

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 600

INTRODUCER: Senator Martin

SUBJECT: Assignment for the Benefit of Creditors

DATE: March 20, 2023

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Collazo</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>BI</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 600 amends several statutes within chapter 727, F.S., relating to assignments for the benefit of creditors. The bill’s revisions were recommended by a subcommittee of the Business Law Section of The Florida Bar to streamline practice, clarify ambiguities in the statute, and minimize the potential for litigation.

Specifically, the bill:

- Revises the legislative intent of ch. 727, F.S., relating to assignments for the benefit of creditors, to include the orderly liquidation of insolvent estates.
- Grants assignees discretion on how to record assignments both inside and outside of this state where relevant assets are located.
- Grants courts discretion to schedule status conferences and require reports only as warranted.
- Provides that assignees may rely upon, and will not be held personally liable for, their own good faith compliance with court documents and other documents believed to be genuine.
- Provides that assignees will not be held personally liable for:
 - Complying in good faith with their duties and responsibilities as assignees; or
 - Acts or omissions, unless those acts or omissions were outside the scope of their duties, were grossly negligent, or constitute malfeasance.
- Provides that, unless assignees’ acts or omissions subject them to personal liability, creditors asserting claims against them must look only to the estate assets and posted bonds to recover.
- Provides that, before bringing a suit against an assignee, a creditor must first obtain leave of the court based upon an act or omission by that assignee subjecting it to personal liability.
- Requires any claims against an assignee to be brought before the assignee is discharged by the court.
- Clarifies that only creditors holding a lien or a right of setoff or recoupment with respect to the subject assets – i.e. not all creditors – are exempt from requirements to turn the assets over to the assignee.

- Provides for negative notice in connection with assignees' rejection of unexpired leases of nonresidential property or of personal property, and flexibility regarding the effective date.

The bill takes effect on July 1, 2023.

II. Present Situation:

Assignment for the Benefit of Creditors

An assignment for the benefit of creditors (an "ABC") is a voluntary state law remedy for the administration of an insolvent estate.¹ It is an alternative to bankruptcy and allows a debtor to voluntarily assign its assets to a third party in order to liquidate the assets to fully or partially satisfy creditors' claims against the debtor.² The process is designed to provide impartial transparency to creditors while an independent fiduciary liquidates the debtor's estate for their benefit under court supervision.³

An ABC is similar to federal bankruptcy proceedings in that it allows the liquidation of a debtor's property for an equal distribution to creditors.⁴ However, the ABC process tends to be significantly less expensive and time consuming than federal bankruptcy.⁵ It is also distinguishable from federal bankruptcy in that it does not impose an automatic stay of collection efforts in favor of the debtor, and it does not discharge the debtor from its debt.⁶

In Florida, the original act authorizing ABCs was enacted in 1889.⁷ The constitutionality of the act was affirmed by the Florida Supreme Court in 1896.⁸ Similar acts have been upheld by the U.S. Supreme Court and other state courts.⁹ The Legislature substantially re-drafted the act in 1987¹⁰ and has amended it many times since, most recently in 2013.¹¹

¹ ABC Statute Revision Subcommittee, the Business Law Section of the Florida Bar, *White Paper: Analysis of Proposed Revisions to Chapter 727 (Assignments for the Benefit of Creditors)*, June 2022 (on file with the Senate Committee on Judiciary).

² *Hillsborough County v. Lanier*, 898 So. 2d 141, 143 (Fla. 2d DCA 2005).

³ ABC Statute Revision Subcommittee, *supra* note 1, at 1.

⁴ Henry P. Trawick, Jr., *Trawick's Florida Practice and Procedure*, s. 38:18 (2022-2023 ed., Nov. 2022 update) (noting that a general assignment for the benefit of creditors "accomplishes the same result as a [federal] bankruptcy").

⁵ ABC Statute Revision Subcommittee, *supra* note 1, at 1.

⁶ The Business Law Section of the Florida Bar, *Support for Proposed Amendments to Chapter 727 – Assignments for the Benefit of Creditors* (undated), at 1-2 (on file with the Senate Committee on Judiciary).

⁷ Chapter 3891, Laws of Fla.

⁸ See *Rosenheim v. Morrow*, 37 Fla. 183, 187-88 (1896) (finding that "the several states of the American Union have power to enact insolvent or bankruptcy laws, applicable within their respective territories, so long as the congress of the United States abstains from exercising its exclusive power to provide a general bankruptcy law"); see also *Dorr v. Schmidt*, 38 Fla. 354, 359 (Fla. 1896) (noting that the Florida Supreme Court held the law to be constitutional in *Rosenheim*).

⁹ See, e.g., *Pobreslo v. Joseph M. Boyd Co.*, 287 U.S. 518, 526 (1933) (finding that "it is apparent that Congress intended that such voluntary assignments ... should be regarded as not inconsistent with the purposes of the federal act"); *In re Mader's Store for Men, Inc.*, 77 Wis. 2d 578, 592 (Wis. 1977) (citing *Pobreslo* on this point).

¹⁰ See ch. 87-174, Laws of Fla. (substantially revising or creating ss. 727.01-727.16, F.S.).

¹¹ Chapter 2013-244, Laws of Fla.

Intent and Definitions

The intent of chapter 727, F.S., the laws governing ABCs, is to provide a uniform procedure for the administration of insolvent estates, and to ensure full reporting to creditors and equal distribution of assets according to priorities established under the chapter.¹²

Chapter 727, F.S., includes definitions for the following terms: “asset,” “assignee,” “assignor,” “assignment,” “claims bar date,” “consensual lienholder,” “court,” “creditor,” “estate,” “filing date,” “lien,” “liquidation value,” “negative notice,” and “petition.”¹³ With relevance to the bill, “negative notice” means a notice which, unless a response is filed within 21 days after the date of service, allows certain actions in the notice to occur.¹⁴

Commencement of an ABC Action

An ABC action commences when an insolvent debtor (i.e. an assignor)¹⁵ makes an irrevocable assignment to an assignee¹⁶ of all of its assets in writing, and in substantial accordance with the statutory form.¹⁷ The assignment must annex certain schedules that have been verified under oath. The schedules must also be in substantial accordance with statutory forms. Schedule A is a list of the assignor’s known creditors, and Schedule B is a list of all of the assets of the estate.¹⁸

The assignee must, within 10 days after delivery of the assignment to the assignee:

- Record the original assignment in the public records of the county in which the assignor had its principal place of business and, soon afterwards, record a certified copy of the assignment in each county where assets of the estate are located.¹⁹
- File a petition that:
 - Provides the names and addresses of the assignor and the assignee.
 - Includes a copy of the assignment, together with Schedules A and B.
 - Requests that the court fix the amount of the assignee’s bond to be filed with the clerk of the court.²⁰

The bond must be payable to the clerk of the court, in an amount that is not less than \$25,000 or double the liquidation value of the unencumbered and liquid assets of the estate identified in Schedule B, whichever is higher, conditioned upon the assignee’s faithful discharge of its duties. The assignee must file the bond with the clerk of court within 30 days after the court enters an order setting the amount of the bond.²¹

¹² Section 727.101, F.S.

¹³ Section 727.103, F.S.

¹⁴ Section 727.103(13), F.S.; *see also* s. 727.111(4), F.S. (providing for negative notice in connection with specified actions).

¹⁵ “Assignor” means one who transfers property rights or powers to another. BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁶ “Assignee” means one to whom property rights or powers are transferred by another. BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁷ Section 727.104(1)(a)-(b), F.S.

¹⁸ Section 727.104(1)(c)-(e), F.S.

¹⁹ Section 727.104(2)(a), F.S.

²⁰ Section 727.104(2)(b), F.S.

²¹ *Id.*

The petition must be filed in accordance with the procedures for filing a complaint as provided in the Florida Rules of Civil Procedure, and may be filed in any of the following offices of the clerk of court:

- The county of the assignor's place of business, if it has one.
- The county of its chief executive office, if it has more than one place of business.
- The county of the assignor's residence, if the assignor is an individual not engaged in business.²²

The assignee must give notice of the assignment. The notice must contain certain information and be published once a week for 4 consecutive weeks, with the first notice being published within 10 days after the assignee files the petition. The assignee must also mail notice to all known creditors within 20 days after filing the petition.²³

Proceedings against an Assignee

A lawsuit may not be commenced against an assignee except as otherwise provided in chapter 727, F.S. Except in the case of a consensual lienholder enforcing its rights in personal property or real property collateral, there may be no levy, execution, attachment, or the like on account of any judgment against assets of the estate in the possession, custody, or control of the assignee.²⁴

Duties and Procedures

Any person or entity – other than a creditor that is in possession, custody, or control of assets of the estate – must, upon notice by the assignee of the assignment proceeding, promptly turn over such assets to the assignee or the assignee's duly authorized representative.²⁵

In connection with an ABC, assignors²⁶ and assignees²⁷ have certain statutory duties they must fulfill, and courts are afforded certain specified powers.²⁸ For example, to the extent reasonable in the exercise of an assignee's business judgment, an assignee must reject an unexpired lease of nonresidential real property or of personal property under which the assignor is the lessee,²⁹ and the court has the power to authorize that rejection.³⁰

With respect to an assignee's duty to reject unexpired leases of nonresidential real property or of personal property, the assignee must file a notice of rejection with the court and serve a copy on the owner or lessor of the affected property and, for personal property, on the landlord of the premises on which the property is located.³¹

The notice of rejection must identify the affected property, the address at which the affected property is located, the name and telephone number of the person in possession of the affected

²² *Id.*

²³ Section 727.111(1), F.S.

²⁴ *See* s. 727.105, F.S. (noting also that nothing in the chapter affects any action or proceeding brought by a governmental unit to enforce its police or regulatory power).

²⁵ Section 727.106, F.S.

²⁶ *See generally* s. 727.107, F.S.

²⁷ *See generally* s. 727.108, F.S.

²⁸ *See generally* s. 727.109, F.S.

²⁹ Section 727.108(5), F.S.

³⁰ Section 727.109(6), F.S.

³¹ Section 727.110(3)(a), F.S.

property, and the deadline for removal of the affected property.³² The rejection is effective the date the court enters an order authorizing it. If the lessor of the affected property fails to take possession after notice of the rejection, the estate's rights and obligations to, and liability for, the property terminate upon the effective date of the rejection.³³

Claims

Claims must satisfy statutory requirements.³⁴ Proof of claims by creditors must be filed within 120 days after the petition is filed unless extended for cause shown. A duly-filed proof of claim constitutes prima facie evidence of the validity and the amount of the claim.³⁵

Any time before the entry of an order approving the assignee's final report, the assignee or any party in interest may file with the court an objection to a claim. A copy of the objection must be served on the concerned creditor. Claims properly filed with the assignee and not disallowed by the court constitute all claims entitled to distribution from the estate.³⁶ The priority of claims is prescribed by statute.³⁷

Discharge

The court may remove or replace the assignee for any of the reasons identified in the statute. If a replacement is needed, the court must appoint the replacement.³⁸

When the administration of the estate has been completed, the assignee must file a petition for discharge attaching a final report that includes all receipts and disbursements of the estate.³⁹ The assignee must give at least 20 days' notice of the petition for discharge to the assignor and all creditors; the notice must include a summary of all receipts and disbursements of the estate.⁴⁰

Upon approval of the final report, the court must discharge the assignee and release its bond. The assignee's discharge has the effect of releasing it from any duties, liabilities, and responsibilities as assignee pursuant to the provisions of the assignment and chapter 727, F.S.⁴¹

III. Effect of Proposed Changes:

In 2021, the Business Law Section of The Florida Bar formed an ABC Statute Revision Subcommittee for the purpose of evaluating the potential need for revisions to chapter 727, F.S.⁴²

³² *Id.*

³³ Section 727.110(3)(b)-(c), F.S.

³⁴ *See generally* s. 727.112, F.S.

³⁵ Section 727.112(2) and (5), F.S.

³⁶ Section 727.113(1), F.S.

³⁷ *See generally* s. 727.114, F.S.

³⁸ Section 727.115(1)-(2), F.S.

³⁹ Section 727.116(1)-(2), F.S.

⁴⁰ Section 727.111(5), F.S.

⁴¹ Section 727.116(3)-(4), F.S.

⁴² ABC Statute Revision Subcommittee, *supra* note 1, at 1. The ABC Statute Revision Subcommittee was comprised of nearly 30 experienced insolvency professionals located throughout the state. *Id.*

Following multiple meetings and analyses, the subcommittee has recommended several changes that form the basis of the bill.⁴³

Intent

The subcommittee recommended revising s. 727.101, F.S., which provides the legislative intent of chapter 727, F.S., to bring the purpose of the statute more in line with the current use of assignment proceedings: the orderly liquidation of insolvent estates.⁴⁴ Consistent with this recommendation, the bill revises the statute to read that the intent of the chapter is to provide a uniform procedure for the administration *and orderly liquidation* of insolvent estates.

Recordation of Assignments

The subcommittee has noted that unlike in Florida, where virtually any document can be recorded, some counties in other states cannot accept assignment documents for recording in the public records. And with respect to some assignments, the assignment documents and schedules can be voluminous, resulting in significant administrative expenses and recording fees.⁴⁵

The subcommittee therefore recommended revising s. 727.104, F.S., regarding the commencement of proceedings, to provide the assignee discretion in determining whether to record full schedules with the assignment; to allow an alternative recording procedure in counties where recordation in the public records is not possible; and to provide that a good faith effort by the assignee to comply with the recording requirement will be sufficient.⁴⁶

Consistent with these recommendations, the bill amends the statute to provide that in connection with assignee's recordation of the original assignment:

- The original assignment may be recorded with or without the schedules.
- If recordation of the original assignment in a county outside of Florida is not possible, then the assignee must file or publish, in a manner reasonably calculated under all the circumstances to apprise interested parties of the pendency of the assignment, a certified copy of the assignment, with or without schedules, in each county where assets of the estate are located.
- The assignee's good faith effort to record, file, or publish in accordance with the bill is effective even if a minor error or omission exists that renders the assignee's effort incomplete or seriously misleading.

Case Management Conferences and Status Reports

The subcommittee has noted that the Florida Supreme Court recently amended Florida Rule of Civil Procedure 1.200 to require courts to convene case management conferences to better manage their dockets. However, this has led to a practice of requiring monthly conferences in some courts, which can be costly and ineffective in assignment cases, and can even lead to the premature closure of some of them. Conversely, although assignment cases are designed to

⁴³ See ABC Statute Revision Subcommittee, *supra* note 1, at 1-2.

⁴⁴ *Id.* at 2.

⁴⁵ *Id.* at 3.

⁴⁶ *Id.*

progress quickly for the benefit of creditors, some cases move slowly due to a lack of communication between creditors as to the status of liquidation.⁴⁷

To address both problems, the subcommittee recommended further revising s. 727.104, F.S., by adding a new subsection that grants courts the discretion to set status conferences or require status reports by an assignee only as warranted, governed by the circumstances of the particular assignment case.⁴⁸

Consistent with this recommendation, the bill provides that the court may determine proper compliance with Rule 1.200, Florida Rules of Civil Procedure, in an action filed under chapter 727, F.S., including, but not limited to, scheduling a case management conference and requiring a periodic status report as warranted by the circumstances of the case.

Actions against Assignees

The subcommittee has noted that s. 727.105, F.S., which addresses proceedings against the assignee and protects the assets of the estate in the possession of the assignee from levy, execution, attachment, or similar procedure, does not directly address the scope of an assignee's personal liability. It therefore recommended language addressing the issue, including language providing that assignees are only liable for acts taken outside of their authority or that constitute gross negligence or malfeasance. It also recommended including a requirement that creditors and parties in interest obtain leave of the court to sue an assignee.⁴⁹

Consistent with these recommendations, the bill provides that in any action against an assignee, the assignee may:

- Rely on any outstanding court orders, judgments, decrees, and rules of law, and is not personally liable for the assignee's own good faith compliance with any such orders, judgments, decrees, or rules of law.
- Rely on, and will be protected in any action by, any resolution, certificate, statement, opinion, report, notice, consent, or other document believed by the assignee to be genuine and to have been signed or presented by the proper parties.

Moreover, the assignee will not be found personally liable for:

- The assignee's good faith compliance with his or her duties and responsibilities as an assignee.
- The assignee's acts or omissions, except upon a finding by the court presiding over an action or proceeding under chapter 727, F.S., that the assignee's acts or omissions:
 - Were outside the scope of his or her duties;
 - Were grossly negligent; or
 - Constitute malfeasance.

The bill further provides that unless such a finding is made, any creditor or party in interest seeking to assert a claim against the assignee must look only to the assignment of estate assets

⁴⁷ *Id.* at 3.

⁴⁸ *Id.*

⁴⁹ *Id.* at 4.

and any bond posted by the assignee to satisfy any liability, and the assignee is not personally liable to satisfy any such obligation. Additionally, any creditor or party in interest seeking to assert a claim against the assignee must first obtain leave of the court presiding over the action or proceeding based on a finding that the assignee's act or omissions were outside the scope of his or her duties, were grossly negligent, or constitute malfeasance.

Any claim against the assignee, or against any agent or professional of the assignee who assists the assignee in the administration of the estate, must be brought before the discharge of the assignee to the extent the claim has accrued and is predicated upon facts that are known or reasonably should have been known at the time of the discharge, at which point all such claims are deemed released and forever barred.

The bill also provides that the revised statute does not alter or limit any other immunity otherwise held by the assignee, or any agent or professional of the assignee who assists the assignee in the administration of the estate.

Turnover of Estate Property

The subcommittee identified what it calls a “glitch” in s. 727.106, F.S. That statute generally requires a person or entity, upon notice of the assignment proceeding, to turn over the assets of the estate to the assignee – but it exempts creditors in possession, custody, or control of assets of the estate. Based upon a plain reading of the statute, a person holding an unliquidated or disputed claim in the assignment proceedings could refuse to turn over estate property based on his or her status as a creditor, but the subcommittee has noted that this is not the intended result of the statute; instead, only a narrower class of creditor, i.e. a creditor *holding a lien or right of set off or recoupment against the asset being held*, should qualify for the exemption.⁵⁰

Consistent with this concern, the bill revises the statute to clarify that only creditors holding a lien or a right of setoff or recoupment with respect to the subject assets (not all creditors) are exempt from having to turn over assets to the assignee upon notice by the assignee of the assignment proceeding.

Lease Rejection and Landlord/Lessor Administrative Expense Accrual

Section 727.110, F.S., provides that an assignee's rejection of an unexpired lease of nonresidential property or of personal property is effective on the date that the court enters an order authorizing the rejection. The subcommittee observed, however, that even if a motion is uncontested, state courts often schedule hearings months after a motion is filed. As a result, there is often a gap period between the filing of the motion to reject, and the entry of the order, which enables landlords or equipment lessors to pursue post-assignment administrative rent claims – even if an assignee has vacated the premises or has abandoned the leased equipment as of the filing of the motion.⁵¹

⁵⁰ *Id.* at 5-6.

⁵¹ *Id.* at 6-7.

To correct the situation, the subcommittee recommends amending the statute to give assignment courts more flexibility in setting the effective date of the rejection and in approving lease rejection procedures. It also recommends explicitly allowing lease rejection to be done on negative notice because doing so would promote judicial economy, save assignment estate resources from unnecessary administrative claims, and avoid unnecessary hearings in situations where there are no significant objections to the lease rejection.

Consistent with these concerns, the bill revises the statute to provide that as to an assignee's rejection of an unexpired lease of nonresidential real property or of personal property, the assignee must serve a copy of the notice or rejection (that it filed with the court) by negative notice on the owner or lessor of the affected property and, for personal property, on the landlord of the premises on which the property is located. Additionally, the bill provides that the effective date of the rejection is the date of entry of a court order authorizing such rejection, unless the court orders otherwise.

Effective Date

The bill takes effect on July 1, 2023.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will positively impact assignees by granting them discretion in determining whether to record full schedules with the original assignment. If assignees decide against recording full schedules with the original assignment, fewer administrative costs and fees associated with assignment recordation will be paid.

The bill will grant assignment courts more flexibility in setting the effective date of assignees' rejection of unexpired leases of nonresidential property or of personal property. Earlier effective dates will result in fewer post-assignment administrative rent claims that assignees will be forced to defend in court, thereby reducing assignees' legal fees and costs.

The bill will positively impact assignees by allowing the giving of negative notice in connection with assignees' rejections of unexpired leases of nonresidential property or of personal property. Explicitly allowing negative notice will eliminate some administrative claims and avoid unnecessary hearings in situations where there are no significant objections to the lease rejection, thereby reducing legal fees and costs.

The bill will positively impact all parties to an assignment proceeding by granting courts the discretion to decide how often to hold status conferences or require status reports in assignment proceedings. Granting this discretion to courts will likely result in fewer conferences and reports, which will decrease legal fees and costs for all parties.

The bill will negatively impact creditors and parties in interest wishing to assert a claim against assignees, because the bill will require them to obtain leave of court before filing suit, which they are not currently required to do. Thus, creditors and parties in interest will incur new legal fees and costs in those situations.

C. Government Sector Impact:

The bill will positively impact courts by granting them the discretion to decide how often to hold status conferences or require status reports in assignment proceedings, which will decrease courts' workload over current conditions and promote judicial economy.

The bill will positively impact courts by allowing the giving of negative notice in connection with assignees' rejections of unexpired leases of nonresidential property or of personal property. Explicitly allowing negative notice will avoid unnecessary hearings in situations where there are no significant objections to the lease rejection, which will decrease courts' workload over current conditions and promote judicial economy.

The bill will negatively impact local government revenues because assignees are likely to record fewer assignment-related documents (i.e. schedules) than they currently do, which means recording offices will recover less in recordation fees.

The bill will require creditors and parties in interest wishing to assert a claim against assignees to first obtain leave of court before filing suit, which they are not currently

required to do. Accordingly, the bill will negatively impact courts because the bill will increase their workload over current conditions.

Ultimately, with respect to the anticipated judicial or court workload impact, the Office of the State Courts Administrator has indicated that it is indeterminate. Although the specific extent of the impact is difficult to determine, the bill is likely to have an impact on judicial workload due to case management conferences; the ordering and review of periodic status reports; any challenges to the assignee's actions or claims; and review of the notice of rejection.⁵²

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 727.101, 727.104, 727.105, 727.106, and 727.110.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

⁵² Office of the State Courts Administrator, *2013 Judicial Impact Statement for SB 600* (Mar. 17, 2023).