

## Key Provisions of a Uniform Act on Assignment for the Benefit of Creditors<sup>1</sup>

### *Postponing, for now, consideration of court involvement*

- I. Title
- II. Definitions
  - a. Terms to consider defining: assets, assignor, assignee, assignment, claim, creditor, debt, disinterested, estate, insider, insolvent, judicial lien, location, person, relative, security agreement, security interest, statutory lien, transfer, wages
  - b. **Notes:**
    - i. The term “assignment” deserves particular attention. Depending on the state, a procedure of the type described herein may be called an “assignment,” a “general assignment,” or an “assignment for the benefit of creditors.” The Act should use consistent terminology throughout.
    - ii. Some states refer to the “assignor” as the “debtor.” Again, the Act should use consistent terminology or use the terms interchangeably, if appropriate.
    - iii. The Committee should consider whether an assignment for the benefit of creditors should be treated as a security interest. The Uniform Commercial Code provides that assignees have the rights of a lien creditor. UCC § 9-102(a)(52)(B) (including an assignee for the benefit of creditors in the definition of a “lien creditor”). This limits creditors’ claims to what they were at the time the assignment was made; for example, if, at the time of assignment, a creditor had a secured, unperfected claim against the assignor, that creditor could not improve its position post-assignment by perfection. Notably, however, the UCC does not make the assignee a “secured party,” and the UCC’s definition of “security interest” does not include an assignment for the benefit of creditors. UCC 9-102(a)(73), 1-201(b)(35). Consequently, there is disagreement over whether an assignment is a security interest. UCC § 9-309 does list an assignment for the benefit of creditors under the category of “security interests [that] are perfected when they attach,” UCC § 9-309(12); however, this section may merely be providing that if an assignment results in a sale of accounts or chattel paper, a financing statement is not necessary to perfect that sale. Furthermore, given that the UCC includes an assignee in the definition of “lien creditor,” it seems anomalous to consider an assignee to also be a secured party.
- III. Scope

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<sup>1</sup> Two sources that were particularly valuable in creating this outline were GEOFFREY L. BERMAN, GENERAL ASSIGNMENTS FOR THE BENEFIT OF CREDITORS 5th ed., <https://www.bloomberglaw.com/product/blaw/browser/105.449892#> and Geoffrey L. Berman & Catherine E. Vance, *Model Statute for General Assignments for the Benefit of Creditors: The Genesis of Change*, 17 AM. BANKR. INST. L. REV. 33 (2009).

- a. The Committee should consider whether the assignor must be a business entity (e.g., corporation, LLC, partnership), or whether the assignor may also be an individual. Although it is possible for individuals to be assignors, the literature suggests that the vast majority of assignors are businesses and that an assignment is most helpful to a business, largely because there is no discharge as a result of the assignment. *See* Geoffrey L. Berman & Catherine E. Vance, *Model Statute for General Assignments for the Benefit of Creditors: The Genesis of Change*, 17 AM. BANKR. INST. L. REV. 33 (2009) (noting that the assignor is usually a business enterprise and that assignments are rarely viable for individuals because there is no release of liability from an individual’s creditors); Mike C. Buckley & Gregory Sterling, *What Banks Need to Know About ABCs*, 120 BANKING L.J. 48, 50 (2003) (“Most individuals will not want to make an ABC unless they have significant business debt to deal with. The reason is that an ABC does not provide an individual with any subsequent protection from creditors.”); *Is an Assignment for the Benefit of Creditors like a Bankruptcy?*, FEIN SUCH KAHN & SHEPARD, P.C. (June 8, 2021) (noting that some states, including New Jersey, allow individuals to use assignments for the benefit of creditors).
- b. The Committee should consider the geographic scope of the Act’s application. Presumably, the Act will apply to assignors located in the enacting state and to assignments stated to be governed by the law of the enacting state. However, the Committee could add a provision that recognizes an assignment made in another state, or an assignment that involves a transfer to the assignee of real property located in the enacting state.
  - i. A uniform choice of law rule should clearly delineate which state’s law to look to in cases involving assignors with assets in multiple states. However, if an assignor has significant assets spread over multiple states, bankruptcy may well be a more appropriate resolution than a multi-state, cross-border assignment for the benefit of creditors. Nevertheless, the assignee may not be able to commence a bankruptcy proceeding: in 2015, the Eleventh Circuit held that unless provided for in the assignment agreement, an assignee lacks corporate authority to file a voluntary bankruptcy petition. *In re Nica Holdings, Inc.*, 810 F.3d 781 (11th Cir. 2015).
  - ii. Upon the creation of the assignment, the assignee typically obtains all of the assignor’s rights, title, and interest in the assigned assets. Without a choice of law rule, however, an assignee may be unable to protect out of state assets.
  - iii. In addition to or as an alternative to a choice of law rule, the Committee may wish to consider whether to provide a process for commencing an ancillary assignment for the benefit of creditors in another state.

- c. Authority to make an assignment. From the Model Statute:<sup>2</sup> “A person may execute a written assignment of property to one or more assignees in trust for the benefit of creditors in conformity with the provisions of this [Act].”
- d. Applicability of other laws. From the Model Statute: “An assignment of property pursuant to the provisions of this [Act] is subject to the provisions of the law relative to trusts and to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnerships, by corporations or by other specified classes of persons; provided, that such assignment shall not be valid if it be upon or contain any trust or condition by which any creditor is to receive a preference or priority over any other creditor except as otherwise provided for by another provision of this [Act]; but in such case the property of the person shall become a trust fund to be administered in equity, and shall inure to the benefit of all the creditors in proportion to their respective claims or demands.”
  - i. **Note:** pursuant to state trust law, a trust beneficiary need not consent to a trust. Consequently, unsecured creditors, the beneficiaries of the assignment, need not consent in order for there to be a valid assignment.
  - ii. **Note:** it should be acknowledged that the assignment shields the officers, directors, and any buyer from litigation of a fraudulent transfer of the assets to said buyer.
  - iii. **Note:** the Model Statute also contains language stating that assignments must be for the equal benefit of all creditors in proportion to their several demands: “Every general assignment made by a debtor residing in this state shall be made for the equal benefit of his creditors in proportion to their several demands, to the extent of the net amount that shall come to the hands of the assignee for distribution. All preferences attempted to be made in any such assignment of one creditor over another, whereby any one creditor shall be first paid or have a greater proportion in respect of his claim than another, shall be deemed fraudulent and shall render the assignment void.”
  - iv. **Note:** some state ABC statutes void common law assignments for the benefit of creditors, while others do not. The Committee may wish to consider whether this Act should void common law assignments for the benefit of creditors.
  - v. **Note:** upon the commencement of an assignment for the benefit of creditors, other state laws may be triggered implicating particular rights or remedies or exempting certain parties from a law’s application. See, e.g., 21 Del. Code § 8404(c)(2)(f) (2013) (providing for reduced notice period for termination, cancellation, or nonrenewal of manufacturer-dealer agreement if dealer enters into an ABC).

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<sup>2</sup> All in-text references to “the Model Statute” refer to the Model Statute on General Assignments, which can be found in the Appendix of Geoffrey L. Berman & Catherine E. Vance, *Model Statute for General Assignments for the Benefit of Creditors: The Genesis of Change*, 17 AM. BANKR. INST. L. REV. 33 (2009).

- e. The Committee should consider the extent of the Act's coverage. Some states, such as Florida, have a detailed statutory scheme, laying out the duties of the parties and the powers of the court in detail. Other states, such as Delaware, leave most details to an assignment agreement that the parties draw up themselves. The consensus of the Study Committee was that an act should not be overly detailed.
- IV. Requirements to be an Assignee
- a. Qualifications
    - i. An assignee is usually a professional experienced in insolvency matters. In addition, some state laws require the assignee to be a resident of the state or county in which the assignor is located.
    - ii. Some states, such as Minnesota, require assignees to meet the same criteria required of a receiver.
    - iii. An assignee need not be an individual. For example, in some states, such as New Hampshire, a trust company may act as an assignee.
    - iv. The assignee should be disinterested and/or should disclose any conflicts of interest.
  - b. Assignee as fiduciary to all creditors
    - i. An assignee's fiduciary duty runs to all creditors of the assignment estate, rather than to any particular creditor. The assignee has a fiduciary responsibility to maximize recovery for all creditors of the estate.
- V. Validity and Effect of Assignments
- a. Assignor's Authority to make an Assignment
    - i. Companies seeking to make an assignment for the benefit of creditors must comply with all requirements of the law of the state where the company was formed to ensure that the assignment was authorized. For example:
      - 1. Illinois' Business Corporation Act requires shareholder approval for an assignment.
      - 2. Delaware's Limited Liability Company Act states that a person ceases to be a member of a LLC upon a member making an assignment, unless all members consent, or the LLC agreement provides otherwise.
  - b. The assignee holds the assignor's property "in custodia legis" (in trust for the creditors of the estate).
  - c. The assignee holds the assignor's property pursuant to the nemo dat principle, meaning that the assignee takes subject to the property claims of third parties and cannot acquire better title than the assignor.
  - d. All of the assignor's real and personal property should be assigned.
    - i. Most states limit the assignment of legal malpractice claims. However, in these states, if there is an assignment agreement, that agreement can assign the proceeds of the cause of action and appoint the assignee as the attorney in fact to prosecute the action in the assignor's name.

- e. Modification of assignment. From the Model Statute: “An assignment for the benefit of creditors cannot afterward be canceled or modified by the parties thereto, without the consent of every creditor affected thereby.”
- f. Void or Invalid Assignments.
  - i. The Committee should consider when an assignment is void or voidable, invalid, or may otherwise be set aside. Possible reasons include:
    - 1. Lack of creditor assent
    - 2. Collusive assignments
    - 3. Fraudulent assignments
  - ii. Rendering an assignment “void” may not be in the best interests of creditors. For example, rendering an assignment void due to lack of creditor assent would allow a single creditor to disrupt the entire assignment.
- g. Actions to set aside Assignments. From the Model Statute: “No assignment shall be set aside except in a direct action filed for that purpose; and no creditor shall obtain any priority or preference of payment out of the assets assigned on any judgment rendered after the filing of a complaint to set aside the assignment if the assignment is set aside and decreed to be void....In all actions to set aside assignments, the assignee and assignor shall be indispensable parties; and any preferred or unpreferred creditor may be made a party plaintiff or defendant at any time in term or vacation....When the assignment is attacked as fraudulent or void for any reason, it shall not be necessary to show fraud or collusion or notice thereof in the assignee in order to render the assignment void.”

## VI. Assignor’s Rights, Powers, and Duties

- a. Right to make an Assignment. From the Model Statute:
  - i. “A corporation incorporated or having its principal place of business within this state may make an assignment under the provisions of this [Act].”
  - ii. “A corporation making an assignment shall be deemed, for the purposes of this [Act], a resident of the county in which its principal office is located.”
  - iii. “When a general assignment is made by partners in business, it may include only the partnership property.”
  - iv. “In order to bring a general assignment of a partnership within the operation of this [Act], the partnership shall have its principal place of business within this state.”
  - v. “Every such conveyance or assignment shall be duly acknowledged before an officer authorized to take the acknowledgement of deeds and shall be recorded in the county clerk’s office in the county where such debtor shall reside or carry on his business at the date thereof. An assignment by copartners shall be recorded in the county where the principal place of business of such copartners is situated. An assignment by a corporation shall be recorded in the county where its principal place of business is situated.”

- vi. **Note:** if the assignor is a partnership or partner in a partnership, commencing an assignment may trigger certain applicable laws. See, e.g., Delaware's Revised Uniform Partnership Act (providing that an assignee in the assignment of a partnership or partner may enforce a partner's obligation to contribute to the partnership).
- b. Assignor's Duty to Provide Information to Assignee
  - i. Schedule of assets. The assignor should provide a full inventory or schedule of all property assigned.
  - ii. List of creditors and claims. The assignor should provide a list of the creditors to be benefitted by the assignment, along with their contact information, and, as near as possible, the amounts due each creditor.
    - 1. Numerous states require the assignor to provide the assignee with a list of its shareholders and creditors, along with an inventory of assets subject to the assignment. See Cal. Code Civ. Proc. § 1802; Ky. Rev. Stat. Ann. § 379.020; N.Y. Debt. & Cred. Law § 4.
  - iii. Assets to be transferred should include all books, books of account, choses in action, notes, drafts, bills, judgments, liens, and mortgages held or owned. In short, all property of every sort that is claimed or owned by the assignor at the time of execution of the assignment should be assigned.
- c. Recording the assignment with the county of residence. From the Model Statute:
  - i. "Every such assignment shall be by an instrument in writing, setting forth the name of the assignor, his residence and business, the name of the assignee and his residence and business, and in a general way describing the property assigned with its location, and stating the purpose of the assignment. It shall be executed and acknowledged in the manner prescribed for the execution and acknowledgement of deeds and recorded in the office of the recorder of the county where the property assigned is located. The assignor shall annex to such instrument an inventory, under oath, of his estate, real and personal, according to the best of his knowledge, and a list of his creditors and the amount of their respective demands, but such inventory shall not be conclusive as to the amount of the debtor's estate, and such assignment shall vest in the assignee the title to any other property belonging to the debtor at the time of making of the assignment, except property exempt from execution and insurance upon the life of the assignor, unless the instrument mentions such exempt property and insurance and declares an intention of the assignor that they shall pass thereby. Such instruments shall be executed under penalty of perjury by an officer or representative of the assignor."
  - ii. "When real property is part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment shall be filed and recorded in the county where such property is situated."

- iii. “The assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of, or endorsed upon the assignment, before the same is recorded and, if separate from the assignment, shall be duly acknowledged.”
  - d. Effect of omitting to record. From the Model Statute:
    - i. “An assignment for the benefit of creditors is void against creditors of the assignor, and against purchasers and encumbrancers in good faith and for value, if the assignment is not recorded. Where it embraces real property the assignment is subject to the provisions of the law on recording transfers, as well as those of this [Act].”
  - e. Exempt property. From the Model Statute:
    - i. “No assignment for the benefit of creditors shall include or cover any property exempt from levy or sale on execution, or exempt from being applied to the payment of debts by any legal process, unless in the assignment the exemption is expressly waived.”
- VII. Assignee’s Rights, Powers, and Duties
- a. Notice of Appointment
    - i. The Committee may wish to consider who appoints the assignee. In many states, the practice is for the assignor to appoint the assignee, with the assent of any secured creditor(s). The assignee is typically chosen by the assignor.
    - ii. Timing of notice (e.g., within 30 days after execution of an assignment)
    - iii. Method of notice. Possible methods include:
      - 1. Newspaper publication for a set time (e.g., once a week for three consecutive weeks)
      - 2. Email/electronic transmission
      - 3. Website
      - 4. Mail
    - iv. Parties that should receive notice:
      - 1. Creditors
      - 2. The IRS
      - 3. All other appropriate taxing authorities (e.g., those at the state, county, or city level)
    - v. Contents of notice
      - 1. Bar date. The common practice in many states is to set the bar date not less than 150 days and not greater than 180 days after the date of the first giving of the written notice to creditors and parties in interest.
      - 2. Other notice provisions. The Committee may wish to consider a uniform form of notice.
    - vi. Adequacy of notice

1. More broadly, the Committee may wish to consider what constitutes adequate notice, in terms of both content and distribution.
- b. Assignee's duty to marshal, inventory, and liquidate assets
    - i. Upon acceptance of the assignment, the assignee should marshal, inventory, and liquidate the assignor's assets.
    - ii. The assignee should take control of the assignor's assets, books, and records.
    - iii. The assignee should interview the assignor to ascertain the existence and value of all assets.
    - iv. The assignee should search the filings to determine the existence of other liens on the assignor's assets as of the date of the assignment.
    - v. The assignee should comply with all applicable state laws in determining the manner and method of liquidation.
    - vi. The assignee should prepare and incorporate a wind-down budget.
  - c. Operation of Business
    - i. If necessary, the assignee may operate the debtor's business after accepting the assignment.
  - d. Assignee's Right to Compensation
    - i. The assignee should receive reasonable compensation for the services provided.
    - ii. The Committee may wish to consider whether secured creditors should subordinate their interests to the assignee's fees. If a lender has a valid, perfected security interest in all of the assignor's assets, the assignee may seek to obtain a subordination agreement with the secured lender prior to accepting the assignment.
    - iii. The Committee may wish to consider whether and to what extent the assignee should be allowed a commission.
  - e. Assignee's Ability to Employ Professionals. From the Model Statute:
    - i. "The assignee may employ counsel to give advice, prosecute or defend litigation. The assignee may employ accountants, auctioneers, real estate brokers, or other professionals as it deems appropriate. Such professionals shall be paid a reasonable fee for their services from the estate."
  - f. Powers of the Assignee
    - i. From the Model Statute: "[T]he assignee has the power to sue in his own name as such assignee and recover all the estate, debts, and things in action belonging to or due to such assignor in the manner and with like effect as could be done if an assignment had not been made."
    - ii. The assignee may take possession or control of assigned property and occupy business premises.
      1. From the Model Statute: "In any general assignment for the benefit of creditors...the assignee shall have the right to occupy, for a period of up to 90 days after the date of the assignment, any



business premises held under a lease by the assignor upon payment when due of the monthly rental reserved in the lease for the period of such occupancy, notwithstanding any provision in the lease (whether heretofore or hereafter entered into) for the termination thereof upon the making of the assignment or the insolvency of the lessee or other condition relating to the financial condition of the lessee.”

- a. See also Cal. Civ. Code § 1954.1 (West 2008) (temporarily limiting the lessor’s right to terminate when there is an assignment and allowing the assignee to occupy and to operate the business on the premises for up to 90 days after the making of the assignment).
- iii. The assignee may sell or dispose of assets in a commercially reasonable manner.
    1. UCC § 9-627(c)(4) deems such a sale commercially reasonable.
    2. State law generally does not give an assignee the right to sell assets free and clear of liens and secured claims.
    3. The assignee can only sell the right, title, and interest that the assignor had in the assets (nemo dat).
  - iv. The assignee may redeem all mortgages and conditional contracts or other encumbrances and pledges of personal property. The assignee may sell such property subject to such encumbrances, contracts, or pledges.
    1. The assignee does not assume the assignor’s contractual liabilities.
  - v. The assignee may settle all matters and accounts between the assignor and its debtors and creditors.
  - vi. The assignee may prosecute or defend suits pending in favor of or against the assignor.
  - vii. The assignee has the rights of a lien creditor. See UCC §§ 9-102(a)(52), 9-317.
    1. UCC § 9-317(a)(2)(A) gives the assignee priority over most unperfected security interests. The interest of an assignee in the assignor’s personal property is subordinate to a security interest perfected at or before the time when the assignment becomes effective. Consequently, the assignee will need the secured creditor’s consent if that creditor’s collateral is to be liquidated.
    2. Assignees may use their status as lien creditors to recover assets under applicable state law, including laws pertaining to fraudulent transfers.
      - a. In addition, in a few states, an assignee may be able to terminate a writ of attachment or temporary restraining order, if such order was created within 90 days of the execution of the assignment. See, e.g., Cal. Code Civ. Proc. § 493.030.

- viii. The assignee has the power to avoid pre-assignment transfers as preferences or voidable transactions.
1. The Committee should discuss the extent to which preference definitions, exceptions, and procedures should be incorporated, as this power is controversial.
  2. See, e.g., Cal. Civ. Proc. Code § 1800(b) (West 2008): the assignee of any general assignment for the benefit of creditors...may recover any transfer of property of the assignor that is all of the following [listing several categories].
  3. See *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir. 2005) (providing that state law giving assignee power to avoid preferential transfers is preempted by the Bankruptcy Code). *Sherwood Partners* has restricted an assignee’s ability to prosecute recovery actions in federal courts; however, the ruling has not eliminated state law avoidance actions. See also *Pobreslo v. Joseph M. Boyd Co.*, 287 U.S. 518 (1933) (providing that state statutes barring preferences and priorities in voluntary assignments “serve to protect creditors against each other and go to assure equality of distribution unaffected by any requirement or condition in respect of discharge”); *In re W. Auto Assoc. Store*, 295 F. Supp. 566 (W.D. Va. 1968) (noting that Virginia law expressly prohibits general assignment preferences benefitting particular creditors).
  4. In addition to California (see above), fifteen other states have enacted statutes permitting only the assignee to avoid preferences. See Vivian Luo, Comment, *A Preference for States? The Woes of Preempting State Preference Statutes*, 24 EMORY BANKR. DEV. J. 513 (2008); Douglas C. Michael, *The Past and Future of Kentucky’s Fraudulent Transfer and Preference Laws*, 86 KY. L.J. 937 (1998) (discussing state anti-preference statutes that apply in the context of proceedings for the benefit of creditors). Several courts, in California and elsewhere, have found that state preference laws do not preempt the Bankruptcy Code. Even courts that have dismissed assignee preference actions have expressed a disinclination to follow *Sherwood*. See, e.g., *Insolvency Servs. Group v. Comcast Cable Communications*, 2021 WL 4477000 (D. Del. Sept. 30, 2021). Nevertheless, where state statutes include other bankruptcy-like provisions, such as the granting of an automatic stay upon the making of an assignment, such provisions will likely be found to be preempted by the Bankruptcy Code. In addition, including too many “bankruptcy type” provisions may eliminate the benefits of using an assignment by making the process overly cumbersome.
- ix. The assignee has the power to sell or otherwise dispose of property.

1. The Committee may wish to consider procedural requirements for the conduct of the sale, e.g., notification.
  2. Time limits on disposal of property.
    - a. From the Model Statute: “The assignee shall dispose of all personal property and divide the proceeds of the same among creditors as they may be entitled thereto within six months from the date of the assignment, and shall dispose of real estate within one year from such date, and make full settlement by that time.”
    - b. In lieu of a specific time limit, alternative language could provide that the assignee must dispose of property “as expeditiously as is compatible with the best interests of parties in interest” or similar.
  3. Proceeds. From the Model Statute: “The proceeds arising from the sale of the property assigned shall be deposited for safekeeping in a national bank within the State or some banking institution incorporated by the State, in the name of the assignee or assignees, in trust for the benefit of the assignor’s creditors.”
- x. The assignee has the power to examine the assignor.
1. **Note:** if the process is court-supervised, the court may instead examine the assignor.
  2. From the Model Statute: “The assignee may call the creditors together...[and] compel the assignor to submit to an examination by the assignee under oath concerning the acts, conduct, assets, liabilities, and financial condition of the assignor or any matter related to the assignee’s administration of the assignment estate.”
- xi. The assignee has standing to pursue causes of action.
1. From the Model Statute: “An assignee may assert on behalf of creditors any rights that an individual creditor could assert under state or federal law.”
- g. Duties of the assignee,
- i. The assignee has a duty to provide information.
    1. Statements of account.
      - a. Frequency. The Committee may wish to consider how often the assignee should provide statements of account, e.g., at the end of each calendar year, at the end of each quarter, or at some other time frame to be agreed.
      - b. Content. Statements should include an exact accounting of the assignor’s assets and liabilities, including monies held in trust for creditors of the estate and expenses incurred by the assignee.
      - c. Upon closure of the estate, the assignee should prepare an accounting of the monies handled during the assignment

administration and either file that accounting with the court (if there is one) or mail the accounting to all creditors. The assignee should also notify creditors that the estate is closed.

2. Upon creditor request. From the Model Statute: “Every assignee, upon the reasonable request of any creditor, shall report to such person or agent the condition of the assets of the assignment, and give the creditor all reasonable information concerning the same.”
- ii. The assignee has a duty to file tax returns.
  1. In some states, the assignment contract may provide that the assignee is responsible for filing all required pre- and post-assignment tax returns for the assignor after acceptance of the assignment.
- h. Remedies for Assignee’s Failure to Comply.
  - i. From the Model Statute: “An assignee is answerable for all damages resulting from refusal or failure to comply with their responsibilities under this [Act].”
  - ii. Substitution. If creditors can substitute the assignee, the Committee should consider removal procedures, how fees should be allocated, and the assignee’s liability after removal.

## VIII. Claims

- a. Filing a Claim
  - i. The Committee may wish to consider whether to include a model proof of claim form.
  - ii. Bar date. The time to file a claim with the assignee varies from state to state. Some states require the claim to be filed within 15 days from the date of assignment or notice, while others (notably California) allow as long as six months.
  - iii. Claim filing procedures.
- b. Creditor Consent.
  - i. Maine and Massachusetts require the assignee to obtain creditor assent to the assignment in order to share in the recovery from asset liquidation. However, a creditor’s failure to consent in these states merely places the creditor behind all those who do assent when proceeds are distributed.
- c. Claims Objections.
  - i. From the Model Statute: “The assignee may contest for [ ] days after the deadline to file claims, [the] claim or demand of any creditor filed with the assignee, who shall forthwith cause notice thereof to be given to the creditor.”
- d. Claims Allowance.
  - i. The assignee should examine the validity of timely filed claims, as well as any documentation provided by the creditor to support the amount of the claim.

- e. Priority of Payments.
  - i. Secured creditors paid from their collateral.
    - 1. From the Model Statute: “If a creditor holds collateral to secure his claim worth less than his claim, the assignee may estimate the value of the collateral and allow the creditor as an unsecured claim against the assigned estate only the difference between the value of the collateral and the amount of the claim.”
    - 2. Properly perfected secured claims should have priority over taxes, wage claims and other priority unsecured claims, as well as over general unsecured claims. However, this priority is subordinate to statutes that create a “trust” or statutory lien in favor of definable creditors.
  - ii. Expenses of administration of the assignment.
    - 1. Administrative rent. The cost of remaining on or in possession of the assignor’s premises. This is generally calculated based on the lease between the assignor and its landlord at the time of the assignment, unless otherwise negotiated.
    - 2. Actual out-of-pocket expenses.
    - 3. Fees and costs of professionals.
    - 4. Assignee’s fees.
      - a. Fees may range from as low as 1% of the amount realized from liquidation of estate assets to as much as 20%; however, on average, they range from 5-10% of proceeds generated.
      - b. Fees may be capped by agreement or by statute (e.g., New Jersey sets statutory limits on assignees’ fees).
  - iii. The federal priority statute.
    - 1. 31 U.S.C. § 3713 gives priority to a claim of any agency of the federal government ahead of other unsecured creditor claims.
    - 2. However, whether a federal agency’s claim under this statute applies to “antecedent perfected liens” is unclear.
  - iv. Recognition of state law priorities, including state and local taxing authority claims.
    - 1. In general, state and municipal tax claims, unpaid wage claims, employee benefits, and customer deposits are recognized as priority claims and paid ahead of general unsecured claims.
    - 2. Absent specific contrary statutory authority, these claims do not prime prior properly perfected security interests.
    - 3. Some states give a higher priority to tax claims than to wage and benefit claims; state caps on the amount of the priority claim differ from state to state.

4. Some states afford priority to reclamation claims under Article 2 of the UCC (§ 2-702); others afford priority to deposit or governmental claims, or to fines or penalties.
  5. In states that do not address the priority of all possible claims, the parties may decide on a priority scheme themselves or seek guidance from a court.
- v. Other priority claims.
  - vi. General unsecured claims.
    1. No distribution to general unsecured creditors should occur until the assignee is satisfied that all secured claims, taxes, and priority wage claims have been paid. All valid priority claims must be paid in full before any monies can be paid to unsecured creditors.
    2. A creditor that fails to file a timely claim shall not be paid.
    3. Distributions should be made to general unsecured creditors on a pro rata basis.
    4. The assignee should question any filed claim that does not match the amount reflected in the assignor's books and records.
    5. Most assignments limit the amount of any claim to that which was owed on the date the assignment was made.
      - a. Unlike in bankruptcy, there is no statutory basis for claims that are not yet due according to their contractual terms to participate in the assignment estate. However, in some jurisdictions, practices have developed that effectively enable prospective claimants to participate, essentially treating the making of the assignment as an anticipatory repudiation of all of the assignor's contractual obligations. This allows the creditor to treat the assignment/repudiation as an anticipatory breach and immediately exercise remedies.
    6. State law determines the priorities of unsecured claims against the assignor. Different states have different priority regimes. Many are similar to the Bankruptcy Code. Others (e.g., New Jersey) provide that the assignment contract governs priorities in an assignment. The Committee may wish to consider whether a uniform priority scheme would be useful to states in updating their priority rules.
  - vii. Subordinated creditors.
  - viii. Surplus returned to the Assignor.
    1. If there is a surplus, the assignee should hold the surplus in trust and return it to the assignor after creditors who did not participate have an opportunity to reach the surplus.
- f. Disputed claims.
    - i. The assignee should have a time limit within which to allow or deny contested claims. The objecting party or claimant then should have a time

limit in which to seek a declaratory judgment in court to determine the validity of a claim.

- ii. From the Model Statute: “In the event a claim is contested, the assignee may reserve from the proceeds of the estate an amount sufficient to pay the contested claimant its pro rata share of the estate’s assets.”
- g. Discount of Claim Not Due. From the Model Statute: “The assignee may allow a claim that is not due at its present value by discounting it at the legal rate.”
- h. Late-filed claims. From the Model Statute: “If any creditor shall fail to present their claim to the assignee within three months from the date of a general assignment, his claim shall be barred of a dividend, except that any creditor may, at any time prior to the making of a final dividend, present that claim under oath to the assignee, and share in any such final distribution on a pro rata basis, but limited to that amount being distributed in said final distribution.”
- i. Invalid claims. From the Model Statute: “Claims which for want of record or for other reasons would not have been valid as against the claims of creditors of the assignor shall not be liens against his estate.”
- j. Unclaimed dividends.
  - i. Unclaimed distributions may be redistributed to all known creditors after a designated time period as an additional recovery on claims against the debtor, if so provided in an assignment agreement or by statute.
  - ii. However, in many states, unclaimed distributions are subject to underlying state law on escheatment or other state-prescribed methods for handling unclaimed funds.
  - iii. In practice, redistribution of unclaimed funds does not occur unless remaining creditors can receive at least a 1% distribution.

#### IX. Liability of the Assignee

- a. Creditors may bring a claim for breach of fiduciary duty against an assignee for failing to act in creditors’ best interests.
- b. Creditors may challenge an assignment’s validity or seek to remove an assignee when the assignee is failing to act as a neutral fiduciary.
- c. Some states require assignees to post a bond. In those cases, creditors may look to the bond as a recovery mechanism if the assignee fails to properly perform its duties.
  - i. The amount of this bond varies. Some states, including California and most common law states, have no bond requirement. Others, such as Ohio, require a bond to be posted in an amount equal to twice the liquidation value of the assigned assets. Still others, such as Florida, require a bond to be posted in an amount determined by a supervising court.
- d. Involuntary bankruptcy as a remedy.
  - i. With limited exceptions, an involuntary petition can only be filed by creditors holding non-contingent claims not subject to a “bona fide dispute.” If even a fraction of a claim is disputed, the entire claim may be disqualified.

- ii. The bankruptcy court's ability to "surcharge" any custodian "for any improper or excessive disbursement" applies only to custodians other than an assignee for the benefit of the debtor's creditors if the assignee was appointed or took possession more than 120 days before the bankruptcy petition. 11 U.S.C. § 543(d)(2).
    - e. In most cases, an assignee's liability is decided pursuant either to applicable state probate law or to common law principles.
- X. Recognition of an Assignment made by an Assignor located in another state and governed by the law of another state.
  - a. As previously discussed, the Committee may wish to consider provisions for recognition of an assignment in these instances.
- XI. Miscellaneous, etc.