



## RECENT FLORIDA APPEALS COURT DECISION CONSTRUES ASSIGNMENT FOR THE BENEFIT OF CREDITORS STATUTE

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In [\*Moffatt & Nichol, Inc. v. BEA International Corp.\*, --- So.3d ---- \(Fla. 3d DCA 2010\)](#), decided last week, Florida's Third District Court of Appeal held that Florida's Assignment for the Benefit of Creditors statute, [Chapter 727, Florida Statutes](#), precludes a creditor from bringing an action against a third party under the [Uniform Fraudulent Transfer Act](#) when an assignment has been filed. The case highlights recent amendments to the assignment statute aligning it with Federal Bankruptcy law. There have been few reported cases discussing the assignment statute, so this case presents a rare opportunity for practitioners to educate themselves on this apparently underutilized tool.

Chapter 727 allows a debtor to assign its assets to an assignee of its choosing for the purposes of liquidating the assets and satisfying the claims of its creditors from the proceeds, similar to Federal Bankruptcy law. A written assignment is executed between the assignor and the assignee in the statutory form, listing all known creditors and describing their claims, and a proceeding is commenced (in State court), where creditor claims, with certain exceptions, must be filed or be forever barred. The proceeding acts as a stay against levy, execution, attachment or the like in respect of any judgment against assets of the estate in the possession, custody, or control of the assignee, similar to the Bankruptcy Code's automatic stay provision, with the exception that unlike the Bankruptcy Code, the assignment statute does not stay foreclosure proceedings based upon a consensual lien. The court before which the assignment is pending is given numerous powers under [Fla. Stat. § 727.109](#), including the power to adjudicate claim priority in accordance with the statute and to hear actions brought by the assignee to require third parties to turn over assets belonging to the estate and to avoid fraudulent conveyances.

Which brings us to the instant case. A judgment creditor of the assignor sought, in a case separate from the assignment action, proceedings supplementary to execution to implead third parties alleged to have received fraudulent transfers from the assignor. Under [Chapter 726, Florida Statutes](#), Florida's Uniform Fraudulent Transfer Act, a debtor may not transfer assets to third parties with the actual intent to hinder, delay, or defraud current or known future creditors or without receiving reasonably equivalent value when the debtor knows it is insolvent or will soon become insolvent.

The creditor in this case argued that it should be allowed to proceed against third parties alleged to have received fraudulent transfers despite the existence of the assignment proceeding, because the assets sought in the third party action were not assets of the estate. The court disagreed. According to amendments to the assignment statute passed in 2007, "asset" as defined under [Fla. Stat. § 727.103\(1\)](#), includes "claims and causes of action, whether arising by contract or in tort, wherever located, and by whomever held at the date of the assignment." The court held based upon this definition that once an assignment proceeding is instituted in which all assets are assigned, only the assignee has standing to pursue fraudulent transfer claims on behalf of the estate. To hold otherwise, reasoned the court, would allow one creditor to improperly 'cut in line', in contravention of the spirit of the assignment statute. Analogy was drawn to Bankruptcy law,

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under which the trustee has exclusive authority to prosecute avoidance actions on behalf of the estate and its creditors.

In some instances, an assignment for the benefit of creditors provides an economical alternative to business bankruptcy, and businesses considering bankruptcy should explore this and all other options. Similarly, creditor's attorneys should familiarize themselves with their clients' rights under the assignment statute, as reorganization becomes necessary for more and more small businesses in this economy.