that apply to “small business debtors.”<sup>32</sup> But these findings suggest the possibility that these observations may reflect a selection bias: viable business debtors may be using ABCs, leaving non-viable debtors to file bankruptcy. Or it may be that debtors are using ABCs as a first measure to address financial problems before turning to bankruptcy law as a last resort.<sup>33</sup>

Finally, this section considers how these findings may inform current efforts to reform the business bankruptcy laws, particularly as to small and medium enterprises. In many ways, state legislatures have

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Free Tr., 136 S. Ct. 582 (2015). The Supreme Court affirmed, but only on explicit preemption grounds. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1949 (2016).

30. See *infra* notes 56–60.

31. See *infra* Section IV.B.2.

32. The “success” reported here is based solely on the ability of debtors to retain their business while effectively discharging their debts. “Success” could also be measured over a longer time frame by looking at whether the reorganized debtor remained in operation. Many bankruptcy studies have measured success in both ways. See, e.g., Anne Lawton, *Chapter 11 Triage: Diagnosing a Debtor's Prospects for Success*, 54 ARIZ. L. REV. 985, 1001–04 (2012) [hereinafter Lawton, *Chapter 11 Triage*] (defining a bankruptcy case as a “success” if “the bankruptcy court did not convert or dismiss the case post-confirmation, and the debtor did not subsequently re-file for bankruptcy under any chapter of the Code”); Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of A “Race to the Bottom”*, 54 VAND. L. REV. 231, 235 (2001) (measuring re-filing rates of large corporate debtors). This current study, though, has no data on this longer term success.

33. The findings in this paper do not address these questions; rather, they identify these as matters for future empirical studies.

created ABCs as a bankruptcy alternative, consciously crafting the law to compete with bankruptcy laws. Federal bankruptcy law may be informed by these state law efforts, in particular, as related to the ability of business owners to retain their equity interests. Further, to the extent these ABCs may give too much power to debtors, these findings may support providing greater protections to creditors.

## II. BACKGROUND

Assignments for the benefit of creditors have been a core platform of debtor-creditor laws dating back to English common law.<sup>34</sup> This section begins with a brief background on ABC laws, proceeds to discuss ABC laws in Florida, and concludes by summarizing prior empirical studies on ABCs.

### A. *General Assignments for the Benefit of Creditors*

The assignment for the benefit of creditors has its roots, doctrinally, in trust law: a debtor assigns its assets to an assignee to liquidate for the benefit of creditors.<sup>35</sup> The assignee is a fiduciary of the creditors, and may fulfill her obligations to creditors by liquidating the assets in the manner most likely to yield the highest returns.<sup>36</sup> This may involve selling the assets piecemeal or by selling all of the assets together.

Originally, ABCs were governed by state common law.<sup>37</sup> During the late 1800s, many states codified their ABC procedures, largely as a response to concerns that ABCs were being abused.<sup>38</sup> Under the

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34. *Brashear v. West*, 32 U.S. 608 (1833) (“[T]he right to make [an assignment] results from the absolute ownership which every man claims over that which is his own . . .”).

35. Melvin G. Shimm, *The Impact of State Law on Bankruptcy*, 1971 DUKE L.J. 879, 888 (1971). Technically, the assignor transfers only those assets that are not exempted from creditor collection—that is, all non-exempt assets. State exemption laws, though, apply only to individual debtors, not to businesses.

36. GEOFFREY L. BERMAN, AM. BANKR. INST., *GENERAL ASSIGNMENTS FOR THE BENEFIT OF CREDITORS: THE ABCS OF ABCS* 4 (David Gould ed., 3d ed. 2015) (2000).

37. See Benjamin Weintraub et al., *Assignments for the Benefit of Creditors and Competitive Systems for Liquidation of Insolvent Estates*, 39 CORNELL L.Q. 3, 6 (1953).

38. *Id.* at 7 (describing the “abusive” uses of common law ABCs – such as partial assignments, preferential payments, using assignments to demand releases from consenting creditors – that led to the late nineteenth century statutory revisions of these procedures); see also Shimm, *supra* note 35, at 889 (noting that ABCs traditionally were prone to abuse because the debtor had discretion to “prefer certain of his creditors and exclude others, conditional participation upon release by creditors of the unpaid balance of their claims against him, and endow a friendly assignee with broad latitude in the administration of the assignment”).

common law, debtors could assign their assets (or even a portion of their assets) to any assignee of their choosing, and the assignee had broad discretion in how to administer the assets and distribute the proceeds.<sup>39</sup> This process, it was feared, provided insufficient safeguards to creditors against the debtor's fraudulent and preferential transfers of assets.<sup>40</sup> Statutory reform, it was thought, would rein in these abuses while retaining the basic structure of ABCs as an efficient creditor collection device.<sup>41</sup>

Eleven states continue to rely on common law assignments.<sup>42</sup> As for the others, some states have attempted to modernize their ABC statutes, while others continue to work largely within the same structure as those late nineteenth century statutes. For example, as discussed in the following section, Florida enacted its first ABC statute in 1889.<sup>43</sup> That statute remained intact until 1987, when the Business Section of the Florida Bar sponsored an overhaul of the statute.<sup>44</sup>

Regardless of whether an ABC is governed by common law or statute, ABCs have the same basic structure: assets are transferred to an assignee, who then administers the assets and distributes the proceedings according to state law creditor priorities.<sup>45</sup> In many ways, this process resembles that of a liquidation under chapter 7 of the Bankruptcy Code, with the assignee doing the work of a bankruptcy trustee.<sup>46</sup> For purposes of this discussion, though, there are two important differences between an ABC and bankruptcy liquidation. First, the assignor-assignee relationship is consensual, in that a business owner can choose her assignee and the assignee is free to accept or refuse the assignment.<sup>47</sup> In contrast, in bankruptcy, the United States Trustee's office appoints a disinterested trustee to administer the estate.<sup>48</sup> This difference is the foundation of the

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39. Weintraub et al., *supra* note 37, at 7.

40. *Id.*

41. *Id.*

42. Carly Landon, Note, *Making Assignments for the Benefit of Creditors as Easy as A-B-C*, 41 FORDHAM URB. L.J. 1451, 1472 (2014).

43. Jodi Daniel Cooke, *Recent Amendments to Ch. 727 Will Streamline Various Aspects of Assignments for the Benefit of Creditors*, 87-AUG FLA. B.J. 34, 34 (2013); Jeffrey Davis, *Florida's Beefed-Up Assignment for the Benefit of Creditors as an Alternative to Bankruptcy*, 19 U. FLA. J.L. & PUB. POL'Y 17, 19 (2008).

44. Davis, *supra* note 43, at 19.

45. BERMAN, *supra* note 36, at 3-6 (describing basic procedure of ABCs).

46. See 11 U.S.C. §§ 701-84 (2012).

47. See BERMAN, *supra* note 36, at 4.

48. 11 U.S.C. § 701(a)(1) ("Promptly after the order for relief under this chapter, the United States trustee shall appoint one disinterested person that is a member of the panel of private trustees . . ."). Non-insider creditors can vote to replace the appointed

historical concerns with ABCs, as these procedures were seen as giving debtors too much control at the expense of creditors.<sup>49</sup>

The second important difference is that, unlike in bankruptcy, the commencement of an ABC does not enjoin creditor collection. A bankruptcy filing automatically gives rise to one of the broadest injunctions available, enjoining collection activities against both the person and property of the debtor.<sup>50</sup> Under an ABC, there is no automatic stay against creditor collection.<sup>51</sup> Creditors may continue to attempt to collect on their debts against the debtor's person and property; however, creditors are practically frustrated from collecting against the debtor's property, as state law gives the assignee priority over levying creditors.<sup>52</sup> Thus, creditors with a prior perfected security interest may still foreclose against their collateral; however, unsecured creditors will be unable to collect on the post-assignment assets.<sup>53</sup> Unsecured creditors, although effectively barred from collecting on their claims post-assignment, may commence an involuntary bankruptcy petition.<sup>54</sup> The bankruptcy laws provide that, within 120 days of an assignment, creditors may file an involuntary bankruptcy petition that, if accepted, would remove the case to federal bankruptcy court.<sup>55</sup>

While these differences have some important implications, as discussed further *infra*, the basic structures and functions of ABCs and

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trustee under § 702. *Id.* § 702(a)(3).

49. Weintraub, *supra* note 37, at 7.

50. 11 U.S.C. § 362; 3-362 COLLIER ON BANKRUPTCY ¶ 362.03 (16th ed., 2009) (“The stay of section 362 is extremely broad in scope and, aside from the limited exceptions of subsection (b), applies to almost any type of formal or informal action taken against the debtor or the property of the estate.”) (listing cases).

51. BERMAN, *supra* note 36, at 5.

52. U.C.C. § 9-309(12) (AM. LAW INST. & UNIF. LAW COMM’N 1987) (providing for automatic perfection of a security interest upon an assignment for the benefit of creditors”); *see also* BERMAN, *supra* note 36, at 5.

53. BERMAN, *supra* note 36, at 5 (noting that ABC laws themselves may stop such collection activities, e.g. Florida Statute 727.105 prohibits unsecured creditors from trying to seize assets in the possession of the assignee; or general state laws may effectively enjoin such actions by giving the assignee an interest in the assigned goods superior to any interest an unsecured creditor may attain by levying on the goods. For example, section 9-309 of the Uniform Commercial Code grants priority to assignee over lien creditors). Likewise, this holds true in common law ABC jurisdictions, such as Illinois. *See* 3 ILL. LAW AND PRAC. ASSIGNMENTS FOR BENEFIT OF CREDITORS § 29 (“Liens existing on the property of the assignor at the time an assignment for the benefit of creditors becomes effective are superior to the assignment.”).

54. 11 U.S.C. § 303(a).

55. *Id.* § 303(h). As discussed *infra*, there are some costs to doing this, e.g., unless there are fewer than twelve total creditors, an involuntary petition can be commenced only by at least three creditors. *Id.* § 303(b).

bankruptcy are so similar that ABCs enjoy an uncertain co-existence with federal bankruptcy laws. The Marshall Court recognized that, in the absence of federal bankruptcy laws, the states retained the right to pass their own bankruptcy laws, provided those laws did not unconstitutionally impair the obligation of contracts.<sup>56</sup> Thus, states could pass bankruptcy laws but those laws could not discharge prior incurred debts; rather, they could only discharge debts incurred after that bankruptcy law's enactment.<sup>57</sup> Once a federal bankruptcy law was in place, that law would "suspend" all conflicting state laws within its scope.<sup>58</sup> The federal bankruptcy laws, then, have preempted state insolvency laws, but their impact on ABCs has been uncertain.<sup>59</sup> The Court has held that the bankruptcy laws will preempt any ABCs to the extent those laws purport to discharge debts; however, otherwise ABCs may coexist.<sup>60</sup>

The unavailability of a debt discharge in ABCs makes the process unattractive for individuals and partnerships, as they would remain saddled with their old debts after the ABC unless creditors otherwise released their claims; however, for limited liability entities, the discharge of indebtedness is unimportant. Owners of a limited liability entity may simply dispose of corporate assets and abandon the empty corporate shell. Thus, the lack of a discharge is not significant for a corporate debtor. In fact, corporate debtors do not receive a discharge even under chapter 7 of the Bankruptcy Code.<sup>61</sup>

ABCs, then, continue to play a role in debtor-creditor relations for corporations and other limited liability entities – but the exact extent of that role has been unclear. The conventional wisdom is that ABCs serve as a liquidation device, similar to that of a liquidating bankruptcy or a state law receivership. Under this common view, ABCs are simply an alternative to bankruptcy liquidation, under chapter 7 of the

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56. *Sturges v. Crowninshield*, 17 U.S. 122, 195 (1819).

57. *Ogden v. Saunders*, 25 U.S. 213, 356–57 (1827).

58. *Sturges*, 17 U.S. at 196 ("If the right of the states to pass a bankrupt law is not taken away by the mere grant of that power to congress, it cannot be extinguished; it can only be suspended, by the enactment of a general bankrupt law.")

59. *Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929) (declaring unconstitutional an Arkansas insolvency statute).

60. *Pobreselo v. Joseph M. Boyd Co.*, 287 U.S. 518, 525–26 (1933) (upholding a Wisconsin assignment law that, even though similar to bankruptcy law in some ways, was 'quite in harmony with the purposes of the federal [bankruptcy] act'). *But see* *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir. 2005) (holding that portion of California's ABC statute preempted to the extent it would conflict with bankruptcy's distribution scheme).

61. 11 U.S.C. § 727(a)(1) (2012) (making discharge available only to individuals); *id.* § 1141(d)(3) (denying a discharge to corporate debtors that liquidate under chapter 11).

Bankruptcy Code.<sup>62</sup> The availability of this alternative prompts the question as to how debtors and their creditors choose which liquidation device to pursue.

### B. Florida Law

Florida is considered to be among the handful of states in which ABCs are regularly used to address debtor-creditor relations, along with California and Illinois.<sup>63</sup> Substantively, Florida law is not unusual: as with most states, the debtor assigns all non-exempt assets to an assignee of its choosing;<sup>64</sup> notice is sent to all creditors;<sup>65</sup> creditors file claims with the assignee;<sup>66</sup> the assignee is authorized to liquidate the assets;<sup>67</sup> and then the liquidation proceeds are distributed to those creditors that filed claims.<sup>68</sup> Procedurally, though, Florida is distinctive in some important ways.

Unlike many states, Florida's ABC process is administered through the courts from beginning to end.<sup>69</sup> This court-centered process differs greatly from other states, in which a court is involved only to the extent there is a dispute.<sup>70</sup> Under the Florida statute, a case is commenced by filing a petition for assignment with the court, attaching schedules of assets and liabilities.<sup>71</sup> Within thirty days, the assignee must examine the assignor "under oath, concerning the acts, conduct, assets,

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62. 11 U.S.C. §§ 701–784. It is possible, of course, to liquidate a business under chapter 11 as well. Chapter 11 process differs in that the debtor may administer the estate and propose a liquidation plan, which must then be approved by the creditors. *Id.* §§ 1123, 1129

63. Landon, *supra* note 42, at 1453.

64. See FLA. STAT. § 727.103(1) (2015) (defining "asset" to exclude "property exempt by law from forced sale"); *id.* § 727.103(2) (requiring only that the assignee not be a creditor, equity security holder, or have "any interest adverse to the interest of the estate."); see, e.g., CAL. CIV. PROC. CODE §§ 1800–02 (West 2007); *S. Side Bank & Tr. Co. v. Yorke*, 305 N.E.2d 367, 370–71 (Ill. 1973).

65. FLA. STAT. § 727.111.

66. *Id.* § 727.112.

67. *Id.* § 727.108.

68. *Id.* § 727.114.

69. *Id.* § 727.102.

70. See Landon, *supra* note 42, at 1472 ("Because a common law ABC is usually an out-of-court process, many courts will only see ABCs in these states when and if disputes occur.").

71. FLA. STAT. § 727.104(c) ("The assignment shall have annexed thereto as Schedule A a true list of all of the assignor's known creditors, their mailing addresses, the amount and nature of their claims, and whether their claims are disputed; and as Schedule B a true list of all assets of the estate, including the estimated liquidation value of the assets, their location, and, if real property, a legal description thereof, as of the date of the assignment.").

liabilities, and financial condition of the assignor or any matter related to the assignee's administration of the estate."<sup>72</sup> The assignee then administers the estate, with many of the same powers and responsibilities as those of a bankruptcy trustee.<sup>73</sup> For example, the assignee may hire professionals, evaluate claims against the estate, reject unexpired leases, and liquidate assets.<sup>74</sup> Finally, the assignee is required to file a final report with the court, detailing the distributions made to creditors and seeking a final order to close the case.<sup>75</sup>

The Florida procedures are remarkable not only because they are judicially administered, but also because the procedures are similar to bankruptcy procedures. Florida's most recent round of amendments were partially in response to the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, which made bankruptcy relief more expensive and inaccessible for "small business debtors."<sup>76</sup> Florida's ABC amendments in 2007, 2008, and 2013,<sup>77</sup> in many ways sought to streamline the ABC process and to make its procedures more bankruptcy-like, making it an attractive and viable alternative to federal bankruptcy relief.<sup>78</sup> For example, Florida extended the amount of time the assignee could presumptively operate the business during the assignment in order to give assignees more flexibility in determining how to maximize the estate's value.<sup>79</sup> Florida also gave greater flexibility and power to assignees by adopting a "negative notice" procedure.<sup>80</sup> An assignee is generally obligated to provide notice to creditors regarding the administration of the estate – including, for example, notice of asset sales, notice of intent to operate the business, notice to abandon assets to the secured creditors, etc.<sup>81</sup> Under the old procedures, the assignee could sell the assets only after notice and a hearing.<sup>82</sup> Under the negative notice provisions, if there are no

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72. *Id.* § 727.107(3).

73. *Id.* § 727.108; *see also* 11 U.S.C. § 341 (2012).

74. FLA. STAT. § 727.108.

75. *Id.* § 727.107.

76. Robert M. Lawless, *Small Business and the 2005 Bankruptcy Law: Should Mom and Apple Pie Be Worried?*, 31 S. ILL. U. L.J. 585, 615–18 (2007) (describing the potential impact of these amendments on small businesses); Davis, *supra* note 43, at 19 (noting that the Florida ABC amendments were, in part, a response to these 2005 bankruptcy amendments).

77. Davis, *supra* note 43, at 19; *see also* H.R. 833, 2013 Leg. (Fla. 2013), <https://www.flsenate.gov/Session/Bill/2013/0833/BillText/Filed/PDF>.

78. *See supra* note 23 and accompanying text.

79. Cooke, *supra* note 23.

80. *Id.*

81. FLA. STAT. § 727.108(3) (2015).

82. Cooke, *supra* note 23.

objections to the assignee's motion, the assignee is empowered to perform in accordance with the motion without a hearing and without further court order.<sup>83</sup>

### C. *Prior Empirical Work*

Florida's court-administered procedures have made it possible for this study to be the first to contribute case-level data on ABC proceedings. Prior to this study, there have been two significant empirical studies on the use of ABCs as a liquidation alternative, both of which have sought to identify factors that predict this ABC/bankruptcy option. The first study, conducted by Ronald Mann, examined high tech firms' use of ABCs as an alternative to liquidating a company in bankruptcy.<sup>84</sup> Mann examined failed enterprises in this industry to determine factors that drove the firms to select ABC laws instead of federal bankruptcy law, and developed three theories: first, debtors are more likely to elect bankruptcy law when that law will provide unique tools for bargaining with creditors, such as, the power to reject unfavorable leases and cap the lessor's damages;<sup>85</sup> second, debtors may choose bankruptcy law because of it offers a powerful and efficient way of recovering pre-bankruptcy transfers;<sup>86</sup> and third, debtors may be more likely to choose ABCs when those processes impose relatively lower costs than bankruptcy. Thus, he posits that bankruptcy provides little benefit for debtors in the software industry, as those debtors' primary concern will be to retain their licensing rights to practice others' intellectual property; however, bankruptcy provides no assistance in this regard.<sup>87</sup> Another industry-specific feature relates to their corporate structure. In venture-capital-funded firms, board members may prefer ABCs since board members in publicly traded firms must disclose involvement in "bankruptcies," which, according to some, would not include ABCs.<sup>88</sup> That is, in some industries, the

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83. FLA. STAT. § 727.111(4) ("If no objections are timely filed and served, the assignee may take such action as described in the notice without further order of the court or may obtain an order approving the action without further notice of hearing. If an objection is filed, the court shall hold a hearing on the objection.").

84. See sources cited *supra* note 26.

85. Mann, *supra* note 26, at 1425.

86. *Id.* at 1436–37.

87. *Id.* at 1437.

88. *Id.* at 1424 n.153 (reporting interviewees' touting this benefit); see also BERMAN, *supra* note 36, at 6–7 (identifying this same factor, noting that "[t]he making of an assignment is not generally considered a bankruptcy and therefore may not be subject to reporting.") The regulation in question is Item 401(f)(1) of Regulation S-K, requiring disclosure of a director's involvement in "[a] petition under the Federal bankruptcy laws



benefits of bankruptcy may seldom outweigh their costs. Based on this interaction, Mann concludes that ABCs may lower the costs of financial distress.<sup>89</sup>

The second study, conducted by Edward Morrison, examined the liquidation choices of small business debtors in Chicago.<sup>90</sup> Morrison posits that the attractiveness of ABCs arises, in part, from the relationship between the owner-operator and its senior lenders.<sup>91</sup> He concludes that a “distressed small business will . . . opt for state procedures if its owner-manager and senior lenders can agree on a division of the surplus generated by state procedures.”<sup>92</sup> If they can’t agree—which he suggests may be the result of a lack of trust between the two parties—then lenders may prefer bankruptcy.<sup>93</sup> Bankruptcy, in that context, serves a verification function.<sup>94</sup> In bankruptcy, the debtor will have to disclose its assets and liabilities and will be subject to court oversight (and potentially oversight by a court-appointed examiner or trustee), thus providing a creditor with greater information than would be attainable otherwise.<sup>95</sup>

These studies have been foundational in understanding the interaction of federal and state liquidation options; however, neither one has examined how debtors have used ABCs. Morrison’s study identifies the possibility that some debtors may be using ABCs in order to reorganize instead of liquidate, but, due largely to data constraints, neither study examines this possibility. Data regarding ABCs are simply hard to find, as in California and Illinois the process is extra-judicial.<sup>96</sup>

The conventional wisdom is that ABCs would not be an option for debtors looking to reorganize. ABCs, it is thought, cannot provide some of key features thought necessary to reorganize a debtor.<sup>97</sup> In part,

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or any state insolvency law.” Mann, *supra* note 26, at 1424 n.153 (citing 17 C.F.R. § 229.401(f)(1)). Like Professor Mann, I remain unconvinced that the SEC disclosure rules are so rigid as to be so easily evaded.

89. Mann, *supra* note 26, at 1417.

90. Morrison, *Bargaining Around Bankruptcy*, *supra* note 26, at 257–58.

91. *Id.* at 257.

92. *Id.*

93. *Id.* at 270.

94. *Id.*

95. *Id.*

96. *Cf.* FLA. STAT. § 727.102 (2015).

97. Choslovsky & Walker, *supra* note 23, at 92 (“ABCs are not limited to liquidations. Just as in bankruptcy, an ABC can be used to facilitate a going-concern sale of the debtor’s assets to a third party. However, an ABC does not provide for the reorganisation of a troubled business, as that relief is provided exclusively by Chapter 11 of the Bankruptcy Code. Furthermore, only corporate entities, not individuals or sole

ABCs may be too limited geographically, unable to administer out-of-state assets or bind out-of-state creditors.<sup>98</sup> Only a federal bankruptcy law could provide truly national relief. Further, ABCs are understood to be limited in the relief they can offer.<sup>99</sup> For example, powers such as the ability to assume or reject executory contracts and leases, to obtain reorganization financing that can take priority over existing liens, and to sell assets free and clear of liens are all commonly understood as available only under the bankruptcy option.<sup>100</sup>

The study reported here seeks to promote a more complete understanding of the ABC option, examining the results debtors have been able to obtain under these state law proceedings. The findings reported below challenge many of these common presumptions about the limited scope of relief available under ABCs, and they raise important questions about the way in which these state law systems function alongside the federal bankruptcy laws.

### III. STUDY DESIGN & METHODOLOGY

This study examines every assignment for the benefit of creditors commenced in South Florida from 2012 through 2014 in order to understand better how often these procedures are used, by what sort of debtors, and to what end. South Florida is defined as the three counties making up the Miami-Fort Lauderdale-West Palm Beach metropolitan statistical area:<sup>101</sup> Miami-Dade, Broward, and Palm Beach counties.

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proprietors, are eligible to commence an ABC.”).

98. Harner, *supra* note 20, at 8–9 (noting that, while recognizing, an ABC could serve a reorganization-type purpose, its effectiveness is limited geographically: “Even SMEs have multi-state operations, and state law remedies may prove inefficient in such situations”). *But see* Mann, *supra* note 26, at 1415 (noting that an ABC can “operate[] as a low-cost privately ordered reorganization” provided the assignee can keep the business running long enough to sell as a going concern).

99. Harner & Griffin, *supra* note 23 at 209–10 & n.11 (“The Chapter 11 process does, however, offer a distressed company tools not otherwise available outside of bankruptcy,” with those tools including “the debtor’s ability to decide unilaterally (for the most part) to assume or reject contracts and leases, to obtain financing that primes existing liens (thus providing a source of capital not available outside of bankruptcy), to sell some or all of its assets free and clear of all liens and claims, and to delay the payment of and restructure its prepetition obligations while continuing to operate the business” (citing 11 U.S.C. §§ 362, 363, 364, 365, 1129 (2012))).

100. *Id.*

101. The Office of Management and Budget delineates metropolitan statistical areas for census and labor data. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 15-01, REVISED DELINEATIONS OF METROPOLITAN STATISTICAL AREAS, MICROPOLITAN STATISTICAL AREAS, AND COMBINED STATISTICAL AREAS, AND GUIDANCE ON USES OF THE DELINEATIONS OF THESE AREAS 41 (2015),

The three years, 2012, 2013, and 2014, capture a period during which court files were accessible in a cost-effective manner, as most of the court files were made electronically available beginning in 2013.<sup>102</sup> As discussed below, data were gathered from court filings, obtained mostly electronically and supplemented with paper copies from each county's court records.<sup>103</sup>

#### A. Data Collection Methodology

The study identified assignments for the benefit of creditor proceedings by searching the public notice section of the primary legal journals in South Florida, namely, the Miami and Broward Daily Business Reviews and the South Florida Business Journal.<sup>104</sup> Florida law requires the assignee file a notice of assignment once a week for four weeks, within ten days of the assignment.<sup>105</sup> Consistent with the language in the statute's model "Notice of Assignment,"<sup>106</sup> cases were identified by searching for the terms "notice of assignment" and "chapter 727."

The notices of assignment contained the names of the assignor and assignee, the court where the proceeding was commenced, and the case number of the ABC proceeding. Using that information, case files were largely accessible via the county courts' online records.<sup>107</sup> For those

<https://www.whitehouse.gov/sites/default/files/omb/bulletins/2015/15-01.pdf>.

102. For Miami-Dade and Broward counties, documents filed before April 1, 2013, must be viewed in the paper file. See FLA. COURTS E-FILING AUTH., UPDATE ON COUNTY CIVIL DIVISION EFILING IN THE ELEVENTH JUDICIAL CIRCUIT (2013), <https://www.jud11.flcourts.org/docs/eFILINGAnnouncementCountyCivil.pdf>; *17th Judicial Circuit eFiling*, 17TH JUD. CIRCUIT CT. FLA., <http://www.17th.flcourts.org/index.php/self-help/efiling-program> (last visited Nov. 10, 2016). For the ABCs commenced in 2012, this meant that all filings made before this date needed to be collected in hard copy.

103. Florida's ABC procedure is supervised by state courts, unlike some states in which the process is extra-judicial. This has the virtue of enabling data collection of this sort; however, it may limit the extent to which the findings here can be generalized to other extrajudicial jurisdictions. See *infra* Part III.

104. Searches in general circulation newspapers, such as the Miami Herald, produced no results.

105. FLA. STAT. § 727.111 (2015); see also *id.* § 727.111(2) (providing Florida's model "Notice of Assignment"), attached here as Appendix A.

106. See FLA. STAT. § 727.111(2).

107. *E.g.*, *Case Search - Public*, HOWARD C. FORMAN CLERK OF THE CTS., <https://www.clerk-17th-flcourts.org/Web2/CaseSearch/> (last visited Nov. 10, 2016) (Broward County); *eCaseView*, SHARON R. BOCK CLERK & COMPTROLLER, <http://www.mypalmbeachclerk.com/courtrecords.aspx> (last visited Nov. 10, 2016) (Palm Beach County); *Miami-Dade County Civil, Family, and Probate Courts Online System*, HARVEY RUVIN CLERK OF THE CTS., <https://www2.miami-dadeclerk.com/ocs/> (last visited Nov. 10,

filings that were not electronically available—as was the case with all filings from Palm Beach County—paper copies of court filings were obtained from each courthouse.

The study drew principally from three types of filings: the complaint (which contains a schedule of assets and liabilities); sale motions; and the final report (which describes and lists how assets were distributed among creditors, as well as any objections filed thereto). In addition, the study noted whether the creditors commenced an involuntary proceeding against the debtor after the assignment.

The petition and schedules provided information about the assignors. First, petitions listed the nature of the assignor's business. For those that did not, the type of business was determined by searching Bloomberg.com by company name.<sup>108</sup> The business type was then classified according to the Standard Industrial Classification Division ("SIC Division"), promulgated by the U.S. Department of Labor.<sup>109</sup> These divisions classify businesses as falling under one of ten divisions: Agriculture, Forestry and Fishing; Mining; Construction; Manufacturing; Transportation, Communications, Electric, Gas, and Sanitary Services; Wholesale Trade; Retail Trade; Finance, Insurance, and Real Estate; Services; and, Public Administration.<sup>110</sup>

Second, the schedules provide a snapshot of the assignors' debt structure. Each case was coded with a categorical variable for secured claims. The presence of secured claims is relevant, since secured creditors may easily thwart an ABC proceeding by foreclosing on their collateral, as discussed above. Thus, ABCs are only possible if the secured creditor does not oppose the procedures. The total liabilities of each case were also listed as a proxy for the debtor's size. Other empirical studies of bankruptcy debtors have measured size by debt, by assets, or by a combination of the two.<sup>111</sup> This study focused exclusively on debt, as asset values were reported inconsistently in the schedules.<sup>112</sup>

Finally, the schedules provided data regarding equity interests in the assignor, listing the identities of all shareholders and their

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2016) (Miami-Dade County).

108. See, for example, *Company Overview of Sanare, LLC*, BLOOMBERG, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=113630414> (last visited Nov. 10, 2016), for the search results for Sanare, LLC.

109. See Occupational Safety & Health Admin., *SIC Division Structure*, U.S. DEPT OF LABOR, [https://www.osha.gov/pls/imis/sic\\_manual.html](https://www.osha.gov/pls/imis/sic_manual.html) (last visited Nov. 10, 2016).

110. *Id.*

111. See, e.g., Mann, *supra* note 26, at 1416; Morrison, *supra* note 26, at 277.

112. Some schedules listed asset values as book value, others as liquidation value, and still others as the debtor's equity in the assets.

ownership interest. Each case was coded for the number of shareholders, as well as for a “closely held” categorical variable. A debtor was considered “closely held” if it was owned by ten or fewer individual shareholders. Debtors with more than ten shareholders, or that were owned by a holding company, were coded as “dispersely owned” companies.

The petition also provided procedural information, namely, the county in which the case was commenced, the identity of the assignee, the identity of assignee’s counsel, and the judge’s identity. These data were potentially relevant to measure the importance, if any, of a debtor’s ability to choose her own assignee and, in Miami-Dade and Broward counties, to move the case to each county’s Complex Business Division. In Miami-Dade and Broward counties, assignees may move to classify an ABC as a complex business litigation, which transfers their case to the Complex Business Division.<sup>113</sup> In Miami-Dade County, there was one complex business litigation judge during the study period.<sup>114</sup> In Broward County, there were three judges that presided over complex business litigation.<sup>115</sup> Although not directly related to the questions of who is using ABCs and to what end, these data were collected to gain a better understanding of the ABC system.

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113. See *In re Reaffirmation of the Creation of Section 40 (“Complex Business Litigation Section”)*, Eleventh Judicial Circuit, Administrative Order No. 11-04, at 4 (Fla. 2011), <https://www.jud11.flcourts.org/docs/CBL%20Section%20Procedures%20and%20AOC-11-04.pdf> (reassigning “action[s] involving the dissolution of a business entity or an assignment for the benefit of creditors” to the Complex Business Litigation Section “where the matter in controversy exceeds the amount of . . . [\$150,000]”). The Complex Business Litigation Judge in Miami-Dade County is John W. Thornton, Jr. *John W. Thornton, Jr.*, ELEVENTH JUD. CIRCUIT OF FLA., <http://www.jud11.flcourts.org/About-the-Court/Ourt-Courts/Civil-Court/Complex-Business-Litigation> (last visited December 27, 2016). In Broward County, Judges Robert Rosenberg and Jeffrey Streitfeld presided over complex business; Judge Rosenberg retired in 2012, and Judge Streitfeld retired in 2014. AGREE2DISAGREE MEDIATION & ARBITRATION, ROBERT A. ROSENBERG, ESQ. 1, [http://www.agree2disagree.com/Bob\\_Rosenberg\\_Bio.pdf](http://www.agree2disagree.com/Bob_Rosenberg_Bio.pdf); Carlos Harrison, *Retiring Judge Streitfeld to Resume Musical Hobby*, DAILY BUS. REV. (Aug. 22, 2014), <http://www.dailybusinessreview.com/id=1202667728179/Retiring-Judge-Streitfeld-To-Resume-Musical-Hobby>.

114. John W. Thornton, Jr., *supra* note 113.

115. Those judges are Judge Jack Tuter, Judge John J. Murphy III, and Judge Patti Englander Henning. *Division 07 Business Court Procedures*, 17TH JUD. CIRCUIT CT. OF FLA., <http://www.17th.flcourts.org/index.php/judges/circuit-civil/complex-litigation-unit/division-07> (last visited Nov. 10, 2016) (Judge Tuter); *Division 19*, 17TH JUD. CIRCUIT CT. OF FLA., <http://www.17th.flcourts.org/index.php/judges/circuit-civil/complex-litigation-unit/division-19> (last visited Nov. 10, 2016) (Judge Murphy); *Division 26*, 17TH JUD. CIRCUIT CT. OF FLA., <http://www.17th.flcourts.org/index.php/judges/circuit-civil/complex-litigation-unit/division-26> (last visited Nov. 10, 2016) (Judge Englander Henning).

The sale motions and orders provided information as to case outcomes, namely, whether the assets were sold at a public auction, abandoned to the secured creditor, or sold all together. Public auctions, abandonments, and collection/sale of receivables were all coded as “liquidations.”<sup>116</sup> Sales of substantially all assets were coded as “going concern sales.” Technically, such sales would not be true going concern sales, since the assignee could sell only the *assets* and not the company itself; however, a sale of all, or substantially all, assets is effectively a sale of the business itself.<sup>117</sup> Further, the price in such a sale presumably reflects the going-concern value of the group of assets. Thus, this study classifies such sales as going concern sales, consistent with the use of this term in the bankruptcy context.<sup>118</sup>

For each going concern sale, the study identified the purchaser as an “insider” if the purchaser was an owner, shareholder, manager, or relative of the debtor/assignor. This definition comports with the meaning of “insider” under the Bankruptcy Code.<sup>119</sup> In some cases, the sale motions disclosed this relationship. In many cases, though, the purchaser’s relationship with the assignor was undisclosed. In these cases, information about the purchaser was gleaned from its corporate records through the Florida Department of State Division of Corporations.<sup>120</sup> The names of these listed officers and directors were then compared to the corporate records of the assignor and to the information in the assignor’s schedules. When at least the last names matched, the purchaser was coded as an insider.<sup>121</sup> This methodology

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116. There may be important distinctions among these three outcomes; however, they ultimately result in winding down the debtor and thus are grouped together in this way.

117. In small business cases, this may be less true, as the owner often times may *be the business*, e.g., there is no Michael’s Gourmet Deli without Michael.

118. See Matthew A. Bruckner, *Improving Bankruptcy Sales by Raising the Bar: Imposing A Preliminary Injunction Standard for Objections to § 363 Sales*, 62 CATH. U. L. REV. 1, 13–15 (2012) [hereinafter Bruckner, *Improving Bankruptcy*] (describing going concern sales); Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE. L.J. 862, 889–90 (2014) (“[C]orporate bankruptcy always involves a sale of some kind: either the estate is formally sold to outside purchasers (piecemeal or as a going concern), or functionally sold to its own stakeholders through a plan of reorganization.” (citing Douglas G. Baird & Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 YALE L.J. 1930, 1937 (2006))).

119. 11 U.S.C. § 101(31)(B) (2012) (defining “insider” of a corporation to include a “(i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor”).

120. FLA. DEPT OF STATE DIV. OF CORPS., <http://www.sunbiz.org/> (last visited Nov. 10, 2016).

121. There were some borderline categorizations, e.g., in one case the purchaser was

may have under-counted the true number of insider sales, as it relies on self-reporting in the assignor's schedules as to ownership interests. Further, it may have missed sales to relatives with non-matching last names.

The assignee's final report and petition for allowance of administrative expenses were used to determine distributions made to creditors and the costs of administration. The final report might list that the encumbered assets were liquidated or abandoned to the secured creditors, recoveries to secured creditors, and distribution (if any) to priority and general unsecured creditors.

### B. Data

During the three-year study period, there were ninety-six ABCs commenced in South Florida.<sup>122</sup> Among these ninety-six filings, there were nine corporate groups that either filed a single collective ABC<sup>123</sup> or multiple ABCs for each affiliate. Counting each group as a single "case," there were a total of eighty-one cases in the study. Roughly 40% of the cases were filed in Miami-Dade County, another 45% in Broward County, and 15% in Palm Beach County. As a point of rough comparison, this number of ABCs nearly matches the number of businesses that filed for bankruptcy relief as "small business debtors" under chapter 11 of the Bankruptcy Code.<sup>124</sup>

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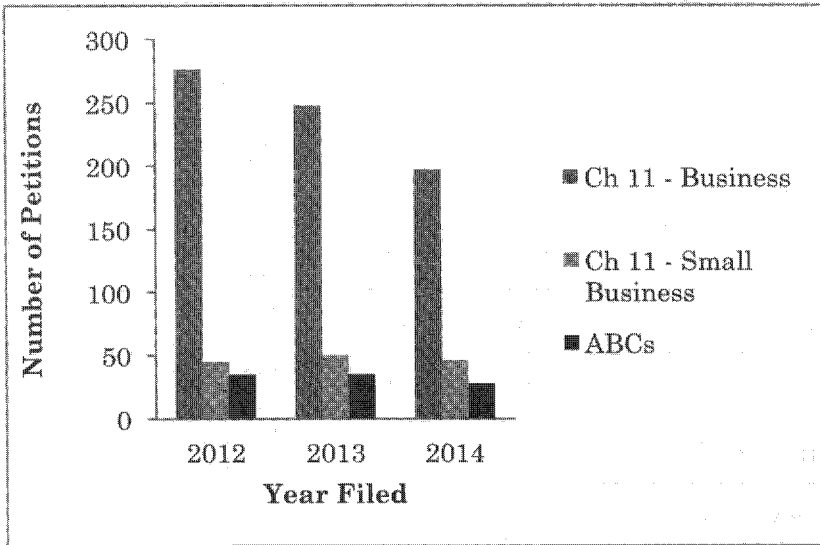
the owner's ex-spouse, Matta International, Inc. In that case, though, the ex-spouse was also a former director of the business, so he was categorized as an "insider."

122. A complete list of ABCs filed is in Appendix B.

123. For example, Shoreline Flooring Supplies 2 of Orlando, Inc., Shore-Line Carpet Supplies of Jacksonville, Inc., and Shore-Line Carpet Supplies, Inc. of Orlando filed a single petition for assignment, although they were three separate corporations. In contrast, Tire Depot and Auto Services, Inc. and Tire Depot Group, LLC filed separate petitions for assignment. Those petitions were administratively consolidated and, ultimately, substantively consolidated.

124. This comparison is rough, both because it relies on bankruptcy figures based on debtors' self-reported status as small business debtors—something debtors may not be accurately doing, particularly when they file as an individual whose debts are primarily business debts. See Elizabeth Warren & Robert Lawless, *The Myth of the Disappearing Business Bankruptcy*, 93 CAL. L. REV. 743, 779 (2005) (concluding that the Administrative Office of the U.S. Courts has under-counted the number of business bankruptcy filings). As to the ABCs in this study, most would likely qualify as a "small business debtor" under § 101(51D) of the Bankruptcy Code, but some would not. 11 U.S.C. § 101(51D). The Bankruptcy Code defines a "small business debtor" as one that has "aggregate noncontingent liquidated secured and unsecured debts" of less than \$2,566,050, excluding debts owed to affiliates and insiders. *Id.* § 101(51D)(A). Excluded from this definition are (1) debtors in a case in which there is a "sufficiently active and representative" unsecured creditors' committee and (2) debtors "whose primary activity is the business of owning or

Figure 1: Number of Petitions Filed: Bankruptcy vs. ABCs



The vast majority (80%) of these debtors/assignors were closely held businesses: most were owned by a single individual shareholder or by spouses.<sup>125</sup> These businesses included several retail stores, construction businesses, medical practices, and several import/export businesses. The other 20% were owned by larger groups of shareholders or by holding companies. Overall, most of the assignor/debtor businesses fit in one of the following four SIC Divisions, as defined by the U.S. Department of Labor: wholesale, retail, manufacturing, and services.<sup>126</sup>

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operating real property or activities incidental thereto". *Id.*

As discussed below, almost all of the assignors reported debts less than this amount. Even as to those whose aggregate debts exceeded this limit, many of their reported debts were contingent debts or debts owed to affiliates and insiders. It is, of course, impossible to know whether the assignors in this sample, if they had filed bankruptcy, would have had active and representative unsecured creditors' committees. Nonetheless, based on common criticisms of the small business bankruptcy laws, it is probably safe to assume they would not.

Some of the ABCs here involved debtors who would also be disqualified as "small business debtors" because their business focused on owning or operating real property.

125. Sixty percent reported a single individual shareholder. Individuals were identified as spouses if they shared the same address and the same last name, although it is entirely possible these were other familiar relations.

126. See *supra* note 109 and accompanying text.



Figure 2: Total Debts per SIC Divisions

Industry	N	%	Total Debt Mean (Median)
Services	23	28%	\$1,878,170 (\$616,396)
Wholesale	17	21%	\$3,177,246 (\$2,300,000)
Manufacturing	12	15%	\$10,200,000 (\$2,300,000)
Retail	12	15%	\$2,000,000 (\$1,200,000)
Finance	6	7%	\$3,500,000 (\$4,200,000)
Construction	6	7%	\$18,100,000 (\$740,000)
Communications	3	4%	\$2,400,000 (\$2,400,000)
Unknown	2	2%	\$2,400,000 (\$2,400,000)
<b>TOTAL</b>	<b>81</b>	<b>100%</b>	<b>\$4,100,000</b> <b>(\$1,400,000)</b>

The assignor's total liabilities ranged widely, but the majority of these debtors would likely qualify as "small business debtors" under the Bankruptcy Code.<sup>127</sup> The average total debt was just over \$4 million, with a median of about \$1.5 million. Nearly 60% of the cases reported total liabilities of \$2 million or less. Eighty percent of the cases reported total liabilities of \$5 million or less.

Most of the debtors reported owing at least some secured debt, with 65% listing secured creditors. Generally, only the smallest debtors in the sample had no secured creditors. The twenty-three debtors with no secured debt reported average total debts about five times lower than those debtors with secured debts. And nearly every one of the largest debtors reported carrying secured debt.

Finally, as to procedural data, there was significant evidence of professionalization among the assignees. Although assignors may in theory choose anyone to be the assignee, more than 80% of the assignments were made to one of four firms.<sup>128</sup> One of these firms

127. See *supra* note 124.

128. These firms were, in descending order of number of cases, Michael Moecker & Associates, Inc.; John A. Moffa, Esq.; Kenneth A. Welt; and Development Specialists, Inc.

alone—Michael Moecker & Associates, Inc.—received more than 65% of the assignments. To a lesser extent, there was a high degree of specialization among the law firms involved in these cases, as the assignees frequently hired a small group of law firms. The professional assignees used a limited number of law firms, frequently hiring the same firm as or, in some cases, their own firm.

To an even lesser extent, there was some specialization at the judicial level. Thirty cases were sent to the complex business litigation judges, meaning that three judges presided over about 40% of the ABCs during this period.

**Figure 3: Specialization of Assignees and Judges**

<b>Assignee</b>	<b>N</b>	<b>%</b>
Michael Moecker & Assocs.	53	65%
John A. Moffa, Esq.	6	7%
Development Specialists, Inc.	4	5%
Kenneth A. Welt	4	5%
Other <sup>129</sup>	14	17%
<b>Total</b>	<b>81</b>	<b>100%</b>
<b>Courts</b>	<b>N</b>	<b>%</b>
Complex Business Division	30	38%
Other	50	63%
<b>Total</b>	<b>80</b>	<b>100%</b>

#### IV. FINDINGS

##### A. Case Outcomes

Roughly 60% of the completed ABC filings fit within the traditional notion of a Chapter 7-style liquidation; the remaining 40% involved sales of all or substantially all of the assignor's assets. Of these "going concern sale" cases, nineteen (65%) were sold to insiders of the original assignor.<sup>130</sup> These outcomes did not vary significantly from county to county within the study. Palm Beach County reported the highest percentage of going concern sale and insider sale cases; however, the number of filings in that county was the lowest of the three counties,

129. None of the other assignees received more than two assignments.

130. As noted above in the methodology of identifying "insiders," it is possible this number under-represents the number of insider transactions, as the study relied on (a) self-reporting and (b) identifying overall of officers/directors as listed in the articles of incorporation of the assignor and purchaser. *See supra* note 119 and accompanying text.

making it impossible to eliminate the possibility that this heavy concentration was by chance.<sup>131</sup>

**Figure 4: Case Outcomes by County, Observations (%)**

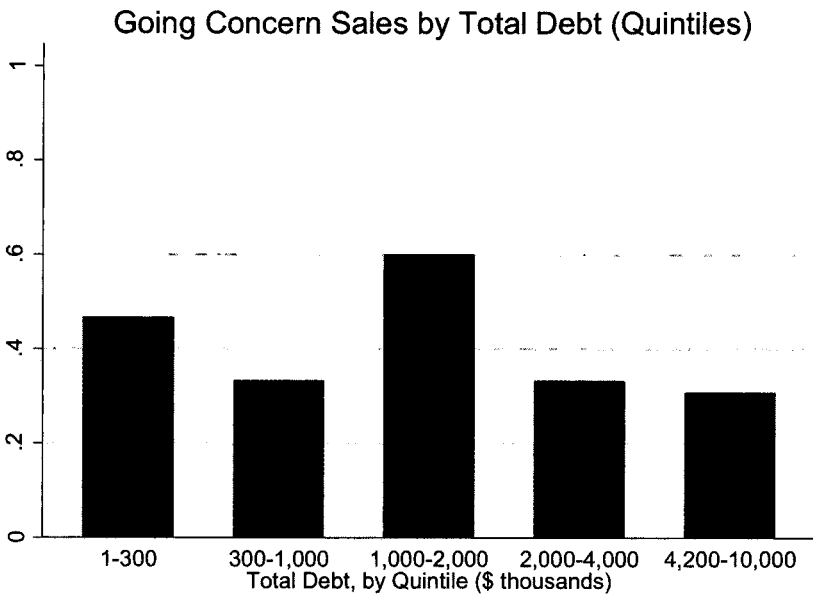
<b>County</b>	<b>Liquidation</b>	<b>Going Concern Sale</b>	<b>Insider Sale (as % of Going Concern Sales)</b>	<b>TOTAL</b>
Broward	20 (62.5%)	12 (37.5%)	8 (67%)	32
Miami-Dade	20 (62.5%)	12 (37.5%)	6 (50%)	32
Palm Beach	5 (45%)	6 (55%)	5 (83%)	11
<b>TOTAL</b>	45 (56%)	30 (37%)	20 (69%)	75 <sup>132</sup>

Outcomes were consistent across debtors regardless of whether they reported secured debt or not. A case resulted in a going concern sale in just over 40% of those cases involving secured debt, and just under 40% of those without secured debt. The percentage of going concern sales was likewise consistent across levels of debt. When dividing cases into quintiles based on their total reported debts, there were only minor differences in outcomes.

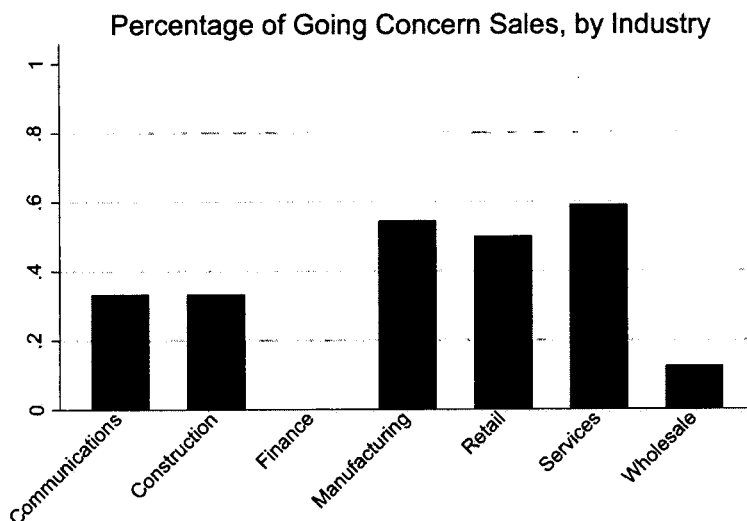
131. There was no statistically significant correlation between "County" and "outcome." The Pearson's *r* was 0.567.

132. Outcomes were still pending in four cases, and data on outcomes were unavailable for two cases.

Figure 5: Percentage of Going Concern Sales by Total Debt



There was some variation in outcomes across industry groups. All cases involving financial services businesses were liquidated. In contrast, the majority of the services firms were sold as a going concern, and nearly all of those were sales to former insiders of the assignor.

**Figure 6: Case Outcomes by SIC Division**

Finally, as to administrative data, there was no clear linkage between case outcomes and specialization in the ABC bench and bar. Outcomes were roughly identical whether or not cases were sent to the specialized Complex Business Division courts. There was likewise no correlation between case outcome and whether the case was assigned to one of the five "professional assignees." Nonetheless, within these five firms, there was some discrepancy, as certain assignees had a higher percentage of going concern sales and insider sales than others.

**Figure 7: Case Outcomes by Assignee**

Assignee	Liquidation	Going Concern Sale	Insider Sale
Michael Moecker & Assocs.	31 (62%)	19	10
John A. Moffa, Esq.	3 (60%)	2	2
Development Specialists, Inc.	1 (20%)	4	4
Kenneth A. Welt	3 (75%)	1	1
Other	8 (67%)	4	2
<b>TOTAL</b>	<b>46</b>	<b>30</b>	<b>19</b>

Although there is no identifiable correlation between choice of assignee and case outcome, there was some anecdotal evidence suggesting the non-professional assignee cases were different. For example, one case, which was actually six separate petitions to the same assignee, illustrates this well. A group of limited liability entities filed assignments, reporting as assets a group of condominium units in Sunrise, Florida.<sup>133</sup> Each unit was reported as “underwater,” with the value of the condos significantly less than the outstanding loans to the mortgagees. The assignors assigned the units to the assignee, who then successfully sought either to (a) force the mortgage holder to take title to the units or (b) sell the units free and clear of the mortgages. Under general principles of state mortgage law, neither of these remedies would be available. Under bankruptcy law, a trustee might be entitled to the “free and clear” sale power; but even in bankruptcy law, it is unlikely a trustee could force a mortgagee to take title to the mortgaged property.<sup>134</sup> These cases were unusual both in their procedures as well as in their adversarial posture with the secured creditors. As mortgagees, the banks could have simply foreclosed on their collateral and stopped the assignment; however, the lenders did not appear at all. The case is worth highlighting because it helps shed some light on the importance of professional assignees and their relationships with secured creditors, which is considered more in Part IV *infra*.

### B. Outcomes & Distributions to Creditors

Distributions to unsecured creditors were roughly identical regardless of case outcome. Unsecured creditors received at least some distribution in nineteen cases, or in about 30% of all cases, regardless of whether the assets were liquidated or sold as a going concern. Among the going concern cases, it did not matter whether the sale was to an insider or not: either way, unsecured creditors received a distribution in about 30% of the cases.

Among the nineteen cases in which general unsecured creditors received at least some distribution, that distribution ranged from as little as 0.2% to 100%, with a mean of 20%. Unsecured creditors received a mean distribution of 21% in liquidation cases, and 19% in

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133. Jupiter 4/3 Realty Holdings, LLC (Broward 13-002573); Saturn .2 Realty Holdings, LLC (Broward 12-28357); Saturn Realty Holdings, LLC (Broward 12-03152); Mars 3/3 Realty Holdings, LLC (Broward 13-006970); HOI Realty Holdings, LLC (Broward 12-33950); and Mercury 3/5 Realty Holdings, LLC (Broward 13-007729).

134. See *In re Zair*, 535 B.R. 15, 21 (Bankr. E.D.N.Y. 2015) (describing the split among courts as to whether a debtor’s Chapter 13 plan may “vest” title to collateral in a secured creditor over that creditor’s objection), *rev’d*, 550 B.R. 188 (E.D.N.Y. 2016).

going concern sale cases. Distributions to unsecured creditors were highest among insider sale cases, with a mean distribution of 23%.

The data regarding distributions to general unsecured creditors, it is important to note, may both understate and overstate actual distributions to creditors. It potentially understates distributions to the extent the purchasing creditor assumed some or all of the unsecured debts. This happened in almost all of the "reorganization" cases, in which the former owner-operator might, for example, assume her lease obligation in order to continue operating at the same location.

This figure may overstate the distribution, because distribution rates count only those general unsecured creditors that actually filed a proof of claim in the ABC case.<sup>135</sup> General unsecured creditors may lack the incentive to file a claim when they know they are likely to receive little to nothing from the case. Unsecured creditors may be even less likely to file a claim in an ABC case to the extent they are unfamiliar with the ABC process.

### C. *Interaction with Bankruptcy*

Bankruptcy law operated in the background of every case, as creditors had the ability to commence an involuntary bankruptcy proceeding and thereby obtain federal bankruptcy court oversight of the case.<sup>136</sup> Generally, creditors may commence an involuntary bankruptcy case only if they can show that the debtor is generally not paying its debts; however, this showing is not required if the debtor has filed an ABC.<sup>137</sup>

Upon an involuntary petition for bankruptcy, the bankruptcy court could then remove the case from state court or, if satisfied that the ABC was adequately protecting the rights of the debtor and the creditors, abstain from accepting the bankruptcy case.<sup>138</sup>

The interaction between bankruptcy and ABC law was most apparent in two situations. The first is the filing of an involuntary petition. Involuntary petitions are widely acknowledged as being

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135. In a bankruptcy case, creditors in a Chapter 7 case must file a proof of claim. FED. R. BANKR. PROC. 3002. In Chapter 11, creditors must likewise file a proof of claim in order to obtain a distribution, unless the debtor lists the liability as non-disputed, non-contingent, and liquidated. See FED. R. BANKR. PROC. 3003(b)(1); Anne M. Lawton & Lynda J. Oswald, *Scary Stories and the Limited Liability Polluter in Chapter 11*, 65 WASH. & LEE L. REV. 451, 521 (2008).

136. 11 U.S.C. § 303 (2012).

137. *Id.* § 303(h). In order to take advantage of the ABC-exception, the creditors must file the petition within 120 days of the assignment. *Id.* § 303(h)(2).

138. 11 U.S.C. § 305(a) (providing that the court may also abstain).

extremely rare, and that held true in this data set.<sup>139</sup> Only twice did creditors attempt to file an involuntary petition.<sup>140</sup>

The second situation is when the parties seek to incorporate the Bankruptcy Code to supplement Florida's ABC law. That is, assignees at times requested relief not authorized by Florida's statute, arguing instead that the state court should grant the relief by analogizing to bankruptcy law.

Data as to involuntary bankruptcy petitions was available, as a notice of bankruptcy was filed in the ABC case; however, there was no systematic way to search for assignees' requesting bankruptcy-like relief. In reviewing dockets, though, examples occasionally were obvious, one of which is described below. While it may not be indicative of this practice broadly, it is illustrative of the ways in which Florida ABCs may be even more bankruptcy-like than they appear on their face.

An example of the first sort of interaction was that of Radiology Corporation of America, in which three petitioning creditors filed an involuntary bankruptcy proceeding against the debtor under Chapter 7 of the Bankruptcy Code.<sup>141</sup> The bankruptcy court, without dismissing the petition or abstaining, authorized the assignee to continue conducting the ABC in state court.<sup>142</sup> The bankruptcy court permitted the assignee to carry out the ABC under Florida law but ordered that, if any party objected to any action in the ABC, the bankruptcy court would resolve any such objection.<sup>143</sup> When the assignee sought to establish a procedure to sell the assets, the state court approved but required the assignee to obtain both bankruptcy and state court approval of the sale.<sup>144</sup> Accordingly, the petitioning creditors were able to establish bankruptcy court oversight of the ABC proceeding.

An example of the second type of bankruptcy-ABC interaction

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139. See Jason Kilborn & Adrian Walters, *Involuntary Bankruptcy As Debt Collection: Multi-Jurisdictional Lessons in Choosing the Right Tool for the Job*, 87 AM. BANKR. L.J. 123, 132 (2013) (listing the "combination of factors" that have "reduced involuntary bankruptcy to the rarest of exceptions in U.S. practice").

140. Chapter 7 Involuntary Petition at 1, *In re Radiology Corp. of Am.*, No. 14-bk-18574 (Bankr. S.D. Fla. Apr. 15, 2014) (No. 14-bk-18574), Entry No. 1; Chapter 7 Involuntary Petition at 1, *In re Arthritis & Back Pain Ctrs., Inc.*, No. 12-14621 (Bankr. S.D. Fla. Feb. 27, 2012), Entry No. 1.

141. Chapter 7 Involuntary Petition, *In re Radiology Corp.*, *supra* note 139, at 2.

142. Order Granting Emergency Motion to Excuse Compliance with 11 U.S.C. § 543(a), (b), and (c) at 2, *In re Radiology Corp.*, No. 14-bk-18574 (Bankr. S.D. Fla. Apr. 30, 2014), Entry No. 12.

143. *Id.* at 2-3.

144. Order Granting First Amended Expedited Motion at 2-3, *In re Radiology Corp.*, No. 14-bk-18574 (Bankr. S.D. Fla. June 6, 2014), Entry No. 61.



occurred in the ABC of Fotobar, LLC, a business engaged in “retail photographic products and services.”<sup>145</sup> The assignee decided to sell the company as a going concern but soon realized it lacked the liquidity to pay employees and vendors.<sup>146</sup> Accordingly, the assignee sought permission to obtain post-petition financing, secured by a lien on the debtor’s assets.<sup>147</sup> While such practice is typical in bankruptcy cases, there is no such authority under Florida’s ABC law. The assignee thus relied on federal bankruptcy court authority for this request, arguing that “[s]tate courts often look to federal bankruptcy law for guidance as to legal issues arising in proceeding[s] involving assignments for the benefit of creditors.”<sup>148</sup> The court approved this order, allowing the assignee to obtain a \$2.5 million line of credit and to grant the lender a secured and administrative claim on account of any advances.

Fotobar, then, was able to continue in operation during the ABC proceeding until it could complete a sale (to its post-petition lender), all because it was able to supplement the ABC relief by analogizing to the bankruptcy laws. The lender was able to then purchase the assets of Fotobar for \$75,000 in cash plus a credit bid of \$1,150,000.<sup>149</sup> The assignee then made a 100% distribution to priority creditors and a .2% distribution to the general unsecured creditors.<sup>150</sup>

#### V. ANALYSIS

These findings indicate that, contrary to conventional wisdom, ABCs may provide a viable state law alternative to Chapter 11 corporate reorganization under the Bankruptcy Code. Although many of the debtors did in fact liquidate in ABCs, a sizable percentage of business owners were able to use the ABC to retain their equity interest and restructure the business’s liabilities—all without the costs and risks of bankruptcy. The study reveals that the ABC proceedings were more bankruptcy-like in substance, administration, and outcomes. After briefly describing these similarities, this Section considers the implications of these findings as to the ways in which state debtor-

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145. Assignee’s Motion for Approval of Post-Petition Financing at 2, *Fotobar, L.L.C. v. Phelan*, No. 14-ca-10564 (Fla. Cir. Ct. Sept. 15, 2014).

146. *Id.* at 2–3.

147. *Id.* at 3.

148. *Id.* at 4 (second alteration in original) (quoting *Moecker v. Antoine*, 845 So. 2d 904, 911 n.10 (Fla. Dist. Ct. App. 2003)).

149. Assignee’s Motion to: (A) Approve Fees and Expenses of Assignee and Assignee’s Counsel; (B) Approve Assignee’s Final Report and Proposed Distribution; (C) Discharge Assignee; and (E) Close Case.

150. *Id.*

creditor laws interact with federal bankruptcy laws.

Substantively, the cases in this study reveal that Florida's ABC laws are even more bankruptcy-like than they appear on their face. While the Florida ABC statute is similar to the Bankruptcy Code, as applied in these cases, the ABC statute is even more bankruptcy-like, particularly as to the powers available to the assignee. Assignees were able to obtain relief normally thought to be available solely in bankruptcy law, chiefly, the power to sell assets "free and clear" of liens and interests;<sup>151</sup> the power to obtain post-petition financing;<sup>152</sup> and the power to substantively consolidate a corporate group.<sup>153</sup> These powers are nowhere mentioned in the Florida ABC statute, but assignees nonetheless were able to exercise these powers with court approval under the statute's "negative notice" provisions.

Administratively, some of these ABCs looked very much like a large Chapter 11 corporate reorganization. These large Chapter 11 cases have dynamics significantly different than that of smaller business debtors largely because active creditor participation is an expensive ordeal, justified only when creditors have substantial sums of money at stake.<sup>154</sup> In these large cases, it is common for a secured lender to demand the appointment of a "Chief Restructuring Officer (CRO)."<sup>155</sup>

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151. 11 U.S.C. § 363 (2012).

152. *Id.* § 364.

153. See William H. Widen, *Corporate Form and Substantive Consolidation*, 75 GEO. WASH. L. REV. 237, 313–17 (2007). Substantive consolidation is conventionally considered to be a bankruptcy-specific remedy, even though it is not specifically authorized by the Bankruptcy Code. *Id.* at 313. This power, though, has its roots in equity and was historically used outside of bankruptcy. *See id.* at 317–19.

154. Select Advisory Comm. on Bus. Reorganization, Am. Bar. Ass'n, *Second Report of the Select Advisory Committee on Business Reorganization*, 60 BUS. LAW. 277, 304 (2004) ("The reasons committees do not operate in so many chapter 11 cases probably vary from case to case and may involve some combination of apathy, creditors having little at stake, the debtor having few unencumbered assets from which to make distributions or compensate committee professionals, creditor interests being highly fragmented, and individual creditor claims being so small that few unsecured creditors can justify the time and expense of serving on a committee."). *See generally* Carl A. Eklund & Lynn W. Roberts, *The Problem with Creditors' Committees in Chapter 11: How to Manage the Inherent Conflicts Without Loss of Function*, 5 AM. BANKR. INST. L. REV. 129 (1997); Douglas G. Baird et al., *The Dynamics of Large and Small Chapter 11 Cases: An Empirical Study* (Yale Sch. of Mgmt., Yale ICF Working Paper No. 05-29, 2007), <http://depot.som.yale.edu/icf/papers/fileuploads/2524/original/05-29.pdf>.

155. Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. PA. L. REV. 1209, 1233 (2006) (mentioning that lenders may use the appointment of a CRO as a pre-condition to lending or as a condition for forgiveness of a default, and noting that lenders may be more willing to waive a loan covenant "if a CRO with whom they have worked before is in place and cleaning shop"); *see also* A. Mechele Dickerson, *Privatizing Ethics in Corporate Reorganizations*, 93 MINN.

Such an officer provides a strong governance tool for lenders, providing lenders with control over the bankruptcy proceedings as well as verification benefits about the debtor's operations and assets.<sup>156</sup> A CRO serves not only to maximize the value of the estate but also to bring a level of trust and security to creditors, particularly to the secured creditors.<sup>157</sup> ABCs may provide a similar sort of creditor protection for debtors that are otherwise too small to justify the costs of having a CRO in bankruptcy. In ABCs, a professional assignee with a strong reputation among secured lenders may serve the same function as a CRO.<sup>158</sup> Like a CRO, a professional assignee may provide the lender with verification benefits and some level of control. Instead of determining whether to trust a borrower, a lender may instead rely on its relationship with the assignee. Assignees, as repeat players in this field, face high reputation costs for frustrating the expectations of lenders.<sup>159</sup>

The result of these bankruptcy-like procedures, substantive law, and administrative procedures is that ABCs are providing something much closer to a true bankruptcy alternative than previously appreciated for corporate debtors, particularly smaller debtors with few out-of-state assets and creditors.<sup>160</sup>

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L. REV. 875, 920 (2009) (noting that lenders "have embraced the concept of replacing managers with private turnaround specialists" instead of seeking a public trustee, and that "CROs have been retained in approximately thirty percent of the largest Chapter 11 filings").

156. See Dickerson, *supra* note 153, at 918–20.

157. See *id.* at 922–23.

158. Mann noted the importance of assignees' reputation in his study, reporting that creditors may tolerate an ABC in California—a jurisdiction in which ABCs are commonly used—only "where they have confidence that the assignee will protect their interests actively." See Mann, *Liquidation Choices*, *supra* note 26, at 1421–22. Thus, he suggests "there is some reason to believe that reputational constraints will have a substantial effect on assignees." *Id.* at 1421.

159. The importance of the assignee's reputation raises important law-in-action questions, discussed in a little more depth below, but which this paper highlights for future research on the debtors' reorganization choices. The assignee-as-CRO dynamic suggests that the assignee's relation with secured creditors may be a driving factor in determining which debtors avail themselves of ABCs instead of bankruptcy. In contrast, Morrison's research has suggested it was the relationship of the *business owner* and secured creditor. Morrison, *supra* note 26, at 270 ("The likelihood of a federal bankruptcy filing may rise when it is costly for senior lenders to verify the value of a debtor's assets. . . . When a firm's owners have private information about the value of assets, a secured creditor may prefer federal bankruptcy law as a mechanism for verifying asset value. The incentive to use federal law will be even strong when there are multiple secured creditors, who may have different beliefs about asset value." (footnote omitted)).

160. But see Body Central Corp., the national retail chain that many expected to file for bankruptcy relief under Chapter 11 of the Bankruptcy Code but that instead filed an

In considering the implications of these results, it is first important to consider these findings in light of the geographic limitations of the data set. The court-centered and bankruptcy-like nature of Florida's ABC law makes Florida unusual, which limits attempts to draw broad national conclusions from this study. The limitation largely comes down to the impact of having a court-centered process. The most obvious impact of such a system is on legal costs: more court filings and supervision means higher legal fees.<sup>161</sup> The higher costs may make ABCs less accessible in Florida than in an extra-judicial ABC jurisdiction like California. But, as long as the ABC procedure is less expensive than a similar federal bankruptcy procedure, then the relative cost of judicial and extra-judicial ABCs is unlikely to be significant..

The real question about a court-centered process is whether it provides greater protections for creditors. On the one hand, court proceedings may provide greater protections in the form of court oversight, transparency, and predictability. Creditors may easily access court records and seek court intervention. On the other hand, these protections only serve those creditors that actually participate in the process. Creditors who lack the sophistication or economic incentive to participate in the process receive no value from the court process. In fact, they may be harmed to the extent that courts grant assignees greater power and discretion whenever creditors fail to raise an objection. Thus, if creditors are not actively participating in the ABC, a court supervised system may actually give greater control to debtors and their assignees.

To the extent Florida's heavily regulated procedure provides creditors with greater protections than they would receive in less regulated ABCs, the outcomes in Florida may be interpreted as conservative estimates as to what is happening in ABCs under other states. For example, if the Florida outcomes suggest reasons to be concerned about the interests of unsecured creditors, one might assume that those concerns may be even higher under other state laws. If, on the other hand, the court-centered process actually *expands* assignee

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ABC in Jacksonville, Florida. Mark Basch, *A Stunning End for Body Central After 42 Years*, DAILY REC. (Jan. 12, 2015, 11:52 AM), [https://www.jaxdailyrecord.com/showstory.php?Story\\_id=544680](https://www.jaxdailyrecord.com/showstory.php?Story_id=544680). That case is still pending, but it may ultimately suggest that ABCs are capable of serving as a bankruptcy alternative even for larger corporations (and perhaps specifically for retailers, for whom bankruptcy reorganization is essentially no longer available). *See id.*; Lauren Coleman-Lochner, *Body Central to Close All 265 Stores, Fire 2,500 Workers*, BLOOMBERG (Jan. 9, 2015, 5:08 PM), <http://www.bloomberg.com/news/articles/2015-01-09/body-central-to-close-all-265-stores-fire-2-500-workers>.

161. *See* Landon, *supra* note 42, at 1481–82.

powers at the expense of unsecured creditors, the concerns for unsecured creditors in Florida may be higher than in other states.

Finally, any generalizations about the Florida-focused findings here may be limited by the importance of South Florida's legal culture. Scholars have long appreciated the importance of local legal culture in bankruptcy law, noting regional disparities in the use of bankruptcy and in outcomes, even though the Bankruptcy Code itself is federal law.<sup>162</sup> This local legal culture may explain variations in outcomes unrelated to variations in the "law on the books." This may reflect local economic conditions, local values and norms.

With these limitations in mind, the findings here raise important questions about the interaction of state and federal law in this field of corporate reorganization. The first class of questions raises legal issues: Did Congress leave room for the states to create such an alternative to the federal bankruptcy laws and, if so, what are the limits of that state power? The second class raises systemic issues: Is it desirable to have state law alternatives to bankruptcy? Who will benefit from such a system? And who may suffer? And the third set raises empirical questions for future research about this dynamic. Although the study here shows that business debtors may "succeed" in reorganizing under ABCs, how do these debtors fare in the long run? And if debtors may obtain most bankruptcy-like relief under ABCs at a lower cost, why do debtors file bankruptcy?

This Section concludes by considering what, if anything, these findings might mean for future bankruptcy reform. To the extent ABCs are indeed better than bankruptcy in some ways, what could bankruptcy law learn from the success of state law procedures? And to the extent ABCs may give too much power to debtors, how might bankruptcy law be amended to restrain this power?

### A. *Legal Questions*

These findings raise important questions as to the interaction of federal and state law in the field of corporate bankruptcy. Although creditors in this study did not challenge the legitimacy of the state law procedures, the Constitution imposes at least some restraints on states'

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162. See Teresa A. Sullivan, Elizabeth Warren, & Jay L. Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 804 (1994) (defining "local legal culture" as "systematic and persistent variations in local legal practices as a consequence of a complex of perceptions and expectations shared by many practitioners and officials in a particular locality, and differing in identifiable ways from the practices, perceptions, and expectations existing in other localities subject to the same or a similar formal legal regime").

ability to pass bankruptcy-like laws.

The first limitation states face is geographical. Practically, state laws may prove ineffective at administering an estate with out-of-state assets and creditors.<sup>163</sup> To be effective, a bankruptcy law must be able to bind all estate creditors and administer all estate assets—that is, the bankruptcy law’s reach must cover all market participants.<sup>164</sup> A state ABC law does not have the national reach of a bankruptcy law: it would instead require assistance from other states to enforce orders and to reach creditors. But, the recent ABC liquidation of the national retail chain Body Central Corporation may suggest that these regional limitations are not insurmountable.<sup>165</sup>

The second limitation more directly challenges ABC statutes. States’ power to grant bankruptcy-like relief is constrained by both the Contracts Clause and the Supremacy Clause of the Constitution, as federal bankruptcy law preempts conflicting state laws.<sup>166</sup> Arguably, these restraints may provide grounds for creditors to challenge ABCs, in particular the Supremacy Clause.

The Contracts Clause, as discussed above, prohibits states from passing any law impairing the obligation of contracts.<sup>167</sup> Prior to the enactment of the federal bankruptcy laws, the Contracts Clause prohibited states from applying new ABC laws to pre-existing contracts; however, it would not prohibit states from applying those laws prospectively.<sup>168</sup> State laws, then, could provide a discharge of indebtedness, so long as such discharge was applied only to contracts

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163. See David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471, 549 (1994) (considering these geographical constraints as part of his argument that Congress should de-federalize corporate bankruptcy law).

164. See Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276, 2287 (2000) (“The historical experience has been that bankruptcy law is made coextensive with a market, so that national markets require national bankruptcy laws . . .”). Although Westbrook makes this “market symmetry” argument in the context of cross-border insolvency (i.e., the insolvency of a debtor with assets and creditors in more than one country), the point is applicable to state ABC laws, as state ABC laws are analogous to national bankruptcy laws. See *supra* Section II.A.

165. See Basch, *supra* note 160; Coleman-Lochner, *supra* note 160. The case was filed in Duval County, Florida. *Mark C. v. Body Central Corp.*, No. 16-2015-CA-00213 (Fla. Cir. Ct. Jan. 15, 2015).

166. U.S. CONST. art. I, § 10; *id.* art. VI, cl. 2; see also Skeel, Jr., *supra* note 163, at 545–46, 551–52.

167. U.S. CONST. art. I, § 10 (“No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

168. Skeel, Jr., *supra* note 163, at 546–47 (“[T]he limitations imposed by the Contracts Clause on state lawmaking would, at most, constitute a transition problem for the proposal to shift bankruptcy authority to the states”).

incurred after the law took effect.<sup>169</sup> The reasoning for this retrospective/prospective distinction was that the “obligation of contracts” was understood as incorporating the state enforcement mechanisms for contracts.<sup>170</sup> Thus, the obligation of contracts would include the ABC statute. An ABC proceeding, then, would simply enforce the obligation of contracts, not impair it. The Contracts Clause, accordingly, would impose some transition costs on states’ attempting to add or expand their ABC laws, but it would not pose a long term obstacle to state bankruptcy laws.<sup>171</sup>

The enactment of federal bankruptcy laws added an additional federal restraint on state ABC laws by preempting conflicting state laws.<sup>172</sup> As stated by the Court in *International Shoe Co. v. Pinkus* in 1929, following the enactment of a federal bankruptcy law the “States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations.”<sup>173</sup> The Court has held, though, that ABC laws fall out of this preemptive scope, at least to the extent the ABC laws do not provide for the discharge of debts.<sup>174</sup> But since the Court last visited that issue in 1933, there have been significant changes in preemption doctrine, in the bankruptcy laws, and in ABC laws. It is not clear to what extent ABCs would withstand preemption challenges under modern jurisprudence.

The only major preemption challenge to an ABC statute in the modern era was in the Ninth Circuit, in which the court, somewhat controversially, found that California’s ABC law was preempted to the extent it provided for the assignee’s right to recover preferential payments to creditors.<sup>175</sup> The case was controversial not just because it extended *International Shoe* for the first time but also because its reasoning could apply to strike down ABC laws broadly.<sup>176</sup> In *Sherwood*

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169. *See id.*

170. *See id.*

171. *Id.*

172. *Int’l Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929).

173. *Id.*

174. *Johnson v. Star*, 287 U.S. 527 (1933); *Pobreselo v. Joseph M. Boyd Co.*, 287 U.S. 518, 525–26 (1933) (upholding a Wisconsin ABC statute because (a) it did not invoke a discharge of indebtedness, (b) did not require creditors to participate the proceeding, and (c) was “quite in harmony with the purposes” of the bankruptcy laws).

175. *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198, 1206 (9th Cir. 2005); *see* Geoffrey L. Berman & Catherine E. Vance, *State Law Preference Actions: Still Alive After Sherwood Partners v. Lycos*, 26 AM. BANKR. INST. J. 24, 81 & n.8 (2008) (noting the immediate criticism from many commentators).

176. *See, e.g.*, Deborah A. Crabbe, *Preemption and the Bankruptcy Code: Lessons from Sherwood Partners*, 24 AM. BANKR. INST. J. 5, 63 (2005); Bruce S. Nathan, *Sherwood Partners Threatens Viability of State Law Preference*, 24 AM. BANKR. INST. J. 4, 66 (2005).

*Partners*, the Ninth Circuit held that California's preference law would interfere with the Bankruptcy Code's core purpose of equitably distributing the estate's assets.<sup>177</sup> The Ninth Circuit described the issue as whether the California law "gives the state assignee powers that are within the heartland of bankruptcy administration."<sup>178</sup> That is, if it created a new power available only to assignees, then it intruded upon bankruptcy law's territory; if, instead, it merely gave the assignee powers that were otherwise available to creditors outside of the ABC, then it was safely under state law. The Ninth Circuit held that the California law created new powers for the assignee, which powers would alter the distributions that would have been made under the bankruptcy laws—thus conflicting with the Bankruptcy Code's core function of equitably distributing assets.<sup>179</sup> Further, the distributional difference would alter the incentives of creditors to file bankruptcy instead of consenting to the ABC process, further conflicting with the Bankruptcy Code's statutory incentives for the initiation of bankruptcy proceedings.<sup>180</sup>

So far, this is the only preemption limitation on state ABC laws in addition to the discharge restriction. But, as noted in the dissent, its rationale could easily be extended to strike down ABCs more broadly.<sup>181</sup> If bankruptcy law suspends any state law affecting creditors' bankruptcy-state law calculus, then bankruptcy law would suspend a broad swath of state debtor-creditor laws. State laws regarding distribution priorities or property exemptions that affect this calculus, for example, fall within the preemptive scope of the bankruptcy laws.<sup>182</sup> Arguably, any state law that made it easier or harder for a creditor to collect on its claim would likewise impact the bankruptcy-state law calculus. The logic of the *Sherwood Partners* majority seems to have no limiting principle.

Although the constitutional question about the extent to which

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177. 394 F.3d at 1205–06.

178. *Id.* at 1201.

179. *Id.* at 1201–02 (“[T]he assignee . . . is given new avoidance powers by virtue of his position.”).

180. *Id.*

181. *Id.* at 1206–08 (Nelson, J., dissenting) (“When the majority’s reasoning is carried to its logical extension, it has the effect of pushing corporations threatened with insolvency from the less stigmatic, and less costly, voluntary assignment scheme into the world of federal bankruptcy. This should not have to be the case.”).

182. See Lynn M. LoPucki, *A General Theory of the Dynamics of the State Remedies/bankruptcy System*, 1982 WIS. L. REV. 311, 354 (1982) (“A fourth factor is the way in which available assets are divided among competing creditors in the two subsystems.”).



ABCs and bankruptcy law may coexist remains unsettled, it is certainly plausible that some creditors—particularly unsecured creditors—are likely to raise these issues in the near future. In particular, one could imagine a challenge to an assignee's authority to conduct a "free and clear" sale. That power is generally understood to be available only under bankruptcy law—and even then, the extent of this bankruptcy power remains controversial.<sup>183</sup> It is not clear the extent to which "free and clear sales" would survive a preemption analysis, particularly if the unsecured creditor may remove the proceeding to a federal court, there is a real possibility that a court might find these state "bankruptcy laws" incompatible with the federal bankruptcy laws.

### B. Systemic Concerns

The possibility of state "bankruptcy" laws poses potential systemic problems, as creditors may have to adjust to multiple state "bankruptcy" laws and states may have an incentive to pass business-friendly laws. This Section considers first the problem of non-uniformity in general before analyzing the potential for a race-to-the bottom in ABC laws.

#### 1. Non-Uniformity

Non-uniformity among the states may present challenges to creditors that may ultimately raise the cost of credit. Although there is considerable confusion about the origin and scope of the Bankruptcy Clause, the inclusion of this enumerated power in the Constitution has been understood to reflect, in large part, fears of the patchwork of state insolvency laws.<sup>184</sup> James Madison described the need for a federal

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183. See Bruckner, *Improving Bankruptcy Sales*, *supra* note 118, at 18–19 (discussing policy tensions in bankruptcy sales); George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235, 235 (2002) (noting that the power to sell property free of interests "is otherwise unavailable under applicable nonbankruptcy law").

184. BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 187–88* (2002) ("[T]he idea that bankruptcy raised issues that were better addressed on a national level rather than through the mechanisms of interstate comity seems to have taken at least tentative root during the convention."); THE FEDERALIST NO. 42, at 232 (James Madison) (Gideon ed., 2001), [http://lf-oll.s3.amazonaws.com/titles/788/Hamilton\\_0084\\_EBk\\_v6.0.pdf](http://lf-oll.s3.amazonaws.com/titles/788/Hamilton_0084_EBk_v6.0.pdf) ("The power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie, or be removed into different states, that the expediency of it seems not likely to be drawn into question."); Jonathan C. Lipson, *Debt and Democracy: Towards A Constitutional Theory of Bankruptcy*, 83 NOTRE

bankruptcy law to “prevent so many frauds where the parties or their property may lie or be removed into different states.”<sup>185</sup> Justice Story later wrote that only a federal system of government could prevent the inevitable parochialism and confusion from leaving bankruptcy law in the hands of the many states.<sup>186</sup>

The availability of a state bankruptcy law regime could threaten the return of this pre-Constitution patchwork of state laws. Before lending to a Florida debtor, for example, a lender would need to consider the treatment of that loan under both the federal bankruptcy laws and Florida’s ABC statute. Differences between federal and state laws, and among the different state laws, would likely increase the cost of credit. To the extent this is a problem, this may give renewed attention to the efforts to create a model ABC law.<sup>187</sup>

At the same time, though, many of those old fears about the patchwork of state laws are largely limited by the Contracts Clause. The type of fraud that James Madison mentioned involved debtors moving to a new state in order to take advantage of its relatively more pro-debtor bankruptcy laws.<sup>188</sup> Thus, the Court has held that the Contracts Clause prohibited a debtor from applying a Louisiana law to discharge a debt contract incurred under the laws of South Carolina.<sup>189</sup> That Louisiana statute could have discharged subsequent debts incurred under the Louisiana statute without impairing the obligation of contracts, because the discharge statute would have been incorporated into the contract’s obligations; however, since that law was not incorporated into the South Carolina contract, to apply Louisiana’s law to discharge that contractual obligation would unconstitutionally

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DAME L. REV. 605, 626 (2008) (describing “the bewildering array of colonial laws that existed at the time”). *But see* Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319, 340 (2013) (noting alternative interpretations of the Bankruptcy Clause as an extension of the Full Faith and Credit Clause).

185. THE FEDERALIST NO. 42, *supra* note 184, at 232.

186. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 387 (1833), <http://www.thefederalistpapers.org/wp-content/uploads/2013/01/Commentaries-On-The-Constitution-by-Joseph-Story-Abridged.pdf> (“In short, diversities of almost infinite variety and objects may be introduced into the local system, which may work gross injustice and inequality, and nourish feuds and discontents in neighboring states. What is here stated, is not purely speculative. It has occurred among the American states in the most offensive forms, without any apparent reluctance or compunction on the part of the offending state. . . . There can be no other adequate remedy, than giving a power to the general government, to introduce and perpetuate a uniform system.”).

187. *See, e.g.*, Geoffrey L. Berman & Catherine E. Vance, *Model Statute for General Assignments for the Benefit of Creditors*, 17 AM. BANKR. INST. L. REV. 33, 40–59 (2009).

188. *See supra* note 184 and accompanying text.

189. *M’Millan v. M’Neill*, 17 U.S. 209, 212–13 (1819).

impair the obligation of contracts.<sup>190</sup>

## 2. Race to the Bottom

Not only would creditors need to navigate the “bankruptcy” laws of the several states, but the de facto de-federalization of bankruptcy laws might spark a race to the bottom, as states respond to pressures to enact ever more “business friendly” ABCs in order to stimulate their small business sector.<sup>191</sup> States may also be especially prone to special interest group lobbying, which may result in a proliferation of creditor distribution priorities.<sup>192</sup> All of this may require creditors to pay more attention to local ABC laws, which could impose greater costs on creditors, which would in turn increase the costs of lending.

On the other hand, state ABC laws may be superior to federal bankruptcy law, leading to a race to the top. David Skeel has argued as much in a similar context.<sup>193</sup> Skeel has argued that corporate bankruptcy law belongs with corporate law, specifically, that both should be governed by state law,<sup>194</sup> and has posited that such a state corporate bankruptcy law would unlikely be overly debtor- or creditor-friendly, as states must balance the interests of both business owners and lenders.<sup>195</sup> An overly-friendly creditor law would discourage businesses from operating in that state; an overly debtor-friendly law would likewise discourage business development, as lenders would respond to this regime by increasing the cost of credit.<sup>196</sup> Skeel’s argument was in the context of a proposal to make state law the *sole* source of corporate bankruptcy law. This argument would likewise be relevant for a state of the world with *both* state and federal corporate bankruptcy law.

Even assuming Skeel’s argument would apply to a dual bankruptcy

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190. *Id.*

191. This debate has its roots in the seminal work of William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974) and response thereto, Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

192. During the brief time in which Congress experimented with adopting state law distribution priorities, there was such a proliferation of such priorities that there was seldom any assets remaining to distribute to the general unsecured creditors.

193. Skeel, Jr., *supra* note 163, at 518–20.

194. *Id.* at 520 (limiting his economic argument against race-to-the-bottom theorists to consensual creditors).

195. *Id.* at 518 (“[M]arket pressures are likely to counteract any tendency states might otherwise have to underappreciate shareholders’ interests.”).

196. *Id.* at 520.

law regime, it does not address the plight of non-adjusting creditors.<sup>197</sup> Non-adjusting creditors are those who are unable to adjust the terms of credit to take into account the risks imposed by a change in the legal system.<sup>198</sup> Whereas a bank could change its lending terms in order to protect itself from changes to the legal system, some creditors will not be able to do so. Some creditors cannot adjust because they did not choose to become creditors at all. Tort victims are the quintessential involuntary creditors. Other creditors may be voluntary creditors but are simply unable to adjust their lending terms. Trade creditors may lack sufficient leverage to adjust their contract terms. Likewise, employees may lack the negotiating power (and perhaps awareness) to adjust the terms of their employment. Would state legislators adequately take the interests of these creditors into account, or might state bankruptcy laws effectively shift value from these non-adjusting creditors to the debtor and its adjusting creditors?

The primary check on debtors' and assignees' ability to divert value from general unsecured creditors would be the ability of these creditors to commence an involuntary proceeding. If unsecured creditors timely filed such a petition, they could obtain bankruptcy court supervision of the ABC process.<sup>199</sup> The bankruptcy court would examine the protections afforded to creditors in that ABC proceeding and, if satisfied, permit the ABC to continue in state court; if not satisfied, the court could shift the insolvency proceeding to the bankruptcy system.<sup>200</sup> But, as discussed in Section V.D below the findings here suggest that these involuntary protections may be ineffective.

### C. Empirical Questions

Finally, the findings here may suggest the need to refine our understanding of small business bankruptcy laws. Small businesses have been reported to reorganize at a lower rate than larger corporations in Chapter 11.<sup>201</sup> Explanations have ranged from blaming

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197. See *id.* Skeel limits his consideration to consensual creditors who could adjust to the de-federalized system by "charg[ing] more for credit so that, *ex ante*, a corporation and its shareholders would not benefit at all from [a state's] inefficient law." *Id.*

198. See Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 864 (1996) (identifying "nonadjusting" such as governmental regulatory and taxing bodies, whose claims are fixed by statute, creditors whose claims are too small to justify the cost of adjusting their credit terms, those that lend money on an unsecured basis prior to the debtor's creation of a security interest for another creditor, and tort claimants).

199. 11 U.S.C. § 303 (2012); see also *supra* note 135–36 and accompanying text.

200. 11 U.S.C. § 303.

201. See Lawton, *Chapter 11 Triage*, *supra* note 32, at 1004–05.

debtors (i.e., claims that small businesses fail because the owners lack business sophistication) to blaming the bankruptcy laws.<sup>202</sup> Consistent with the bankruptcy-like relief debtors obtained in this study, a third possible explanation is that viable business debtors are reorganizing under ABCs, leaving more distressed debtors to file bankruptcy.

If ABCs may provide bankruptcy-like relief, then this may suggest that selection bias explains the lower bankruptcy success rates for small businesses. A debtor can commence an ABC only if an assignee is willing to accept the assignment. Assignees may not be willing to accept an assignment unless they have reason to believe (a) it will work out and (b) it will pay. When secured creditors do not approve of the ABC, the case is not likely to work out, as those creditors can foreclose on their collateral. And a case in which there are insufficient assets to pay the administrative and legal fees are unlikely to pay. Thus, the debtors that end up in an ABC—especially those looking to reorganize under a going concern sale—may be relatively “healthy” businesses as compared to those that file bankruptcy. Chapter 11, under that theory, is not failing to save these businesses; rather, the businesses that file bankruptcy are beyond salvage. That is, as Professor LoPucki described this interplay of federal and state laws: “[B]ankruptcy court deals not with businesses in financial difficulty, but with their skeletons, already picked clean by workouts, state court proceedings, informal liquidations, or merely the ravages of time and poor management.”<sup>203</sup> Although further empirical research comparing assignors with businesses in bankruptcy would be needed to test this hypothesis, the findings here suggest that debtors would likely turn to bankruptcy relief only after exhausting state law alternatives.

#### *D. Implications for Bankruptcy Reform*

This final section considers the implications of these findings for bankruptcy reform. As mentioned above, there are current efforts underway to reform Chapter 11 of the Bankruptcy Code generally, and

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202. See generally NAT'L BANKR. REV. COMM'N, FINAL REPORT, BANKRUPTCY: THE NEXT TWENTY YEARS (1997), <http://govinfo.library.unt.edu/nbrcreportcont.html>. A common complaint is that most small businesses that file bankruptcy have no real chance at rehabilitation because of cash flow problems, not because of unsustainable debt structures. Thomas E. Carlson, Jennifer Frasier Hayes, *The Small Business Provisions of the 2005 Bankruptcy Amendments*, 79 AM. BANKR. L.J. 645, 654 (2005) (describing some of the small business reporting requirements as necessary because “small business debtors often lack basic financial information about their own operations”).

203. LoPucki, *supra* note 182, at 312

as applied to small businesses in particular.<sup>204</sup> As to small businesses, there is a concern that Chapter 11 is too expensive and that it fails to provide these debtors with the tools to reorganize.<sup>205</sup> According to some, these failures have led debtors to choose state law alternatives to bankruptcy.<sup>206</sup>

The findings reported here illustrate that debtors are indeed able to use ABCs to obtain many of the benefits of Chapter 11, thus providing support for these concerns about state law competition for distressed businesses. Even more, the findings here show that this state law competition is more robust than conventionally understood, as ABC proceedings in this study provided powers to debtors generally thought to be unavailable under non-bankruptcy law. In fact, the ABC relief may be greater, since ABCs do not require that creditors be paid in full in order for business owners to retain their equity interest in the debtor.<sup>207</sup>

The findings also suggest that bankruptcy law may be an ineffective tool to protect creditor interests. In theory, creditors unhappy with the debtor's use of an ABC may commence an involuntary bankruptcy proceeding.<sup>208</sup> If a creditor, for example, was concerned that a business owner was using the ABC to shed liabilities while retaining his or her equity interest in the firm, the creditor could file an involuntary petition.<sup>209</sup> Creditors in this dataset, however, rarely used this tool. There were only two such involuntary petitions filed in the dataset, and the first was dismissed. It is possible, of course, that some creditors used the threat of involuntary bankruptcy during these ABCs, and the data collection methodology would not have detected that. Even if that were the case, the threat of an involuntary bankruptcy may not necessarily protect the interests of creditors generally. Such a threat

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204. D.J. BAKER ET AL., *supra* note 22, at 277 (“Chapter 11 is now viewed as too slow and too costly for the majority of middle-market companies to do anything other than sell its going concern assets in a 363 sale or to simply liquidate the company . . . [usually] almost exclusively for the sole benefit of the secured lender.” (alteration in original) (quoting *ASM Field Hearing Before the ABI Comm’n to Study the Reform of Chapter 11*, at 2–3 (2013) (written statement of Daniel Dooley))).

205. *Id.*; see also Lawton, *Chapter 11 Triage*, *supra* note 32, at 1016 (“Debtors with liabilities in excess of \$5 million confirm and perform plans at significantly greater rates than do debtors with liabilities of \$5 million or less.”); A. Thomas Small, *If You Fix It, They Will Come - A New Playing Field for Small Business Bankruptcies*, 79 AM. BANKR. L.J. 981, 983 (2005) (“Professional fees can make Chapter 11 reorganization prohibitively expensive for small businesses”).

206. See sources cited *supra* note 204.

207. See Korobkin, *supra* note 17, at 425.

208. 11 U.S.C. § 303 (2012).

209. See *id.* § 303(b).

could in theory inure to the benefit of all unsecured creditors, for example, if creditors used this threat to force the purchaser to pay more for the estate assets. But it is just as likely that the purchaser would simply pay more to the *petitioning* creditors alone. Thus, assignees and purchasers might simply “buy off” threatening creditors—benefitting that creditor but not the estate.

With these two observations about debtor control, this section considers how bankruptcy law may be amended to give debtors more control and/or provide greater protection for creditors. These two options, as discussed below, are not mutually exclusive.

### 1. Debtor Control

ABCs give an astonishing amount of control to debtors and their chosen assignees. As discussed in Section V.B.2 above, one might expect this control to be used to extract value from unsecured creditors, particularly those unable to adjust the terms of their lending. For example, assignees could decline to pursue causes of action to recover preferential and fraudulent transfers; assignees might decline to challenge the validity of purported security interests; and, most strikingly, control the sale process that frequently results in an insider transaction.

Currently, federal bankruptcy law attempts to protect against debtor control. But these protections come at a cost, and—as long as ABCs continue to coexist with bankruptcy laws—this cost can be expected to push business debtors into state law alternatives such as ABCs. This suggests re-evaluating the benefits of these creditor protections in small business cases. Many of these protections may simply impose costs without conferring any benefit on creditors in such cases. When a large corporation files bankruptcy, it may be expected to impose serious losses on unsecured and non-adjusting creditors: a corporation may have significant tort liabilities, environmental liabilities, and tax liabilities; a corporate bankruptcy may also impose significant losses on communities, which may have invested heavily in the way of local tax credits.<sup>210</sup> Bankruptcy protections for unsecured creditors may be particularly important in those cases. But it is not clear that those protections fit the circumstances of most small business debtors.

In particular, the findings suggest re-evaluating the benefits of the absolute priority rule in small business Chapter 11 cases. The absolute priority rule, as described above, prevents business owners from

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210. See Bruckner, *The Virtue*, *supra* note 8, at 279–80.

retaining ownership of their business through bankruptcy unless all classes of creditors consent or any nonconsenting class is paid in full.<sup>211</sup> That rule developed in the 1930s to address a concern that business owners and their powerful lenders were colluding to wipe out unsecured debts in bankruptcy.<sup>212</sup> The application of that rule to small businesses, though, is more recent and more controversial.<sup>213</sup> The problem, of course, is that requiring owner-operators to pay the full going concern value of the business to creditors might render reorganization impossible.<sup>214</sup>

The findings reported here show that assignees frequently sold businesses back to their old owners—exactly the type of transaction the absolute priority rule in theory prohibits. Those sales could be interpreted as evidence of debtor-assignee collusion. And it is entirely plausible that at least some of these sales were collusive. But it is not likely that most were, especially given that most of these sales were conducted by professional assignees who face high reputational constraints. These assignees have a greater incentive to ensure that assets are properly marketed and sold for the highest value. The fact that the old owners offered the highest value may suggest that the assets are worth more in their hands; that is, that the value of these small businesses lies mostly with the owner-operators.

This suggests that a strict application of the absolute priority rule in bankruptcy might be value destructive. At the very least, in applying the rule, courts should preserve the equitable “new value exception” to the rule, which permits owners to retain equity to the extent they have contributed new value to the reorganization effort. While the Court has hinted that this rule may not have survived the enactment of the 1978 Bankruptcy Code, the Court has left open the possibility that new value may be considered as long as the new value represents the value of retained equity interest.<sup>215</sup> At the most, Congress may consider eliminating the absolute priority rule for small businesses, as it did under the old Chapter XI. A middle ground approach, endorsed by the Commission, would embrace the “Option-Preservation Priority”

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211. See *supra* Part I. See generally John D. Ayer, *Rethinking Absolute Priority After Ahlers*, 87 MICH. L. REV. 963, 969–79 (1989) (discussing the history of the absolute priority rule).

212. Ayer, *supra* note 211, at 969–79.

213. *Id.* at 976–77 (noting that the absolute priority rule did not apply to “compositions” under Chapter XI).

214. *Id.*

215. See *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 458 (1999) (assuming, without deciding, that the new value exception/corollary survived the Bankruptcy Reform Act of 1978).



proposed by Professor Anthony Casey.<sup>216</sup>

## 2. Creditor Protection

This Subsection considers two possible ways to amend the bankruptcy laws to provide better protection for creditors in ABC proceedings. The first is to make it easier for creditors in an ABC to obtain bankruptcy court oversight. This would run against the traditional American aversion to involuntary bankruptcy;<sup>217</sup> however, this expansion would likely be a very minor one since it would apply only when a debtor had commenced an ABC. Further, the involuntary petition would be subject to an abstention analysis.<sup>218</sup> The second proposal, a more drastic one, would be to federalize the ABC process, an idea that had some traction in the 1930s.<sup>219</sup>

As noted above, there were only two involuntary petitions filed against the debtors in this dataset. The lack of involuntary petitions may reflect, once again, the ineffectiveness of bankruptcy law. To the extent bankruptcy would not sufficiently help creditors, there may be little incentive to file such petitions. This may also reflect that the costs of commencing involuntary petitions are too high. For debtors with fewer than twelve creditors holding “noncontingent, undisputed claims,” a single creditor with a claim of at least \$15,775 may file an involuntary petition; otherwise, three or more creditors must band together to file an involuntary petition.<sup>220</sup> An involuntary petition, if granted by the court, would scuttle the state law alternatives; however, a bankruptcy court may deny the petition or abstain from hearing the case.<sup>221</sup> Because a debtor that has commenced an ABC is presumed insolvent, a court will deny an involuntary petition only if filed in bad faith. A court may abstain, though, if it finds that the debtor and creditors would be better off under the already-commenced ABC.<sup>222</sup>

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216. Casey, *supra* note 18, at 760.

217. See Kilborn & Walters, *supra* note 138, at 132.

218. 11 U.S.C. § 305 (2012); see, e.g., *In re AMC Inv'rs, L.L.C.*, 406 B.R. 478, 487–88 (Bankr. D. Del. 2009).

219. See Ayer, *supra* note 211, at 979–93.

220. 11 U.S.C. § 303(b)(1)–(2).

221. *Id.*; see also *id.* § 305(a)(1) (“The court, after notice a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if the interests of creditors and the debtor would be better served by such dismissal or suspension . . .”).

222. 2-305 COLLIER ON BANKRUPTCY ¶ 305.02 (16th ed., 2009) (“Based on the legislative history and the conjunctive nature of the statute, some courts have limited the application of section 305(a)(1) to involuntary bankruptcy cases and devised the following three-part test for abstention: (i) the petition was filed by a few disgruntled creditors and

Bankruptcy law could be amended to make it easier for creditors to commence involuntary proceedings. Coordination costs could be eliminated by permitting a single creditor to file an involuntary petition against a small business. Legal costs could also be reduced by limiting the liability of the petitioning creditor. For example, instead of making the petitioning creditor liable for the debtor's legal costs in the event the court denies the bankruptcy petition, bankruptcy laws could be amended to impose damages on the petitioning creditor only in the event of a bad-faith filing.<sup>223</sup> These changes, of course, come at a potential cost of giving creditors too much power over a distressed debtor. The debtor, in theory, could oppose any petition or request the court to abstain from any petition. Practically, though, the distressed debtor may have neither the time nor money to do so. Such fears of creditors abusing bankruptcy petitions have a long history in U.S. bankruptcy, but making it easier for creditors to file involuntary petitions may be a powerful tool to keep state debtor-creditors laws in check.

Alternatively, a more drastic change would be to federalize ABCs in order to better protect creditors—a move which had support in the 1930s as a response to concerns about creditors' abuse of involuntary bankruptcy petitions.<sup>224</sup> Such a move now could, in theory, be used to balance the interests of creditors and debtors alike. In the 1930s, the National Association of Credit Men supported bringing ABCs under the purview of bankruptcy laws in order to prevent holdout creditors from filing involuntary bankruptcy petitions.<sup>225</sup> At that point in time, creditors could commence an involuntary petition if the debtor committed an "Act[] of Bankruptcy"—which included filing an ABC.<sup>226</sup> The Hastings-Michener Bill in 1932 would have allowed assignees to register a state ABC in the bankruptcy court.<sup>227</sup> Creditors then had a period of time to move the court to replace the assignee with a

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most creditors oppose the bankruptcy proceeding; (ii) there is an out-of-court restructuring in progress; and (iii) the debtor's interests are furthered by dismissal.").

223. See 11 U.S.C. § 301(i) (imposing at least costs and attorney fees on the unsuccessful petitioning creditor).

224. See *Statutory Regulation of Assignments for the Benefit of Creditors*, 47 YALE L.J. 944, 946 (1938).

225. *Uniform System of Bankruptcy: Joint Hearings on S. 3866 Before the Subcomms. of the Comms. of the Judiciary*, 72d Cong. 449–51 (1932) (statement of Mr. Montgomery, National Association of Credit Men).

226. Bankruptcy Act of 1898, ch. 3, § 3(4), 30 Stat. 544, 547 (defining "Acts of Bankruptcy" to include "a general assignment for the benefit of his creditors.")

227. S. 3866, 72d Cong. § 74 (1932) (permitting the assignee to file a petition in bankruptcy, at which point the court would appoint the assignee as trustee).

trustee.<sup>228</sup> If no one so moved, or if the court denied such motion, the ABC would no longer constitute an act of bankruptcy, which was important for two reasons.<sup>229</sup> First, without an act of bankruptcy, creditors could not then commence an involuntary proceeding. Second, this would de-stigmatize ABCs, which might encourage more debtors to use these proceedings. The motivation for this bill was to protect debtors from holdout creditors.<sup>230</sup> These creditors could sit back during an assignment proceeding and, if unsatisfied with their distribution, threaten to commence an involuntary proceeding, thus holding up the ABC process.<sup>231</sup>

Today, the fear of involuntary petitions is somewhat ameliorated by the willingness of courts to abstain from accepting involuntary petitions when an ABC is already underway. Federalized ABCs, then, would

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228. *Id.* § 74(c) (giving creditors five days after the filing of the ABC to move for the appointment of a trustee).

229. *Id.* § 74(d) (“[T]he court shall adjudge the debtor a bankrupt (1) upon the application of parties in interest, if after a hearing upon notice to the debtor and the trustee the court is satisfied that the debtor has failed to perform any of the duties required of him by this Act, or (2) if he applied for a discharge and the discharge is suspended or denied.”).

230. *Uniform System of Bankruptcy*, *supra* note 223, at 451 (statement of Mr. Montgomery).

We feel also that the provisions of the Attorney General's bill which are designed to bring assignments for the benefit of creditors under the protection of the bankruptcy act are highly desirable. During the last 10 or 15 years business men, being dissatisfied with the red tape and delay and the inflexibility of bankruptcy proceedings, have resorted more and more to the handling of cases out of court.

The out-of-court cases are usually handled by the taking of assignments for the benefit of creditors, either at common law or under State statutes, or by the execution of a deed of trust, or as a trust mortgage—the making of such an instrument is an act of bankruptcy. Where the debtor is honest and there is no reason why he should be subjected to the stigma of the word 'bankrupt,' it has been the experience of business men that the affairs of insolvent debts can be wound up much more quickly, economically, and with much greater profit to creditors, if the case is kept out of the bankruptcy court; but keeping the case out of bankruptcy court is fraught with danger, both to the creditors and to the liquidating officials, under the existing system, because any three creditors with claims totaling \$500 can upset all the good work that has been done by the assignee or by the creditor's committee, and for purely selfish motives the case can be thrown into bankruptcy, with no benefit to the creditors.

From the point of view of the creditors themselves, there are decided disadvantages in out-of-court proceedings, in that preferential transfers can not be attacked as they can be under the bankruptcy law, nor can the debtor be subjected to an examination under oath.

*Id.*

231. *Id.*

provide little protection from creditors; however, it would regularize ABCs and could provide greater oversight and protection for unsecured creditors.

## VI. CONCLUSION

This Article has presented original data on the use of ABCs, providing the first look at how these procedures work. These findings illustrate the way that debtors have used state law procedures to obtain results generally thought to be available only through bankruptcy—and they have done so without the costs or stigma associated with bankruptcy. It is certainly possible that states have exceeded their authority in creating this sort of relief and that, if challenged, such procedures may be found to be unconstitutional; however, the fact that debtors are seeking and obtaining bankruptcy-like results under state law ABCs raises important questions and concerns.

This Article has sought to identify some of those issues and to layout a research agenda for further study of this field. The outcomes reported here raise important doctrinal questions about states' ability to regulate in the field of bankruptcy—an issue that has not received much attention since the Great Depression era. If states are able to legislate in this field, this raises policy questions concerning the potential for a patchwork system of state bankruptcy laws. And finally, these outcomes also raise questions about how we assess the current bankruptcy laws. The ability to reorganize under state law might be expected to attract “healthy” debtors into ABCs, leaving the truly “sick” debtors to file bankruptcy—an outcome which, if true, might help explain the lower bankruptcy “success” rates of small business debtors.

Ultimately, the data raise important questions about whether state law alternatives, such as ABCs, are better than bankruptcy for small businesses. To the extent one believes that small businesses should have some sort of tool available to reorganize in the event of financial distress, then state law alternatives may be superior; after all, according to many, businesses, federal bankruptcy relief is effectively unavailable for these debtors. Thus, for the owners, employees, and trade creditors of small businesses, ABCs may result in superior outcomes, as these procedures provide an alternative to liquidation. At the same time, the data reported here highlight potential problems with the ABC process and raise questions about who bears the costs of these state “bankruptcy” laws. To that extent, this Article has suggested ways in which bankruptcy laws may be amended in order to be more like ABCs, and ways in which the bankruptcy laws may be amended to shield creditors from potential abuses of the ABC procedures.

APPENDIX A: MODEL NOTICE OF ASSIGNMENT<sup>232</sup>

## NOTICE OF ASSIGNMENT

IN THE CIRCUIT COURT  
OF THE  
CIRCUIT, IN AND FOR  
COUNTY,  
FLORIDA  
IN RE: ,

Assignor,  
to: ,  
Assignee.

## TO CREDITORS AND OTHER INTERESTED PARTIES:

PLEASE TAKE NOTICE that on , a petition commencing an assignment for the benefit of creditors pursuant to chapter 727, Florida Statutes, made by , assignor, with principal place of business at , to , assignee, whose address is , was filed on , (year) .

YOU ARE HEREBY further notified that in order to receive any dividend in this proceeding you must file a proof of claim with the assignee or the assignee's attorney on or before (120 days from the date of the filing of the petition).

## ASSIGNEE

Attorney for assignee (if any):

Address:

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232. FLA. STAT. § 727.103(1) (2015).

## APPENDIX B: LIST OF ASSIGNORS

<b>Assignor</b>	<b>Case Number</b>	<b>County</b>	<b>Assignee</b>
ABC Management, Inc. (LLC)	13-24642	Miami	Michael Phelan
Advertising Specialty Associates, Inc.	12-06940	Broward	Michael Phelan
Agrizzi Enterprises Corporation	14-015597	Miami	Philip Von Kahle
Alan W. Smith, Inc.	12-09773	Miami	Philip Von Kahle
Alko Printing, Inc. (Defendant)	14-015783	Miami	Philip Von Kahle
All American Trailer Manufacturing, Inc.	13-026100	Broward	John A. Moffa
American Document Management Group, Inc.	12-016825	Broward	Philip Von Kahle
Anita Mandal MD PA	12-015703	Palm Beach	Michael Phelan
Arthritis and Back Pain Centers, Inc. (d/b/a Las Clinica de Artritis a/d/b/a Centros Medicos Del Dolor y Artritis a/d/b/a Athritis and Pain Medica Centers)	12-04486	Miami	Michael Phelan
Associated Air Products, L.C.	13-01632	Broward	Jonathan Satter
Associated Property Management, Inc.	13-3222	Broward	Jonathan Satter
Augello & C, LLC	13-021958	Miami	Philip Von Kahle
Azimuth Unlimited, LLC	12-34004	Broward	Michael Phelan
Ben Stanley LLC (d/b/a Sheerbliss Ice Cream)	12-31376	Broward	Ross Hartog
Brand House, LLC	12-24972	Broward	Michael Phelan

Brooks Patio Furniture, Inc.	12-06945	Miami	Michael Phelan
Century Building Restoration USA, Inc.	13-022629	Broward	Philip Von Kahle
Dixie Bedding Corporation (d/b/a/ Dixie Bedding Co.)	14-030681	Miami	Philip Von Kahle
Electric Beverage Company, Inc.	12-02577	Miami	Barry Mukamal
Engine Rebuilders Warehouse, Inc.	14-007985	Broward	Maria M. Yip
Euromedia Holdings, Corp.	14-022265	Miami	John A. Moffa
F.C.S. Service, Inc. (d/b/a Allstate Security of Florida)	14-003074	Miami	Daniel Stermer
Financial Credit Clearing House - 1956 Incorporated	13-08014	Broward	Michael Phelan
Fotobar, LLC	14-010564	Palm Beach	Michael Phelan
Global Engineering Group Inc	12-40681	Miami	Michael Phelan
GM Sales & Marketing LLC	12-33839	Broward	Philip Von Kahle
Gold Coast Hurricane Shutters, Inc. (d/b/a Gold Coast Construction and Restoration, a/d/b/a Shield of Protection)	14-021052	Broward	Kenneth A. Welt
Green Bullion Financial Services	12-19244	Broward	Philip Von Kahle
Halas Millwork, Inc.	14-023378	Broward	Melissa Davis
Highland Interiors, Inc.	13-021637	Broward	John A. Moffa
Hurst Awning Company, Inc.	14-029067	Miami	Grisel Alonso

Italkitchen International, Inc.; Eurokitchen, Inc.; Euro Group International Corp.; JTN Holdings of Miami, LLC; EK Holdings, LLC	12-13342	Miami	Philip Von Kahle
It's Only Zero's, Inc. (d/b/a Downtowner Saloon, a/d/b/a The Maxwell Room)	13-000898A	Broward	John A. Moffa
Jay S. Mendelsohn, M.D., P.A. (d/b/a Associates in Physical Medicine)	13-026138	Broward	Philip Von Kahle
Jupiter 4/3 Realty Holdings, LLC	13-002572	Broward	Ronald Goldman
M & R Laundries & Dry Cleaners, Inc.	12/23850	Broward	Philip Von Kahle
Matta Int., Inc.	13-005895	Miami	Michael Phelan
Mediation, Inc.	13-019925	Broward	Michael Phelan
MedidaMetrics, Inc.	14-015891	Miami	Joseph J. Luzinski
Medina's Collections, Inc.	13-024366	Miami	Michael Phelan
MIA Design Group, LLC	14-020287	Miami	Daniel Stermer
Michael's Seafood, Inc. (d/b/a Michael's Gourmet Delicacies)	13-01583	Miami	Michael Phelan
Military Funding USA, Inc.	13-017557	Broward	Philip Von Kahle
Minimalist Solutions, Inc.	14-028949	Miami	Daniel Stermer
Moll Systems Corporation	12-25868	Miami	Kenneth A. Welt
MR. Prepaid, Inc.	12-18735	Miami	Philip Von Kahle



Nationwide Metal Recycling and Processing, Inc.	12-05392	Miami	Michael Phelan
Nebula Glass International, Inc.	12-19376	Broward	Michael Phelan
Nextlife Enterprises, LLC	13-016187	Palm Beach	Nicole Testa Mehdi pour
Old Jupiter, LLC	12-005113	Palm Beach	Michael Phelan
Onyx Soft, Inc.	14-16344	Miami	James F. Martin
Pasat Roofing, Inc.	14-015760	Broward	Philip Von Kahle
Pearl Artist & Craft Supply Corp. (d/b/a Pearl Arts & Crafts d/b/a Design Images)	14-012499	Broward	Philip Von Kahle
Plastic Surgery Associates, P.A.	12-22233	Broward	Michael Phelan
Precision Packaging, Inc.	13-009615	Broward	Philip Von Kahle
Prodecom International Corp.	13-028001	Miami	Philip Von Kahle
Radiology Corporation of America	14-002431	Palm Beach	Gregg F. Stewart
Ralph Choeff, P.A. (d/b/a Ralph Choeff Architect (pa))	12-08838	Miami	Michael Phelan
Raquette Sales International, Inc.	12-016493	Palm Beach	Seth Heller
Revdia Corp.	14-009100	Miami	Philip Von Kahle
Ringstar, Inc.	14-013973	Palm Beach	Kenneth A. Welt
Sanare, LLC	14-019878	Broward	Philip Von Kahle
Sandoval, Inc.		Palm Beach	John A. Moffa
Seaborn Partners, Inc. (Seaborn Group LLC?)	14-10092	Miami	Seth Heller

Shoreline Flooring Supplies 2 of Orlando, Inc.	14-021372	Broward	Philip Von Kahle
Slonim International, Inc.	12-27501	Miami	Philip Von Kahle
Sobe LX, Inc.	14-021215	Miami	Michael Phelan
South Florida Produce, LLC	12-028184	Broward	Michael Phelan
Structurit, LLC	12-11173	Broward	Philip Von Kahle
Studio Imports, Ltd., Inc.	14-018491	Broward	Michael Phelan
Swimming Pool Services, Inc.	13-001930	Palm Beach	John H. Reynolds
The Law Offices of Bradley Winston, P.A.	13-012848	Broward	Michael Phelan
Thompson Press, Inc.	12-17982	Miami	Philip Von Kahle
Tire Depot Group, LLC (d/b/a Tire Depot)	14-017295	Broward	Philip Von Kahle
Traci Communications, Inc.	12-011805	Palm Beach	John A. Moffa
Trans Continental Wholesale, Inc	13-002999	Palm Beach	Philip Von Kahle
UMT International, LLC	14-021389	Broward	Philip Von Kahle
Venafin Financial Services, LLC	14-003509	Miami	Michael Phelan
Viander USA, Inc. (Defendant)	12-43144	Miami	Michael Phelan
Vizcaya by the Sea, Inc.	13-012751	Broward	Michael Phelan
YAK America, Inc.	12-37372	Palm Beach	KENNETH A. WELT