

## MODEL STATUTE FOR GENERAL ASSIGNMENTS FOR THE BENEFIT OF CREDITORS: THE GENESIS OF CHANGE

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### INTRODUCTION

It has been well documented that general assignments have become particularized to fit the needs of those states that have found the process a useful tool in managing debtor-creditor relationships and as a vehicle for the orderly liquidation of a business outside of bankruptcy.<sup>1</sup> However, what has become all too clear is that the process is so diverse on a state by state basis that it is less useful than it might otherwise be because of the significant differences among state laws governing the process.<sup>2</sup>

Begun in conjunction with the American Bankruptcy Institute's first manual on general assignments in the mid 1990's,<sup>3</sup> a series of proposed statutes that would make the state laws on general assignments more uniform, and hopefully more utilized on a national basis, was developed for consideration by practitioners across the country. Now years later, as general assignments once again are being looked at

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<sup>1</sup> See *Moecker v. Antoine*, 845 So. 2d 904, 910 (Fla. Dist. Ct. App. 2003) (acknowledging "procedure for assignments for the benefit of creditors varies" between jurisdictions, and assignment for the benefit of creditors is "cooperative effort" benefiting creditors); David S. Kupetz, *The Venerable Assignment for the Benefit of Creditors Weathers the Ninth Circuit's Decision in Sherwood v. Lycos and Remains a Valid Alternative to Federal Bankruptcy Proceedings*, 2008 NORTON ANN. SURV. OF BANKR. LAW, Part I, §12, at 297 ("State and Federal courts have long recognized ABCs as a valuable tool for liquidating insolvent estates for the benefit of creditors without having to institute federal bankruptcy proceedings."); Ronald J. Mann, *An Empirical Investigation of Liquidation Choices of Failed High Tech Firms*, 82 WASH. U. L.Q. 1375, 1390 (2004) (indicating general assignments are "superior to bankruptcy" in context of liquidations of "failed high-tech compan[ies]" in California).

<sup>2</sup> See Geoffrey L. Berman, *General Assignments: Are They a Thing of the Past or in Your Future?*, 15 AM. BANKR. INST. J. 37, 37 (June 1996) (discussing different treatment of general assignments among states); Kupetz, *supra* note 1, at 297 (noting ABCs are regulated differently by states using various statutory schemes); Vivian Luo, Comment, *A Preference for States? The Woes of Preempting State Preference Statutes*, 24 EMORY BANKR. DEV. J. 513, 514 (2008) (enumerating division in states adopting laws addressing ABCs).

<sup>3</sup> See Geoffrey L. Berman & Robert J. Keach, *"The Receivership Alternative"—A Response*, 20 AM. BANKR. INST. J. 26, 26 (June/Aug. 2001) (noting availability of this publication).

as a viable alternative to liquidation through bankruptcy, the concept of a Model Statute on General Assignments seems an appropriate mechanism to provide states with a framework to modernize their respective rules governing assignments, thereby bringing the understanding and use of general assignments into the 21<sup>st</sup> century.

This article looks at the framework supporting the concept behind the proposed Model Statute and suggests alternatives to the underlying concepts that individual states can look to in order to modernize their respective rules governing assignments, while providing flexibility for each state to address its own particular needs and concerns. There is no right answer to how to attack the need for change. Rather, the concept behind the proposed Model Statute is that a variety of choices is provided for decision makers and legislators to choose from to fit the needs of their locale, custom and practice.<sup>4</sup>

## SECTION I

Section I is the definitional section of the Model Statute. There is no definition for "assignee", "assignor" and "estate". These terms are well-defined generally<sup>5</sup> and there is no requirement that they be defined within the Model Statute. However, certain basic concepts should be recognized: the assignee should be a disinterested, third party not related to or affiliated with the debtor.<sup>6</sup> The debtor, or assignor, is generally a business enterprise (be it a corporation, limited liability corporation or in limited instances, a partnership). A general assignment is rarely a viable alternative for an individual because of the inability to guarantee a release of liability from the individual's creditors.<sup>7</sup>

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<sup>4</sup> The Model Statute also has comments within the proposed statutes. Some of the comments are incorporated within this article; others are left for the reader to review within the framework of the Model Statute.

<sup>5</sup> See, e.g., *Paul H. Schwendener, Inc. v. Jupiter Elec. Co.*, 829 N.E.2d 818, 827–28 (Ill. App. Ct. 2005) (explaining "an assignment for the benefit of creditors 'is simply a unique trust arrangement in which the assignee (or trustee) holds property for the benefit of a special group of beneficiaries, the creditors.'") (citation omitted); *Linton v. Schmidt*, 277 N.W.2d 136, 143 (Wis. 1979) (stating assignment law aims to equally disperse "assignor's estate to all creditors in proportion to their claims") (citation omitted). See also Richard H.W. Maloy, *The "Priority Statute"—The United States' "Ace-in-the-Hole"*, 39 J. MARSHALL L. REV. 1205, 1278 (2006) (indicating terms "'assignee' or 'trustee'" are used interchangeably to define "person to whom the assignment has been made").

<sup>6</sup> See *In re Heinsohn*, 247 B.R. 237, 244 (E.D. Tenn. 2000) ("A bankruptcy trustee is a fiduciary of the estate, its beneficiaries and the creditors."); *In re Accomazzo*, 226 B.R. 426, 429 (D. Ariz. 1998) (noting trustees are fiduciaries of estate's creditors (citing *Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339, 1357 (9th Cir. 1983))); *Moecker*, 845 So. 2d at 910 (noting with ABCs, "debtor voluntarily assigns its assets to a third party as trustee for the purpose of liquidating the assets to satisfy, in full or in part, creditors' claims against the debtor").

<sup>7</sup> See *United States v. Rome*, 414 F. Supp. 517, 520 (D. Mass. 1976) (stating, under Massachusetts law, "assignments [for the benefit of creditors], unlike bankruptcy, do not totally discharge a debtor of his obligations to creditors"); see also *Freeman v. Marine Midland Bank-N.Y.*, 419 F. Supp. 440, 447 (E.D.N.Y. 1976) (noting "[a]fter a claim is allowed the debtor-assignor continues to remain liable for the unpaid balance of the debt, and the creditor may resort to and pursue such remedies as may be available") (citations

## SECTION II

Here begins the body of the Model Statute. Included is enabling language to bring into effect state laws on such topics as fraudulent transfers and trust law. Many states have requirements that assignments are of equal benefit to their creditors and that preferences among creditors are not permitted.<sup>8</sup> The proposed provisions embodied in sections 202 and 203 are in many respects duplicative, and also embody concepts in proposed section 206. As mentioned above, this is typical of the alternatives drafted into the Model Statute to provide choices to each state's drafters of revised legislation.

Section 204 references the potential for a bond to be posted by an assignee. Some states have such a requirement and the requirements vary from some multiple of the value of all assets to the value of the unencumbered assets.<sup>9</sup> The cost of such bonds is generally an administrative expense, meaning the creditors pay for the protection the bond provides. To the extent a state feels a bond requirement is an important component of any revisions to existing statutes, it should be included within Section II.

Section 206 includes a provision to require "consent" to the assignment by a majority of the creditors (section 206(b)). This proposed language gives rise to areas of concern that need careful scrutiny by each state's proposing body. The fact that an assignment may be "void" if a provision of the section fails may be too draconian a result. For example, a significant creditor of the assignor could block the assignment by withholding consent. This would leave the assignor in a form of legal limbo and all but require the filing of a bankruptcy or secured lender foreclosure, depending on the facts of the situation. As such, section 206(b) may be more of a penalty than states want to require. This, however, should not mean that notice of the assignment should be ignored. Section 211 proposes criminal

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omitted); Mike C. Buckley & Gregory Sterling, *What Banks Need To Know About ABCs*, 120 BANKING L.J. 48, 50 (2003) (observing "[m]ost 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").

<sup>8</sup> See *Pobreslo v. Joseph M. Boyd Co.*, 287 U.S. 518, 526 (1933) (stating 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, 572 (W.D. Va. 1968) (stating Virginia law expressly prohibits general assignment preferences benefitting particular creditors); see also Douglas C. Michael, *The Past and Future of Kentucky's Fraudulent Transfer and Preference Laws*, 86 KY. L.J. 937, 964 (1998) (observing "[m]ost states have anti-preference statutes that apply in the context of general or special collective proceedings for the benefit of creditors").

<sup>9</sup> See *Williamson v. Leith (In re Clark & Benson)*, 36 F.2d 643, 645 (5th Cir. 1929) (indicating Florida statute provides "that no one shall be appointed assignee under a general assignment for the benefit of creditors who does not give bond in double the value of the property assigned"); *Commercial Standard Ins. Co. v. Merit Clothing Co.*, 377 S.W.2d 179, 181 (Tex. 1964) (acknowledging statute "contemplated" assignees should file bonds); *Stannard v. Youmans*, 75 N.W. 1002, 1003 (Wis. 1898) (restating Wisconsin's assignment statute which states assignee must post bond "not less than . . . the nominal value" of assignor's assets).

penalties for fraudulently making an assignment. However, imposition of criminal liability may be outside the scope of the Model Statute.

### SECTION III

Section III addresses the rights, powers and duties, such as they may be, of the assignor. Jurisdiction is addressed in section 301 and should include any limited liability company, to the right of a corporation to make an assignment. Partnerships are dealt with in section 304.

Sections 305–309 deal with the assignor's duty to provide detailed information to the assignee as to its assets, creditors (claims) and the transfer of assets pursuant to the general assignment. Also involved in this section is the proposed requirement of recordation of the assignment with the county of residence. The elements within these provisions are not mutually exclusive and can (and maybe should) be consolidated for clarity to fit each state's requirements.

### SECTION IV

Here the Model Statute turns to the rights, powers and duties of the assignee. Section IV also begins the portion of the Model Statute where alternative provisions to various concepts are proposed. Also embodied within this section (and the entire proposed Model Statute) is the concept that states may want to continue to require court supervision of the assignment process rather than leave the process solely subject to creditor oversight. Of primary concern is the need for notice of the assignment to creditors. This is dealt with in section 401. Additionally, in light of the emergence of electronic mail, notice to creditors could also be found acceptable if done by e-mail.<sup>10</sup> It might also be worthwhile to require an assignee to make information available generally to creditors through the use of a website dedicated to that purpose.<sup>11</sup>

Another area where there has been a large divergence in existing rules is how an assignee liquidates assigned assets.<sup>12</sup> Although many assignees believe that

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<sup>10</sup> See Susan M. Thurston, *Noticing Just Keeps Getting Better*, 27 AM. BANKR. INST. J. 36, 36 (Oct. 2008) (noting benefits to bankruptcy system through ability to provide notice through use of e-mail); cf. 9A AM. JUR. 2D *Bankruptcy* § 1086 (2008) (providing generalized information on "[n]otice by electronic transmission"); Timothy P. Meredith & Barbara S. Mishkin, *Truth in Lending 2001*, 57 BUS. LAW. 1163, 1164–65 (2002) (discussing use of e-mail as method for creditors to provide notice to consumers).

<sup>11</sup> See Appendix Model Statute § 407 ("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."); cf. Meredith & Mishkin, *supra* note 10, at 1164–65 (discussing use of websites as method for creditors to provide notice to consumers).

<sup>12</sup> Compare 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, 17–25 (2008) (explaining assignee's role relating to assignment for benefit of creditors law in Florida), with Joel B. Weinberg, *California General Assignments: Still Alive, Kicking and Useful*, 29 CAL. BANKR. J. 293, 294–96 (2007) (discussing assignee's role relating to general assignments law in California).

having a time limit to dispose of assets is counter productive to maximizing values, it may be that states with this type of requirement will not be as willing to remove such a requirement in a revised set of statutes.

Section 409 encompasses provisions of trust law by codifying the requirement of a regular accounting to creditors. Remember, the assignment process is in theory for the benefit of the creditors<sup>13</sup> and they should not be required to wait months, or years, to see how the estate was administered by the assignee.

Section 411 provides for the potential of a creditor election of the assignee, thereby reducing the concern expressed by many commentators that the ability of the assignor to select its assignee is grounds for fraud in the process, at the expense of creditors. Patterned after Bankruptcy Code section 1104(b),<sup>14</sup> this creditor "remedy" may be too much of a shift towards bankruptcy and give rise to preemption arguments already of concern when dealing with the concepts of assignments versus bankruptcy.<sup>15</sup>

Section 414 creates a right of the assignee to occupy the premises of the assignor upon the making of the assignment. Based on statutory support found in California in this area,<sup>16</sup> this section gives the assignee the right to keep a landlord from preventing the assignee from taking possession of the assigned assets and liquidating those assets. A landlord that is not in possession of its premises prior to the assignment becoming effective is prohibited from locking the assignee out. The assignee is of course required to pay rent for the use of the premises.

Section 417 provides the framework for recovery of preferential transfers. A statutory right found in less than half the states, the ability to recover preferences

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<sup>13</sup> See *In re Sundance Corp.*, 83 B.R. 746, 748 (Bankr. D. Mont. 1988) ("An assignee for the benefit of creditors is one to whom, under an insolvent or bankrupt law, the whole estate of a debtor is voluntarily transferred to be administered *for the benefit of creditors*." (emphasis added); Berman, *supra* note 2, at 37 (positing when states properly regulate and administer general assignments, both secured and unsecured creditors are benefited); John W. Easterbrook, *Bankruptcy Petitions Versus Assignments for the Benefit of Creditors: A "Win" for Bankruptcy?*, 122 BANKING L.J. 415, 415–16 (2005) (explaining popularity among many businesses of ABCs and benefit to lenders).

<sup>14</sup> 11 U.S.C. § 1104(b) (2006).

<sup>15</sup> The topic of preemption, made much more prevalent by the ruling in *Sherwood Partners v. Lycos*, 394 F.3d 1198 (9th Cir. 2005) (cert. denied), is not the focus of this article. The authors have written separately on the changing landscape on this issue. See Geoffrey L. Berman & Catherine E. Vance, *State Law Preference Actions: Still Alive After Sherwood Partners v. Lycos*, 26 AM. BANKR. INST. J. 24, 24 (Dec./Jan. 2008) (proposing assignments and other non-bankruptcy proceedings may still be viable option); see also Berman, *supra* note 2, at 37 (arguing assignments are efficient *alternative* to bankruptcy proceedings). See generally Berman & Keach, *supra* note 3 (pointing to "differences between receiverships, general assignments and bankruptcy proceedings").

<sup>16</sup> CAL. CIV. CODE § 1954.1 (West 2008) ("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 . . ."). See William G. Coskran, *Assignment and Sublease Restrictions: The Tribulations of Leasehold Transfers*, 22 LOY. L.A. L. REV. 405, 530 (1989) (noting "California Civil Code section 1954.1 temporarily limits the lessor's right to terminate when there is a general assignment for the benefit of creditors. That section allows the assignee to occupy and to operate the business on the premises for up to 90 days after the assignment") (citation omitted).

(subject to the outcome of the *Sherwood Partners v. Lycos* prodigy of cases)<sup>17</sup> is one of the major areas of concern for creditors and assignees. Where an assignor has paid creditors (or insiders) in what would be easily defined as a preferential transfer, in those states without a recovery provision, the assignee is left with the decision whether the assignment should be converted into a bankruptcy to preserve the asset value for creditors.<sup>18</sup> Where the goal is a faster, more efficient administration of the liquidation process, *requiring* the use of a bankruptcy is counter-intuitive to support of a non-bankruptcy alternative.

The priority of creditor claims is addressed in the optional provisions of section 418. Again, the choice of provisions is left to those making the recommendation to the state legislature.

## SECTION V

Claims are the focus of this portion of the Model Statute. The requirements as to the form of notice and consent, or proof of claim, to be filed, are left to the respective state authors to determine. The need for a creditor to "consent" to the assignment, to be able to share in recovery from the liquidation of the assets, however, is assumed.

Section 504 provides the basis for an assignee to litigate a disputed claim. Often times, an assignee is left with limited ability to bring an action to dispute a claim filed by a creditor.<sup>19</sup> Assignees are left to contemplate the filing of a declaratory relief or interpleader action, both of which are time consuming and costly. The ability to have a court rule on a creditor claim dispute would provide the assignee with a tool to move the administration of an assignment efficiently

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<sup>17</sup> See, e.g., CAL. CIV. PROC. CODE § 1800(b) (West 2008) (stating "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" and while listing several categories); see also *Sherwood Partners, Inc.*, 394 F.3d at 1204 (noting under Bankruptcy Code, "trustee is authorized to recover these sums for the use of the bankruptcy estate in making its distribution to creditors"); Luo, *supra* note 2, at 525 ("California's preference statute is not an anomaly. Fifteen other states have also enacted statutes permitting *only* the assignee to avoid preferences.").

<sup>18</sup> See 11 U.S.C. § 547 (2006) (stating under federal law too, "trustee may avoid any transfer of an interest of the debtor in property" in listed circumstances); see also *In re Martin*, 184 B.R. 985, 990 (Bankr. M.D. Ala. 1995) (stating purpose of Bankruptcy Code's preference law as "insuring that all creditors receive an equal distribution from the available assets of the debtor") (citation omitted); Luo, *supra* note 2, at 515 (positing preemption of state preferential transfer statutes would "result in a tradeoff between recovering preferences in bankruptcy and lower expenses in ABCs").

<sup>19</sup> See GEOFFREY L. BERMAN, GENERAL ASSIGNMENTS FOR THE BENEFIT OF CREDITORS: THE ABCS OF ABCS 5 (2d ed. 2006) ("[A]ssignments do not have the same ability to prohibit lawsuits from proceeding as provided for by the Bankruptcy Code."); see also *Sherwood Partners, Inc.*, 394 F.3d at 1205–06 (stating state law giving assignee power to avoid preferential transfers is preempted by Bankruptcy Code); *Bankruptcy Reform and the Chandler Bill*, 46 YALE L.J. 1177, 1186 (1937) (describing how "[h]onest assignees" are "constantly plagued by nuisance creditors or unscrupulous attorneys who threaten to institute bankruptcy proceedings if they are not bought off").

along, while eliminating the need to hold all creditors "hostage" by reason of a creditor claim not otherwise supportable.<sup>20</sup>

#### SECTION VI

The miscellaneous provisions are found within this section and include recognition of the rights of the assignee as a lien creditor found in each state's Uniform Commercial Code (9-309). Section 603 also proposes the ability for the assignee to void or release pre-assignment attachment liens and is based on California Code of Civil Procedure section 493.030. There is no reason an assignee should be required to bring a preference action (even if supported under state law) or a bankruptcy so as to be able to remove pre-assignment writs of attachment and/or judgment liens recorded within ninety days of the assignment. These liens would be a preference under bankruptcy law and should not be allowed to survive outside of a bankruptcy.

#### CONCLUSION

Not all aspects of assignments for the benefit of creditors are addressed within the Model Statute. Again, specific needs of each state are left to those responsible for proposing the revisions to state law. The Model Statute is a framework for discussion and change. But the time is right for those states looking to create an alternative to bankruptcy for the efficient liquidation of a business' assets to look at existing law and see where the Model Statute can provide a basis for change.

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<sup>20</sup> See Berman, *supra* note 19, at 4 ("Assignments for the benefit of creditors are generally less expensive to administer than a chapter 7 bankruptcy, and generally provide for a less cumbersome process."). See *generally id.* at 1 (describing general assignments for the benefit of creditors as process for liquidating and distributing debtor's assets under state law); Luo, *supra* note 2, at 514 (discussing weakness of assignments for the benefit of creditors, that federal law prevents assignees from recovering preferential transfers) (citations omitted).

**APPENDIX****MODEL STATUTE  
GENERAL ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**

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**I. DEFINITIONS**

§ 101. In this [chapter]—

- (a) "assignment" means a general assignment for the benefit of creditors;
- (b) "assets" means—
  - (1) property of a debtor not exempt from liability for his debts; and
  - (2) any property to the extent that the property is liable for any debts of a debtor;
- (c) "claim" means—
  - (1) a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
  - (2) a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;
- (d) "conveyance" means every payment of money, assignment, release, transfer, lease, mortgage, or pledge of tangible or intangible property, and also the creation of any lien or incumbrance;
- (e-1) "creditor" means a person who has any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent, against the debtor/assignor;
- (e-2) "creditor" means a person who has a claim and includes an assignee of a general assignment for the benefit of creditors against a debtor/assignor;
- (e-3) "creditor" means—
  - (1) an entity that has a claim against the debtor that arose at the time of or before the general assignment for the benefit of creditors;
  - (2) an entity that has a claim against the assignment estate of a kind specified in [section \_\_\_\_\_] of this [chapter];
- (f-1) "debt" means any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent;
- (f-2) "debt" means liability on a claim;
- (g) "general assignment for the benefit of creditors" means an assignment that
  - (1) is an assignment of all the debtor/assignor's assets that are transferable and not exempt from enforcement of a money judgment;
  - (2) is for the benefit of all the debtor/assignor's creditors; and



(3) does not create a preference of one creditor or class of creditors over any other creditor or class of creditors, but the assignment may recognize the existence of priorities to which creditors are entitled under applicable law;

(h) "insider" means—

(1) if the debtor/assignor is an individual—

(A) a relative of the debtor/assignor or of a general partner of the debtor/assignor;

(B) a partnership in which the debtor/assignor is a general partner;

(C) a general partner of the debtor/assignor;

(D) a corporation of which the debtor/assignor is a director, officer, or person in control;

(2) if the debtor/assignor is a corporation or a limited liability company—

(A) a director, officer, or person in control of the debtor/assignor;

(B) a partnership in which the debtor/assignor is a general partner;

(C) a general partner of the debtor/assignor;

(D) a relative of a general partner, director, officer, or person in control of the debtor/assignor;

(3) if the debtor/assignor is a partnership—

(A) a general partner in the debtor/assignor;

(B) a relative of a general partner in, general partner of, or person in control of the debtor/assignor;

(C) a partnership in which the debtor/assignor is a general partner;

(4) an affiliate of the debtor/assignor or an insider of an affiliate as if such affiliate were the debtor/assignor;

(5) a managing agent of the debtor/assignor;

As used in this subsection, "relative" means an individual related by affinity or consanguinity with the third degree as determined by the common law, or an individual in a step or adoptive relationship within such third degree; and an "affiliate" means a person that directly or indirectly owns, controls or holds with power to vote 20 percent or more of the outstanding voting securities of the assignor or 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with power to vote by the assignor (excluding securities held in a fiduciary or agency capacity without sole discretionary power to vote, or held solely to secure a debt if the holder has not in fact exercised the power to vote), or a person who operates the business of the assignor under a lease or operating agreement or whose business is operated by the assignor under a lease or operating agreement.

(i-1) "insolvent" means a person is unable to pay its debts from its own means as they become due or the person's liabilities exceed its assets;

(i-2) "insolvent" means—

(1) with reference to an entity other than a partnership and a municipality, a financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—

(A) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(B) property that may be exempted from property of the estate under [section \_\_\_\_] of this title;

(2) with reference to a partnership, a financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—

(A) all of such partnership's property, exclusive of property of the kind specified in subparagraph (a)(1) of this paragraph; and

(B) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in paragraph (1) of this subsection, over such partner's nonpartnership debts; and

(3) with reference to any person, a financial condition such that the person is—

(A) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or

(B) unable to pay its debts as they become due;

(j) "judicial lien" means a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding;

(k-1) "person" includes an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, two or more persons having a joint or common interest, or any other legal or commercial entity;

(k-2) "person" includes individual, partnership, and corporation, but does not include governmental unit;

(l) "security agreement" means an agreement that creates or provides for a security interest;

(m) "security interest" means a lien created by an agreement;

(n) "statutory lien" means a lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute;

(o-1) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest;

(o-2) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor/assignor's equity of redemption;

(p) "wages" means all remuneration paid to any employee for his employment including the cash value of all remuneration paid in any medium other than cash.

*Comment:* Although used in various sections, the terms "assignee," "assignor," and "estate" are not defined in section 101. "Wages" in this section is not as specific as provided for in section 418-3, creating a potential statutory conflict.

## II. ASSIGNMENTS: VALIDITY & EFFECT

§ 201. Authority to make a general assignment for benefit of creditors.

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 [chapter].

§ 202. Applicability of other laws.

An assignment of property pursuant to the provisions of this chapter 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 [chapter]; 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.

§ 203. Assignments must be for equal benefit; preferences void.

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.

*Comment:* Sections 202 and 203 are duplicate in certain respects. In addition, both provide that the assignment is ineffective under certain circumstances, which is more generally dealt with in section 206.

§ 204. Amendments permitted.

No assignment shall be void because of any defect, informality or mistake therein or in the bond, inventory or list of creditors accompanying the same; and the assignment may be amended and any such amendment shall relate back to the time of the execution of the assignment. No mistake or inadvertent failure to comply with the provisions of this chapter shall void the assignment. No creditor shall, in case an assignor has attempted to make an assignment for the benefit of creditors, by attachment, garnishment or otherwise, obtain priority over other creditors, but in all such cases the property of such debtor shall be administered for the benefit of all of the debtor's creditors.

*Comment:* This section refers to a "bond," but no bond requirement is presently provided for herein. Also, the reference to "attachment, garnishment or otherwise" bears no relation to the substance of this section. If such procedures are to be given no effect in the event of an assignment, a separate section so providing is warranted. Generally, a section addressing technical defects would seem to require a corollary section detailing the required contents of the assignment itself.

§ 205. Assent of creditors necessary to modification of assignment.

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.

§ 206. When assignment void.

An assignment for the benefit of creditors is void against any creditor of the assignor in the following cases:

(a) if the assignment prefers a creditor dependent upon any condition or contingency, or with any power of revocation, reserved;

(b) the assignment is not consented to by a majority in number and in amount of allowed claims of the creditors;

(c) if the assignment provides for the payment of any claim known by the assignor to be false or fraudulent, or for the payment of more upon any claim than is known to be justly due from the assignors;

(d) if the assignment fails to disclose any reservation of any interest in the assigned property, or in any part thereof to the assignor or for his benefit;

(e) if the assignment confers upon the assignee any power which, if exercised, might prevent or delay the immediate conversion of the assigned property; provided, that the assignment may provide reasonable terms and manner of sale to be carried out only so far as practicable and not prejudicial to the interest of the estate.

(f) if the assignment fails to transfer all assets of the assignor to the assignee.

*Comment:* This section requires careful review. Rendering an assignment "void" may not be in the best interests of the creditors of the assignor. Subsection (b), for example, would allow a disgruntled creditor to disrupt the entire assignment, and subsection (d) overlooks the possibility of the assignee avoiding any right reserved in the assignor. This section also fails to address collusive assignments, in which case the assignment should be voidable.

§ 207. Contest of assignment due to fraud.

Any assignment for the benefit of creditors may be contested or attacked for fraud by any creditor. Proof of fraud on the part of the assignor shall be sufficient to invalidate the assignment, whether the assignee knew of it or not.

*Comment:* The remedy of an involuntary bankruptcy petition may be more appropriate for creditors. Should this provision be retained, consideration should be given to the provision's reference to the assignee's lack of knowledge of the assignor's fraudulent conduct. Similar consideration is warranted with respect to

*section 210, which addresses not only fraudulent assignments, but also those that are "void for any reason."*

§ 208. Actions to set aside assignments—Nature of actions generally; priorities and payment to creditors on judgments rendered after filing of complaint to set aside assignment.

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.

§ 209. Actions to set aside assignments—Parties.

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.

§ 210. Actions to set aside assignments—Necessity of showing fraud, collusion, or notice thereof in assignee.

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.

§ 211. Fraud in assignment for benefit of creditors.

Every person who, having made, or being about to make, a general assignment of his property to pay his debts, shall by color or aid of any false or fraudulent representation, pretense, token or writing induce any creditor to participate in the benefits of such assignments, or to give any release or discharge of his claim or any part thereof, or shall connive at the payment in whole or in part of any false, fraudulent or fictitious claim, shall be guilty of a gross misdemeanor.

*Comment: Criminal provisions may be beyond the scope of this model statute.*

### III. RIGHTS, POWERS & DUTIES OF ASSIGNOR

§ 301. Any corporation may assign.

A corporation incorporated or having its principal place of business within this state may make a general assignment under the provisions of this [chapter].

§ 302. Corporation deemed resident of what county.

A corporation making a general assignment shall be deemed, for the purposes of this chapter, a resident of the county in which its principal office is located.

§ 303. Any partnership may assign.

When a general assignment is made by partners in business, it may include only the partnership property.

§ 304. Partnership residency.

In order to bring a general assignment of a partnership within the operation of this chapter, the partnership shall have its principal place of business within this state.

Every such conveyance or assignment shall be duly acknowledged before an officer authorized to take the acknowledgment 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.

§ 305. Schedule; list of creditors.

Assignments shall be specific and accompanied by a full inventory or schedule of the property assigned, including choses in action, and with a list of the creditors to be benefitted by the assignment and the sums due each one as near as may be.

*Comment: Sections 305–308 are all variants on the issue of the assignor's disclosure and related duties at the time of making the assignment. Accordingly, the aspects of these sections that are to be retained should be incorporated into a single section.*

§ 306. Deeds of assignment for benefit of creditors—Conveyances; statements as to aggregate amounts.

Assignments referred to in this [chapter] shall convey all books, books of account, choses in action, notes, drafts, bills, judgments, liens, and mortgages held or owned, indicating, as near as may be, the aggregate amount thereof, with a statement as to the total amounts which are considered good, doubtful, or bad.

§ 307. Deeds of assignment for benefit of creditors—Property to be conveyed generally; description of property; attachment of list of creditors of assignor.

(a) All assignments referred to in this [chapter] shall convey all of the property of every sort which is claimed or owned by the assignor at the time of the execution thereof. Such assignments shall:

(1) identify any lands owned or any interest in lands;

(2) identify goods, wares, and merchandise by general words of description, indicating the location, kind, and quality thereof, with a statement as accurate as possible, containing the purchase price and selling price of the lot as a whole; and

(3) describe in general terms any shares of capital stock, livestock, or personal property which are not connected with any mercantile or manufacturing business.

(b) The assignor shall attach a list of all creditors with their post office addresses and the amounts due to each.

§ 308. Assignment contents—Recording.

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 acknowledgment 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 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.

When real property is a 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.

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.

§ 309. Effect of omitting to record—Assignment of real property.

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 law on recording transfers, as well as those of this chapter.

§ 310. Exempt property excepted from assignment.

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.

#### IV. RIGHTS, POWERS & DUTIES OF ASSIGNEE

§ 401-1. Notice of assignee's appointment.

(a) Within 30 days after an assignment is executed, the assignee shall publish notice of his appointment as assignee in a newspaper published in the county:

(1) where the assignor resides or operated its principal business before the assignment; or

(2) nearest the assignor's residence or principal business if a newspaper is not published in the county of the assignor's residence or principal business.

(b) The assignee shall publish notice of his appointment as assignee once each week for three consecutive weeks.

(c) The assignee shall notify by mail each of the assignor's listed creditors.

(d) In any general assignment for the benefit of creditors, the assignee shall, within 30 days after the assignment has been accepted in writing, give written notice of the assignment to the assignor's creditors, equity holders, and other parties in interest as set forth on the list provided by the assignor pursuant to subsection (f).

(e) In the notice given pursuant to subdivision (a), the assignee shall establish a date by which creditors must file their claims to be able to share in the distribution of proceeds of the liquidation of the assignor's assets. That date shall be 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.

(f) The assignor shall provide to the assignee at the time of the making of the assignment a list of creditors, equity holders, and other parties in interest, signed under penalty of perjury, which shall include the names, addresses, cities, states, and ZIP Codes for each person together with the amount of that person's anticipated claim in assignment proceedings.

§ 401-2. Notice of assignee's appointment.

(a) In any general assignment for the benefit of creditors, the assignee shall, within 30 days after the assignment has been accepted in writing, give written notice of the assignment to the assignor's creditors, equity holders, and other parties in interest as set forth on the list provided by the assignor pursuant to subdivision (c).

(b) In the notice given pursuant to subdivision (a), the assignee shall establish a date by which creditors must file their claims to be able to share in the distribution of proceeds of the liquidation of the assignor's assets. That date shall be 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.

(c) The assignor shall provide to the assignee at the time of the making of the assignment a list of creditors, equity holders, and other parties in interest, signed under penalty of perjury, which shall include the names, addresses, cities, states, and ZIP Codes for each person together with the amount of that person's anticipated claim in the assignment proceedings.

§ 402-1. Compensation of assignee.

An assignee referred to in this article may receive reasonable compensation for services.

§ 402-2. Commissions allowed.

The commission due and owing to the assignee or assignees and agent or agents for their trouble and labor shall be five percent on receiving and two and a half percent on paying, or shall be subject to the terms of the Assignment contract, but in no event shall they exceed [\_\_\_\_\_].

§ 403. Employment of professionals.

The assignee may employ counsel to give advice, prosecute or defend litigation. The assignee may also 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.



§ 404. Specific powers of assignee.

Among other things the assignee has the power to:

(a) 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 he might or could have done if an assignment had not been made;

(b) take into his hands all the estate of such assignor whether delivered to him or afterwards discovered, and all books, vouchers and papers relating to the same;

(c) sell or otherwise dispose of the assets in a commercially reasonable manner;

(d) redeem all mortgages and conditional contracts or other encumbrances and pledges of personal property; or sell such property subject to such encumbrances, contracts or pledges;

(e) settle all matters and accounts between such assignor and his debtors and creditors;

(f) prosecute or defend suits pending in favor of or against the assignor.

§ 405-1. Disposal of property—Time limit.

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.

§ 405-2. Disposal of property—Time limit.

The assignee shall collect and reduce to money the property of the assignment estate and close such estate as expeditiously as is compatible with the best interests of parties in interest.

§ 406-1. Examination of assignor.

The court may, upon application of the assignee or any creditor, compel the appearance in person of the debtor before such court or forthwith to answer under oath such matters as may be inquired of the debtor, and such debtor may be fully examined under oath as to the amount and situation of the debtor's estate, and the names of the creditors and amounts due to each, with their places of residence, and may be compelled to deliver to the assignee any property or estate embraced in the assignment.

*Comment: This section assumes court supervision, raising a question that should be considered with respect to this model statute generally, that of whether the courts shall supervise assignments or, conversely, whether their operation should occur largely under the contract with only certain disputes taken before the court.*

§ 406-2. Assignees.

The assignee may call the creditors together.

§ 406-3. Meeting of creditors; examination of assignors.

(a) The assignee may call the creditors together.

(b) The assignee may, in conjunction with any meeting called under subsection (a), 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.

§ 407. Assignee shall provide information.

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.

§ 408. Deposit of proceeds of sales.

The proceeds arising from the sales 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.

§ 409. Statements of account.

The assignee or assignees shall provide at the end of each calendar quarter, or some other agreed upon and appropriate time frame, to the creditors an exact accounting of the assets and liabilities of the assignor, including monies held in trust for creditors of the estate, as well as the expenses incurred by the assignee.

§ 410. Damages for failure to account or follow directions.

An assignee is answerable for all damages resulting from refusal or failure to comply with their responsibilities under this [chapter].

§ 411. Substitution of another assignee by creditors.

A majority of the unsecured creditors in number and amount of the assignor may agree in writing upon an assignee different from the one named in the assignment. Such substitute assignee shall be substituted in lieu of the original assignee with all of the rights, powers and duties conferred upon such original assignee in the assignment.

*Comment:* This section appears to be an attempt to create a creditor election (similar to section 1104(b) of the Bankruptcy Code). If retained, this section needs to be explored further to deal with such issues as the reasons for removal (good cause, breach of fiduciary duty, etc.), the payment of fees earned to date of removal, and exoneration of liability after removal.

§ 412. Effect on suits and proceedings of death, resignation, or removal of assignee.

No suit or proceeding pending at the time of the death, resignation, or removal of any such assignee, and to which he is a party, shall be abated by his death, resignation, or removal, but the same may be proceeded with or defended by his joint assignees or assignee or successor, in the same manner as though the same had been begun or was being defended by such successor.

*Comment:* This section assumes the assignee is an individual. As noted in the comment to section 101, "assignee" is not a defined term herein.

§ 413. Powers and rights of assignee.

The assignee shall succeed to all rights of the assignor but may attack and set aside any fraudulent conveyances or recover property conveyed by the assignor for the purpose of hindering, delaying, or defrauding creditors.

*Comment:* This section appears to be duplicative of section 404.

§ 414. Assignment for the benefit of creditors' rights of assignee to occupy business premises; payment of rent; time.

In any general assignment for the benefit of creditors, as defined in section 101, 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. This section shall be construed as establishing the reasonable rental value of the premises recoverable by a landlord upon a holding-over by the tenant upon the termination of a lease under the circumstances specified herein.

§ 415. Assignee takes subject to rights of third parties—Non-liability for acts done in good faith under void assignment.

An assignee for the benefit of creditors is not to be regarded as a purchaser for value, and has no greater right than his assignor had, in respect to things in action transferred by the assignment. He is not to be held liable for his acts done in good faith in the execution of the trust, merely for the reason that the assignment is afterward adjudged void.

§ 416. Assignee's cause of action.

An assignee may assert on behalf of creditors any rights that an individual creditor could assert under state or federal law.

§ 417. Recovery of preferences.

(a) In this section—

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed to a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the assignor or the assignee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means a right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Recovery by assignee of property transfer. Except as provided in subdivision (c), the assignee of any general assignment for the benefit of creditors may recover any transfer of property of the assignor:

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the assignor before such transfer was made;

(3) made while the assignor was insolvent;

(4) made on or within 90 days before the date of the making of the assignment or made between 90 days and one year before the date of making the assignment if the creditor, at the time of the transfer, was an insider and had reasonable cause to believe the debtor was insolvent at the time of the transfer; and

(5) that enables such creditor to receive more than another creditor of the same class.

(c) Prohibition against recovery of transfer of assignee. The assignee may not recover under the section a transfer:

(1) to the extent that such transfer was:

(A) intended by the assignor and the creditor to or for whose benefit such transfer was made to be contemporaneous exchange for new value given to the assignor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was:

(A) in payment of a debt incurred in the ordinary course of business or financial affairs of the assignor and the transferee;

(B) made in the ordinary course of business financial affairs of the assignor and the transferee; and

(C) made according to ordinary business terms;

(3) of a security interest in property acquired by the assignor;

(A) to the extent such security interest secures new value that was:

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the assignor to acquire such property; and

(iv) in fact used by the assignor to acquire such property; and

(B) that is perfected within 10 days after such security interest attaches;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the assignor:

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the assignor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) of a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the making of the assignment and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of:

- (A) ninety days before the date of the making of the assignment; and
- (B) the date on which new value was first given under the security agreement creating such security interest; or
- (6) that is the fixing of a statutory lien.

(d) Avoiding transfer to secure reimbursement of surety; liability. An assignee of any general assignment for the benefit of creditors under this [chapter] may avoid a transfer of property of the assignor transferred to secure reimbursement of a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the assignee under subdivision (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the assignee or the amount paid to the assignee.

(e) (1) Perfection of transfer. For the purposes of this section:

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3), a transfer is made:

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the making of the assignment if such transfer is not perfected at the later of:

(i) the making of the assignment; or

(ii) ten days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the assignor has acquired rights in the property transferred.

(f) Insolvency of assignor; presumption. For the purposes of this section, the assignor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the making of the assignment.

(g) Action by assignee; commencement. An action by an assignee under this section must be commenced within one year after the making of the assignment.

§ 418-1. Priority of payments by assignee.

The following claims shall be given priority over claims of unsecured creditors:

(a) all debts which are a lien upon any of the trust property in his hands, to the extent of the net proceeds of the property upon which such debt is a lien;

(b) the necessary costs of the administration of the assignment;

- (c) priority claims as defined in section [418-3];
- (d) state and local taxing authority claims; and
- (e) unsecured claims of individuals, to the extent of [\$2,100 as adjusted] for each individual from the deposit, before the making of an assignment under this [chapter], of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of the individuals, that were not delivered or provided.

§ 418-2. Priorities in insolvency.

(a) Priorities. The property of an insolvent who makes an assignment for the benefit of creditors or who has his property taken by a receiver under a decree of a court in an insolvency proceeding shall be applied to the following, in the order stated:

- (1) costs and expenses of the administration of the trust or insolvency proceeding which the court approves;

- (2) wages of an employee and health, welfare, and pension contributions contracted for in place of wages, earned not more than three months before the assignment or institution of the insolvency proceeding;

- (3) lien claims of the State, a county, municipal corporation, or other political subdivision of the State perfected or recorded before the assignment or institution of the insolvency proceeding, and claims of persons having judicial liens on property of the insolvent recorded more than four months before the assignment or institution of the insolvency proceeding;

- (4) unsecured claims of individuals, to the extent \$900 (\$1,800 Bankruptcy amount) for each individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of the individuals, that were not delivered or provided;

- (5) taxes not included in paragraph (3) of this subsection; and

- (6) claims of unsecured creditors.

§ 418-3. Assignment for benefit of creditors; preferred labor claims; payments; pro rata distribution; presentation of claims; disputed claims; receivership actions.

When any assignment, whether formal or informal, is made for the benefit of creditors of the assignor, or results from any proceeding in insolvency or receivership commenced against him, or when any property is turned over to the creditors of a person, firm, association or corporation, or to a receiver or trustee for the benefit of creditors, the following claims have priority in the following order:

- (a) allowed unsecured claims for wages, salaries, or commissions, including vacation, severance and sick leave pay—

- (1) earned by an individual within 90 days before the date of the making of such assignment or the taking over of such property or the commencement of such court proceeding or the date of the cessation of the debtor's business, whichever occurs first; but only

(2) to the extent of [four thousand dollars (\$4,000)] for each such individual;

(b) allowed unsecured claims for contributions to employee benefit plans—

(1) arising from services rendered within 180 days before the date of the making of such assignment or the taking over of such property or the commencement of such court proceeding or the date of the cessation of the debtor's business, whichever occurs first; but only

(2) for each such plan, to the extent of:

(A) the number of employees covered by such plan multiplied by [four thousand dollars (\$4,000)]; less

(B) the aggregate amount paid to such employees under subdivision (a) of this section, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan;

and must be paid by the trustee, assignee or receiver before the claim of any other creditor of the assignor, insolvent, or debtor whose property is to be turned over, and must be paid as soon as the money with which to pay the same becomes available. If there is an insufficient money with which to pay all such labor claims in full the money available must be distributed among the claimants in proportion to the amount of their respective claims. The trustee, receiver or assignee for the benefit of creditors shall have the right to require sworn claims to be presented and shall have the right to refuse to pay any such preferred claim, either in whole or in part, if he has reasonable cause to believe that such claim is not valid but must pay any part thereof that is not disputed, without prejudice to the claimant's rights, as to the balance of his claim, and withhold sufficient money to cover the disputed portion until the claimant in question has a reasonable opportunity to establish the validity of his claim by court action, either in his own name or through an assignee.

This section is binding upon all the courts of this state and in all receivership actions the court must order the receiver to pay promptly out of the first receipts and earnings of the receivership, after paying the current operating expenses, such preferred labor claims.

*Comment: This section moves beyond the scope of assignments by its reference to trustees and receivers. What constitutes "wages" should be reconciled with the definition provided in section 101.*

## V. CLAIMS

### § 501-1. Claims to be filed.

The claims of all creditors, clearly and distinctly stated and sworn to by the claimant, or by some person acquainted with the facts, shall be filed with the assignee within three months of the date of the first publication provided for in this Act.

*Comment:* This section may be duplicative of, and inconsistent with, section 401. Neither section, however, sets forth form or documentary requirements for the claim itself.

§ 501-2. Creditor's consent to assignment.

(a) A creditor must file its claim with the assignee in writing by the date set forth in the assignee's notice made pursuant to section 401 of this [chapter].

(b) If a creditor is not given actual notice of an assignment, but subsequently learns of the assignment, such creditor may file its claim at any time before the final distribution of the assigned estate is begun.

§ 502. Objections to claims.

The assignee may contest for \_\_\_\_\_ days after the deadline to file claims, claim or demand of any creditor filed with the assignee, who shall forthwith cause notice thereof to be given to the creditor.

§ 503. Assignee's allowance of claim.

(a) The assignee shall allow a claim filed under this [chapter] against the assigned estate unless he has good reason to believe the claim is not just and true.

(b) If a creditor does not file a claim in the time required by this [chapter], he is not entitled to receive any of the assigned estate.

*Comment:* The "good reason to believe the claim is not just and true" standard should be given further consideration. It may be more appropriate to examine the validity of the claim in light of its timeliness and whether the creditor provided documentation to support the amount and, if applicable, the priority of the claim.

§ 504. Suit on disputed claim.

(a) Within \_\_\_\_\_ days after the notification of dispute provided for by section 502 of this [chapter], the assignee shall allow or deny the contested claim. Within \_\_\_\_\_ days after the assignee's allowance or denial of any contested claim, the objecting party or the claimant may seek a declaratory judgment to determine the validity of the claim.

(b) 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.

§ 505. Discount of claim not due and allowance of secured claim.

(a) The assignee may allow a claim which is not due at its present value by discounting it at the legal rate.

(b) 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.

§ 506. Claims due or to become due are presentable.

Any creditor may present not only any debt due, but any debt to become due, making in such case a reasonable rebate when interest is not accruing on the same.



§ 507. Claims filed after time share only in subsequent dividends.

If any creditor shall fail to present his 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 his 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.

§ 508. Invalid claims.

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.

## VI. MISCELLANEOUS PROVISIONS

§ 601. Persons who take priority over unperfected security interests; "Lien creditor."

The provisions of Uniform Commercial Code Section 9-309 apply to determine the priority of unperfected security interests.

§ 602. Termination of lien of temporary protective order or of attachment upon assignment.

(a) The making of a general assignment for the benefit of creditors terminates a lien of a temporary protective order or of attachment if the lien was created within 90 days prior to the making of a general assignment.

(b) Subsection (a) does not apply unless all liens of attachment on the defendant's property in other states that were created within 90 days prior to the making of an assignment under this [chapter] have terminated.

§ 603. Release of attachment after lien terminates; procedure.

(a) Where a lien of attachment terminates pursuant to applicable state law, the assignee under a general assignment for the benefit of creditors may secure the release of the attached property by filing with the levying officer a request for release or attachment stating the grounds for release and describing the property to be released, executed under oath, together with a copy thereof.

(b) In the case of an assignee, the request shall include two copies of the general assignment for the benefit of creditors.

(c) If immediate release of the attachment is sought, the request shall be accompanied by an undertaking to pay the plaintiff any damages resulting from an improper release of the attachment, the amount to be secured by the attachment, executed by an admitted surety insurer.

(d) Within five days after the filing of the request for release of attachment, the levying officer shall mail to the plaintiff:

(1) a copy of the request for release of the attachment, including the copy of the document filed pursuant to subsection (b).

(2) if an undertaking has not been given, a notice that the attachment will be released pursuant to the request for release of attachment unless otherwise ordered by a court within 10 days after the date of mailing the notice.

(3) if an undertaking has been given, a notice that the attachment has been released.

(e) Unless otherwise ordered by a court, if an undertaking has not been given, the levying officer shall release the attachment pursuant to the request for release of attachment after the expiration of 10 days from the date of mailing the papers referred to in subsection (d) to the plaintiff. If an undertaking has been given, the levying officer shall immediately release the attachment pursuant to the request for release of attachment.

(f) Where the attached property has been taken into custody, it shall be released to the person making the request for release of attachment or some other person designated in the request. Where the attached property has not been taken into custody, it shall be released as provided in subsection (c) or applicable state law.

(g) The levying officer is not liable for releasing an attachment in accordance with this section nor is any other person liable for acting in conformity with the release.

§ 604. Reinstatement of lien of temporary protective order or attachment; particular cases.

(a) The lien of a temporary protective order or of attachment, which has terminated pursuant to applicable state law, is reinstated with the same effect as if it had not been terminated in the following cases:

(1) where the termination is the result of the making of a general assignment for the benefit of creditors and the general assignment for the benefit of creditors is set aside in a way other than by the filing of a petition commencing a case under Title 11 of the United States Code.

(2) where the termination is the result of the filing of a petition commencing a case under Title 11 of the United States Code and the petition is dismissed.

(3) where the termination is the result of the filing of a petition commencing a case under Title 11 of the United States Code and the trustee abandons property which had been subject to the lien of the temporary protective order or attachment.

(b) The period from the making of a general assignment for the benefit of creditors until reinstatement of the lien of the temporary protective order or of attachment is not counted in determining the duration of the temporary protective order or the lien of attachment.

§ 605. Subrogation; preservation of lien.

(a) Upon the making of a general assignment for the benefit of creditors that terminates a lien under this chapter, the assigned is subrogated to the rights of the plaintiff under the temporary protective order or attachment.

(b) Upon the filing of a petition commencing a case under Title 11 of the United States Code, a lien terminated pursuant to this chapter is preserved for the benefit of the estate.