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When Cannabis Businesses Fail: Assignment for the Benefit of Creditors as an Alternative to Bankruptcy

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WHEN CANNABIS BUSINESSES FAIL: ASSIGNMENT FOR THE BENEFIT OF CREDITORS AS AN ALTERNATIVE TO BANKRUPTCY

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INTRODUCTION

In 2020, the cannabis industry generated $17.5 billion in sales, growing at a 46% rate from 2019 to 2020.[1] Analysts expect the cannabis industry to grow to $32 billion by 2022.[2] While the industry thrives, success does not come to every company. Like other industries, there are winners and losers in the legal cannabis space. Unlike other industries, however, distressed cannabis companies cannot turn to the protections of the bankruptcy system.[3]

For various reasons, businesses associated with the cannabis industry are not entitled to federal bankruptcy protections.[4] As American cannabis companies face "distressed local, national, and global markets,"[5] this raises numerous questions of both policy and law. Where are cannabis businesses expected to turn in insolvency? Should they be entitled to some version of federal bankruptcy protection? Why is an industry projected to be worth tens of billions of dollars in the coming years left to guess how to order its legal affairs?[6] With federal cannabis legalization supported by about sixty-eight percent of Americans in 2020,[7] Congress seems somewhat open

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[1] Will Yakowicz, *U.S. Cannabis Sales Hit Record $17.5 Billion as Americans Consume More Marijuana than Ever Before*, FORBES (Mar. 3, 2021, 3:43 PM), https://www.forbes.com/sites/willyakowicz/2021/03/03/us-cannabis-sales-hit-record-175-billion-as-americans-consume-more-marijuana-than-ever-before/?sh=77fdf0c2bcf7 [https://perma.cc/LAD6-5S7Z].

[2] *Cannabis for . . . Everything? 23 Industries Seizing the $32B Market Opportunity*, CBINSIGHTS (Apr. 16, 2019), https://www.cbinsights.com/research/report/cannabis-disruption-legal-marijuana [https://perma.cc/3ZUJ-LJGP].

[3] Michael R. Herz, *Alternative to Bankruptcy for Cannabis Companies After COVID-19*, LEGAL INTELLIGENCER (May 22, 2020, 1:02 PM), http://www.evergreeneditions.com/publication/?i=660965&article_id=3678191&view=articleBrowser&ver=html5 [https://perma.cc/CEQ3-7TWD] ("Under current law and policy, however, bankruptcy is likely not an option for companies within the steadily expanding cannabis industry."); MATTHEW KITTAY, CANNABIS OPPORTUNITIES IN DISTRESSED MARKETS (2020), Bloomberg (noting that cannabis businesses are also ineligible for federal aid, including relief money from the COVID-19 rescue packages, making such businesses more susceptible to economic downturns).

[4] Herz, *supra* note 3 ("[C]annabis products with a THC concentration exceeding 0.3% on a dry weight basis remain a Schedule I substance in the federal Controlled Substances Act . . . .").

[5] Kittay, *supra* note 3.

[6] Thomas Pellechia, *Legal Cannabis Industry Poised for Big Growth, in North America and Around the World*, FORBES (Mar 1, 2018, 8:35 AM), https://www.forbes.com/sites/thomaspellechia/2018/03/01/double-digit-billions-puts-north-america-in-the-worldwide-cannabis-market-lead/#2807965c6510 [https://perma.cc/RLZ3-2CEH].

[7] Megan Brenan, *Support for Legal Marijuana Inches Up to New High of 68%*, GALLUP (Nov 9, 2020), https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx [https://perma.cc/WU8F-WS2G].

to making meaningful changes.[8] Still, Congress seems to have few answers to these questions so far. Fortunately, a lesser-known state-level substitute for federal bankruptcy can serve as a reasonable alternative until Congress makes up its mind: an assignment for the benefit of creditors (ABC).

In the early 2000s, when the dot-com bubble crashed, businesses in states like California turned to the ABC as the optimal path for maneuvering financial distress, demonstrating its viability for certain parts of our economy.[9] This Article explores how cannabis companies can use the unique characteristics of ABCs. Part I will discuss the general history of cannabis laws in the United States, including how both law enforcement and the judiciary have responded as the law has changed. Part II will focus on some of the more relevant aspects of the Bankruptcy Code and how they have been applied to cannabis-related businesses. Part III will examine how ABCs function, while Part IV will discuss their advantages and limitations. Finally, Part V applies ABCs to cannabis businesses and offers some considerations for cannabis businesses.

While federal law may not yet be protecting the interests of cannabis businesses, state law should reasonably be able to serve as an alternative. This avenue may come with certain downsides, but a greater awareness about how ABCs will help to protect the assets and interests of both business owners and their creditors will inure to their benefit.

I. HISTORY OF CANNABIS LEGALIZATION IN THE UNITED STATES

This Section examines (A) the history of state legislative enactments related to cannabis legalization and (B) the history of federal executive responses to State legalization of cannabis.

A. Cannabis Legalization by State

Today, cannabis is illegal at the federal level under the Controlled Substances Act, which categorizes various drugs on different schedules according to their potential for abuse or use in a medical setting.[10] Under the Act, cannabis is made illegal as a Schedule I controlled substance.[11] That was not always the case. Congress first began regulating cannabis by requiring disclosure of its inclusion in

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[8] Adrian Mojica, *US Congress Expected to Vote on Decriminalizing Marijuana at Federal Level in December*, FOX 17 (Nov. 16, 2020), https://fox17.com/news/local/us-congress-expected-to-vote-on-decriminalizing-marijuana-at-federal-level-in-december-legalize-weed- [https://perma.cc/5MM7-TQSS].

[9] David Kupetz, *Assignment for the Benefit of Creditors: Effective Tool for Acquiring and Winding Up Distressed Businesses*, AM. BAR ASS'N (Nov. 15, 2015), https://www.americanbar.org/groups/business_law/publications/blt/2015/11/05_kupetz/ [https://perma.cc/KJ5Y-AR6N].

[10] 21 U.S.C. § 812(c)(c)(10).

[11] *Id.*

products under the Pure Food and Drug Act of 1906.[12] By 1937, the Pure Food and Drug Act had been repealed in full, and Congress enacted the Marihuana Tax Act, which implemented taxes on the transportation and use of the drug even though every state had already criminalized its possession and use.[13] In 1969, the Supreme Court found the statute unconstitutional in violation of the Fifth Amendment's protection from self-incrimination.[14]

The following year, Congress passed the Controlled Substances Act of 1970 (CSA),[15] making cannabis explicitly outlawed at the federal level,[16] harmonizing federal law with the many states that had outlawed cannabis for several decades prior.[17] These laws would remain undisturbed for many years; but states began to change their policies. On the vanguard, California's Compassionate Use Act of 1996, which legalized limited medical cannabis use, was an indicator of things to come: a world in which state and federal cannabis laws would be in tension with one another.[18]

Medical cannabis found favor in state legislatures across the country before recreational cannabis. California was the first to legalize the medical use of cannabis in 1996.[19] Arizona almost joined California in 1996 with its voters approving a ballot initiative allowing doctors to prescribe cannabis for medical use,[20] but the Arizona state legislature passed a bill the following year to prevent the initiative's

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[12] *See* Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768.

[13] Rosalie Liccardo Pacula, Jamie F. Chriqui, Deborah A. Reichmann & Yvonne M. Terry-McElrath, *State Medical Marijuana Laws: Understanding the Laws and Their Limitations*, 23 J. PUB. HEALTH POL'Y 413, 415 (2002).

[14] *See* Leary v. United States, 395 U.S. 6 (1969).

[15] Pub. L. No. 91-513, § 100, 84 Stat. 1242 (1970).

[16] Stephen Siff, *The Illegalization of Marijuana: A Brief History*, ORIGINS: CURRENT EVENTS IN HIST. PERSP., (May 2014), http://origins.osu.edu/article/illegalization-marijuana-brief-history [https://perma.cc/2CPZ-UAUA]. The Controlled Substances Act is contained within the Comprehensive Drug Abuse Prevention and Control Act. *Id.*

[17] *Id.*

[18] Anne Sraders, *History of Marijuana: Origins and Legalization*, THESTREET (Feb. 18, 2020, 9:48 AM), https://www.thestreet.com/markets/history-of-marijuana-14718715 [https://perma.cc/7M6C-QM82]. The true vanguard of decriminalization was Oregon, which decriminalized non-medical marijuana in 1973 (though it should be noted that decriminalization and legalization did not occur at the same time). *See* Mark A. Salzberg, John E. Wyand, & Elliot M. Smith, *State-Legalized Marijuana Businesses and Access to the Bankruptcy Code*, WESTLAW: PRACTICAL LAW, https://www.westlaw.com/w-014-7152?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 [https://perma.cc/9KJD-T87P] (last visited Nov. 8, 2021).

[19] *See* Sraders, *supra* note 18.

[20] *See* Louis Sahagun, *Arizona Begins Revolt Against Drug War*, L.A. TIMES (Dec. 10, 1996, 12:00 AM), https://www.latimes.com/archives/la-xpm-1996-12-10-mn-7548-story.html [https://perma.cc/H9J7-63Q3].

enactment.[21] It was not until 2010 that Arizona was able to pass a medical cannabis measure (and it passed by only 4,300 votes).[22] Despite Arizona's inability to reach an early legislative consensus, Washington, Oregon, Alaska, Maine, Colorado, Hawaii, and Nevada all legalized cannabis for certain medical uses by 2000.[23] By 2010, Montana, Vermont, New Mexico, Rhode Island, Michigan, New Jersey, and Arizona had all legalized medical use of cannabis to some degree, meaning fifteen states had medical cannabis laws.[24] By 2022, thirty-eight states and Washington D.C. had provided for medical cannabis.[25]

Because of the need to go through proper medical channels for prescribing and dispensing, medical cannabis use would inherently be a relatively narrow market.[26] The true turning point for cannabis legalization occurred in 2012: recreational use. That year, voters in both Colorado and Washington legalized cannabis for recreational use.[27] In the years that followed, more states relaxed their laws or moved towards legalizing recreational cannabis. In 2018, Vermont was the first state to use legislative action to make cannabis available recreationally instead of through a ballot initiative.[28] Illinois followed suit in 2019.[29] Arizona and New Jersey voters legalized the recreational use of cannabis in 2020.[30] There was sufficient momentum

[21] *Arizona Bill Delays Medical Marijuana Use*, L.A. TIMES (Apr. 16, 1997, 12:00 AM), https://www.latimes.com/archives/la-xpm-1997-04-16-mn-49181-story.html [https://perma.cc/PKN3-CGQA].

[22] CNN Wire Staff, *Arizona Voters Approve Medical Marijuana Measure*, CNN (Nov. 14, 2010, 12:57 PM), https://www.cnn.com/2010/POLITICS/11/14/arizona.medical.marijuana/index.html [https://perma.cc/67KT-UL7R].

[23] Keith Speights, *A Guide to Marijuana Legalization in the United States*, MOTLEY FOOL (July 5, 2022, 4:55 PM), https://www.fool.com/investing/timeline-for-marijuana-legalization-in-the-united.aspx [https://perma.cc/HJ22-AYVY].

[24] *Id.*

[25] Jeremy Berke, Shayanne Gal, & Yeji Jesse Lee, *Marijuana Legalization Is Sweeping the US. See Every State Where Cannabis Is Legal*, BUS. INSIDER (May 27, 2022, 12:34 PM), https://www.businessinsider.com/legal-marijuana-states-2018-1 [https://perma.cc/3SK4-3K45].

[26] Jennifer Casarella, *Medical Marijuana FAQ*, WEBMD (Dec. 18, 2021), https://www.webmd.com/a-to-z-guides/medical-marijuana-faq ("To get medical marijuana, you need a written recommendation from a licensed doctor in states where that is legal . . . You must have a condition that qualifies . . . Each state has its own list of qualifying conditions.").

[27] *See* Sraders, *supra* note 18.

[28] Michael Hartman, *Cannabis Overview*, NAT'L CONF. STATE LEGISLATURES (May 31, 2022), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx [https://perma.cc/BS8T-S2TZ].

[29] *Id.*

[30] *See* Ryan Randazzo, *Legal Recreational Marijuana in Arizona: What You Need to Know*, AZCENTRAL (Nov. 4, 2020, 5:05 PM), https://www.azcentral.com/story/money/business/consumers/2020/11/04/what-know-legal-marijuana-arizona-proposition-207/6160784002 [https://perma.cc/HLR5-WVW9]; Tracey Tully, *Recreational Marijuana Legalized by New Jersey Voters*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2020/11/03/nyregion/nj-marijuana-legalization.html [https://perma.cc/M2QA-2Z7Z].

such that by 2022, nineteen states and Washington, D.C. had legalized cannabis for recreational use.[31] In 2021, New York reached an agreement in its state legislature to allow for the sale and use of recreational cannabis.[32] Shortly after New York, Virginia also joined the group of states that allows some recreational cannabis use.[33]

B. Federal Executive Response to State Legalization

Despite the movement of state governments away from cannabis prohibition, the federal government has taken an ambiguous and ever-changing posture concerning the style and severity of its enforcement of the federal law. Its posture has, of course, created great uncertainty for commercial actors in the cannabis realm.[34] President Barack Obama never promised to support full legalization while campaigning for president in 2008. He did, however, assure the public that he was "not going to be using Justice Department resources to try to circumvent state laws on [the] issue."[35] Once elected, the Obama administration appeared to follow through on its more relaxed federal attitude toward cannabis.[36] For example, Deputy Attorney General David Ogden wrote a memorandum in October 2009 in which the Department of Justice (DOJ) indicated that federal resources should not be used for

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[31] Berke et al., *supra* note 25.

[32] Luis Ferré-Sadurní, *New York Reaches a Deal to Legalize Recreational Marijuana*, N.Y. TIMES (Apr. 1, 2021), https://nytimes.com/2021/03/25/nyregion/ny-legalize-marijuana.html [https://perma.cc/72J9-TAAZ].

[33] Gregory S. Schneider & Antonio Olivo, *Virginia General Assembly Votes to Allow Adults to Possess Marijuana on July 1*, WASH. POST (Apr. 7, 2021, 7:07 PM), https://www.washingtonpost.com/local/virginia-politics/virginia-general-assembly-headed-back-to-richmond-to-take-up-marijuana-legalization-other-unfinished-business/2021/04/07/c95c54f8-96e0-11eb-962b-78c1d8228819_story.html [https://perma.cc/4WRU-W9AP].

[34] *See, e.g.*, Sarah Trumble & Nathan Kasai, *The Past—and Future—of Federal Marijuana Enforcement*, THIRD WAY (May 12, 2017), https://www.thirdway.org/memo/the-past-and-future-of-federal-marijuana-enforcement [https://perma.cc/L6EZ-TDHK] (discussing the shifting enforcement prioritization of cannabis across the George W. Bush, Obama, and Trump administrations); Tiffany Kary, *Cannabis Banking Is Booming Despite Federal Uncertainty*, BLOOMBERG (Jan. 18, 2022, 6:00 AM), https://www.bloomberg.com/news/newsletters/2022-01-18/marijuana-banking-is-moving-forward-despite-federal-uncertainty [https://perma.cc/P3LA-ZGR9] (discussing how banking services are navigating working with cannabis companies despite marijuana remaining illegal at the federal level); *see generally* Mike Schuster & Robert Bird, *Legal Strategy During Legal Uncertainty: The Case of Cannabis Regulation*, 26 STAN. J.L. BUS. & FIN. 362 *passim* (2021) (discussing the history of cannabis regulation, its state of uncertainty, its implication to cannabis businesses, and legal strategies employed in the wake of such uncertainty).

[35] Tim Dickinson, *Obama's War on Pot*, ROLLING STONE (Feb. 16, 2012, 2:55 PM), https://www.rollingstone.com/politics/politics-news/obamas-war-on-pot-231820/ [https://perma.cc/HDD2-T9H6].

[36] *See* Memorandum for Selected United States Attorneys from David W. Ogden, Deputy Attorney General, U.S. Dep't of Just. (Oct. 19, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf [https://perma.cc/Q4VG-RJ7V].

"individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[37] Despite these assurances, the administration did not initially follow through on this message.

When California took steps towards full legalization in 2010, Attorney General Eric Holder openly criticized the move.[38] In June 2011, DOJ released guidance in line with this hostile attitude, threatening potential enforcement actions against individuals who continued to violate federal law.[39] Federal officials followed through on this when California's four United States Attorneys, acting together, brought charges related to numerous cannabis dispensaries.[40] Despite the initial hostility, in 2013, Deputy Attorney General James M. Cole issued guidance (the Cole Memo) deprioritizing the enforcement of federal cannabis laws in jurisdictions with state regulatory schemes in place.[41]

The Trump Administration was similarly perplexing with its approach. The administration initially signaled it would return to enforcing federal law in states with various legalization levels.[42] Under the direction of Attorney General Jeff Sessions, the DOJ rescinded the Cole Memo, leaving the status of federal enforcement in a state of great uncertainty.[43] But, in April 2018, Senator Cory Gardner of Colorado received assurance from the Trump Administration that the DOJ would not begin enforcing federal cannabis laws in states that had their own regulatory schemes, despite the revocation of the Cole Memo.[44] Attorney General

[37] *Id.*

[38] *See* John Hoeffel, *Holder Vows Fight over Prop. 19*, L.A. TIMES (Oct. 16, 2010, 12:00 AM), http://articles.latimes.com/2010/oct/16/local/la-me-marijuana-holder-20101016 [https://perma.cc/PY56-6S3N] (quoting Holder as writing: "Let me state clearly that the Department of Justice strongly opposes Proposition 19. If passed, this legislation will greatly complicate federal drug enforcement efforts to the detriment of our citizens.").

[39] *See* Memorandum for United States Attorneys from James Cole, Deputy Attorney General, U.S. Dep't of Just. (June 29, 2011), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf [https://perma.cc/M3QR-G69E].

[40] *Feds Warn, Indict California Medical Marijuana Dispensary Operators*, ABC7 (Oct. 7, 2011), https://abc7.com/archive/8383655/ [https://perma.cc/B9YZ-3PHV].

[41] Memorandum for All United States Attorneys from James Cole, Deputy Attorney General, U.S. Dep't of Just. (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [https://perma.cc/HW66-38UG].

[42] John Wagner & Matt Zapotosky, *Spicer: Feds Could Step Up Enforcement Against Marijuana Use in States* (Feb. 23, 2017, 7:08 PM), https://www.washingtonpost.com/news/post-politics/wp/2017/02/23/spicer-feds-could-step-up-anti-pot-enforcement-in-states-where-recreational-marijuana-is-legal/ [https://perma.cc/5US5-LCCX].

[43] Memorandum for All United States Attorneys from Jefferson B. Sessions, Attorney General, U.S. Dep't of Just. (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download [https://perma.cc/T5TR-ATXB].

[44] Mark K. Matthews & Alicia Wallace, *President Trump to Cory Gardner: Colorado's Legal Marijuana Won't Be Targeted by Jeff Sessions, Justice Department,* DENV. POST (Apr. 13, 2018, 4:59 PM), https://www.denverpost.com/2018/04/13/trump-gardner-colorado-marijuana-industry-not-targeted/ [https://perma.cc/G7YX-JMX3].

William Barr reaffirmed this stance during his confirmation hearing in January 2019.[45] Although he maintained reservations about such a decision, Barr stated that he would not pursue businesses complying with their state legalization schemes.[46]

It is currently unclear what the federal approach to cannabis will be under President Joe Biden, and Biden's personal stance is similarly murky. Although Biden continues to oppose legalization (which would be consistent with his time as a senator), he is open to reform, such as allowing state laws to operate without federal interference.[47] Additionally, Biden's Attorney General Merrick Garland consistently emphasizes that it would be inefficient to use federal resources to prosecute non-violent marijuana offenses in states where cannabis is legal.[48]

II. BANKRUPTCY CODE

A. General Requirements of U.S. Bankruptcy Code

Reviewing bankruptcy law requirements is vital to understanding how courts have dealt with cannabis businesses seeking bankruptcy protections. It is also helpful to understand some bankruptcy mechanisms to recognize the similarities and differences with ABCs. There are various federal bankruptcy protections available, so the first question a floundering business must ask is under which section of the Bankruptcy Code to file. The U.S. Bankruptcy Code consists of nine chapters, with the distinct forms of debtor-relief falling under Chapters 7, 9, 11, 12, 13, and 15.[49] Chapters 7 and 11 are the most relevant to this discussion.

The most common form of bankruptcy, Chapter 7, involves liquidating all non-exempt assets to pay creditors.[50] Although Chapter 7 is a form of bankruptcy available to certain business entities, it will not receive great attention here because cannabis companies (and businesses in general) do not typically file under Chapter 7.[51]

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[45] Brandi Kellam, *Trump's Attorney General Nominee May Shift Policy on Marijuana Enforcement*, CBS NEWS (Jan. 18, 2019, 2:25 PM), https://www.cbsnews.com/news/william-barr-on-marijuana-legalization-attorney-general-nominee/ [https://perma.cc/8VD8-HMFL].

[46] *Id.*

[47] Tom Angell, *Joe Biden Is Frustrated People Think He Still Believes Marijuana Is a Gateway Drug*, FORBES (Mar. 6, 2020, 10:55 AM), [https://www.forbes.com/sites/tomangell/2020/03/06/joe-biden-is-frustrated-people-think-he-still-believes-marijuana-is-a-gateway-drug/?sh=4f8852a09aa2 [https://perma.cc/4YFR-M8P4].

[48] Rachel LaBruyere & Slates Veazey, *Attorney General Garland Reconfirms the DOJ's Hands-Off Approach Toward Federal Marijuana Prosecution*, JD SUPRA (May 3, 2022), https://www.jdsupra.com/legalnews/attorney-general-garland-reconfirms-the-9983989 [https://perma.cc/M6QP-HG5Z].

[49] 1 HENRY J. SOMMER & RICHARD LEVIN, COLLIER ON BANKRUPTCY ¶ 1.07 (16th ed. 2020).

[50] *Brooks v. Clark*, 784 F.3d 380, 381 (7th Cir. 2015).

[51] 1 SOMMER & LEVIN, *supra* note 49, at ¶ 1.07.

Chapter 11 bankruptcy is the primary legal method for corporations to reorganize, and its attractive features make clear why that is so. First, it allows a business to continue operating while undergoing bankruptcy proceedings.[52] Further, Chapter 11 is particularly attractive because it presumes that while the relief plan is being finalized, the debtor will remain in possession of its property (hence, the term "debtor in possession"). This continued possession gives the debtor significant powers to negotiate its reorganization plan.[53] Once a debtor has filed for Chapter 11 relief, it has a period of 120 days when it holds an exclusive right to propose a reorganization plan, plus a period extending sixty more days to receive votes of acceptance from creditors.[54] Limitations exist on this exclusivity, and a trustee (who would then be granted broad powers over the case) may be appointed for cause and other reasons.[55] Among its numerous powers, the trustee can propose a reorganization plan instead of the debtor.[56]

Another attractive aspect of bankruptcy filing is that, upon filing, a stay of action is automatically put in place, giving debtors breathing room from their creditors.[57] The automatic stay severely limits the rights parties can normally create or enforce against debtors.[58] In practice, the automatic stay gives debtors a temporary reprieve so that insolvency or reorganization can be conducted without parties pulling the debtor into other courts.

The strength of the automatic stay should not be understated, as illustrated by *In re Braught*. The case started when the debtors filed for Chapter 13 bankruptcy.[59] A creditor, Sullivan County had been pursuing the debtors in a tax foreclosure state action before their bankruptcy filing.[60] Six days after the debtors filed their bankruptcy petition, the court entered a judgment against them in the state court action.[61] The debtors' bankruptcy petition was dismissed several months after these events, and the state court's judgment was then filed with the county clerk, transferring the debtor's property to Sullivan County.[62] The debtors then brought suit against the county for violating the automatic stay.[63] Sullivan County argued

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[52] Emma Caterine, *A Fresh Start for a Women's Economy: Beyond Punitive Consumer Bankruptcy*, 33 BERKELEY J. GENDER L. & JUST. 1, 6 (2018).

[53] *See* 7 SOMMER & LEVIN, *supra* note 49, at ¶ 1100.01 (noting several attractive features for debtors in a Chapter 11 proceeding).

[54] *See id.*

[55] Mark G. Douglas*, Assessing the Impact of the New Chapter 11 Exclusivity Deadline,* MARTINDALE (Feb. 2, 2007), https://www.martindale.com/legal-news/article_jones-day_272162.htm [https://perma.cc/35P5-NKUC].

[56] 11 U.S.C. § 1121(c).

[57] 11 U.S.C. § 362(a) (stating that a Section 362 automatic stay stops all collection efforts, all harassment, and all foreclosure actions against the debtor).

[58] *Id.*

[59] *In re* Braught, 307 B.R. 399, 402 (Bankr. S.D.N.Y. 2004).

[60] *See id.*

[61] *See id.*

[62] *See id.*

[63] *See id.*

that it took no action to enforce its judgment during the automatic stay.[64] The court, however, found this argument unpersuasive because the county had an affirmative duty to take action to vacate the judgment.[65] This failure "amounted to a willful violation of the automatic stay," and the court held that the county was liable for damages.[66] Courts do not take the automatic stay lightly, and parties with interests implicated in a bankruptcy proceeding should not either.

Another important aspect of a Chapter 11 proceeding is that it can be converted to Chapter 7 "for cause" in certain conditions if the party requests so.[67] "For cause" refers primarily to the "absence of a reasonable likelihood of rehabilitation" of the debtor.[68] But, it can also include, among other things, "gross mismanagement of the estate," "failure to maintain appropriate insurance," or "unauthorized use of cash collateral" such that a creditor is harmed.[69] It is impossible to convert if the debtor could not be a debtor under Chapter 11.[70] This prohibition demonstrates a certain degree of flexibility in the Bankruptcy Code.

There are numerous requirements a business must meet to comply with Chapter 11. 11 U.S.C. § 1129 lays out the necessary elements a court must find to confirm a reorganization plan.[71] Section 1129(a)(1), a seemingly vague provision of the law, relates to the "classification and contents of [the] plan."[72] This section permits a court to deny a plan if it is contrary to basic requirements of the Bankruptcy Code or if certain claims have been classified improperly.[73] Under Section 1129(a)(2), the court is concerned with whether the plan proponent has provided sufficient information in its disclosure statement or failed to comply with a cash collateral order.[74] Most importantly, Section 1129(a)(3), discussed in further detail below, requires that a plan be "[1] proposed in good faith and [2] not by any means forbidden by law."[75]

1. Good Faith

Whether the "good faith" requirement is met is not clear in all circumstances, and courts are directed to "consider the totality of the circumstances," as it is a "fact-

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[64] *In re* Braught, 307 B.R. 399, 403 (Bankr. S.D.N.Y. 2004).
[65] *Id.*
[66] *Id.* at 404.
[67] 11 U.S.C. §§ 1112(a), (b)(1) (noting also that a debtor cannot convert from Chapter 11 to Chapter 7 if the debtor is (1) not in possession, (2) the case was initially involuntary, or (3) the case in question had been converted to a case under Chapter 11 at the request of someone other than the debtor).
[68] *Id.* § 1112(b)(4)(A).
[69] *Id.*
[70] *Id.* § 1112(f).
[71] 11 U.S.C. § 1129; *see also* 7 SOMMER & LEVIN, *supra* note 49, at ¶ 1129.02.
[72] 7 SOMMER & LEVIN, *supra* note 49, at ¶ 1129.02.
[73] 11 U.S.C. § 1129(a)(3).
[74] *Id.*
[75] *Id.*

intensive, case-by-case inquiry."[76] One court interpreted this provision to simply examine "whether the plan will fairly achieve a result consistent with the Bankruptcy Code."[77]

Filing for bankruptcy is not in bad faith simply because the debtor hoped to avail themselves of bankruptcy protections.[78] In *In re Autterson*, the court found several aggravating factors to determine that the debtor's plan was proposed in bad faith.[79] The debtor spent $1,658,444 of his $1,669,799 "accumulated total cash receipts" on personal expenses while making no effort to repay creditors.[80] Further, the debtor misrepresented the number of claimants in a particular class hoping to create an administrative convenience class.[81] He then tried to create the impression that the plan was confirmable under 11 U.S.C. § 1129(10) because his law firm would serve as an alleged impaired accepting class.[82] These factors convinced the court that the debtor was acting in bad faith.

A close look at the facts and circumstances of a case may not always be necessary because bad faith may be obvious on its face. *In re Hesed Enters., LLC* was initially filed under Chapter 11 for reorganization, but the debtor later motioned to convert the case to Chapter 7.[83] The court found that the initial Chapter 11 filing was in bad faith because the debtor "had no tangible assets—no real or personal property, no inventory, no bank account, no cash. It had no employees and no real prospects for restructuring or reorganization—there was nothing to reorganize or restructure."[84]

Because good faith is a discretionary decision dependent on the facts and circumstances of each case, courts may not find bad faith even when the facts give a negative initial impression. *In re Clinton Fields, Inc.* was a Chapter 11 filing in which the debtor had only a single asset in the form of a piece of undeveloped land.[85] As the original seller of the land, the party alleging bad faith had a secured interest in the property and sought relief from the automatic stay.[86] The court found that there

[76] *In re* PPI Enters. (U.S.) Inc., 324 F.3d 197, 211 (3d Cir. 2003).

[77] *In re* Matter of Madison Hotel Assocs., 749 F.2d 410, 425 (7th Cir. 1984).

[78] *In re* Autterson, 547 B.R. 372, 400–401 (Bankr. D. Colo. 2016) ("To be sure, debtors often file for bankruptcy protection after suffering adverse judgments. The Court does not suggest that such post-judgment bankruptcy filings, by themselves, establish bad faith.").

[79] *Id.* at 401–402.

[80] *Id.*

[81] *Id.*

[82] *Id.* Under 11 U.S.C. § 1129(a)(10), a court can confirm a plan with a class of impaired claims if one class of claims that is impaired under the plan has accepted the plan.

[83] *In re* Hesed Enters., LLC, No. 16-10299-rlj7, 2017 Bankr. LEXIS 3322, at *3, *7 (Bankr. N.D. Tex. Sep. 29, 2017).

[84] *Id.* at *19.

[85] *In re* Clinton Fields, Inc., 168 B.R. 265 (Bankr. M.D. Ga. 1994).

[86] *Id.* at 266.

were several factors indicating bad faith.[87] It ultimately found, however, under the entirety of the circumstances, there was evidence of good faith and "serious effort[s] to conclude the project and repay the loan."[88] The court noted "unforeseeable delays" to the debtor's plans and the debtor's serious health concerns.[89] Based on the circumstances, including the debtor's efforts while facing health challenges, the court believed the debtor "sincerely intend[ed] to reorganize."[90]

Courts have developed various tests for assessing good faith. For example, the *In re Clinton* court, operating under the law of the Eleventh Circuit Court of Appeals, used a non-exhaustive six-factor test to determine whether there was bad faith.[91] These factors, taken from *In re Phoenix Piccadilly*, are still used in bad faith determinations.[92] The Ninth Circuit has articulated its own test for good faith involving certain "circumstantial factors."[93] It considers whether:

> (1) the debtor has only one asset; (2) the debtor has an ongoing business to reorganize; (3) there are any unsecured creditors; (4) the debtor has any cash flow or sources of income to sustain a plan of reorganization or to make adequate protection payments; and (5) the case is essentially a two party dispute capable of prompt adjudication in state court.[94]

A court need not give particular weight to any factor under the Ninth Circuit's test, and it can find bad faith based on one factor or because of factors not addressed by the test.[95] For example, in *In re Greenberg*, the Ninth Circuit's Bankruptcy Appellate Panel upheld the bankruptcy court's finding of bad faith.[96] The bankruptcy

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[87] *Id.* at 269–71 (including the low number of employees employed by the business and the timing of the bankruptcy filing to coincide with the day of a nonjudicial foreclosure sale). For a list of all factors considered by this court in its bad faith determination, *see infra* note 91.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 268–69 ("(i) The Debtor has only one asset, the Property, in which it does not hold legal title; (ii) The Debtor has few unsecured creditors whose claims are small in relation to the claims of the Secured Creditors; (iii) The Debtor has few employees; (iv) The property is the subject of a foreclosure action as a result of arrearages on the debt; (v) The Debtor's financial problems involve essentially a dispute between the Debtor and the Secured Creditors which can be resolved in the pending State Court Action; and (vi) The timing of the Debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the Debtor's secured creditors to enforce their rights.").

[92] *In re* Gen. Capacitor, LLC, No. 19-40279-KKS, 2020 Bankr. LEXIS 1878, at *4 (Bankr. N.D. Fla. Jan. 9, 2020); *see also In re* Phx. Piccadilly, Ltd., 849 F.2d 1393, 1394–95 (11th Cir. 1988).

[93] *In re* St. Paul Self Storage Ltd. P'ship, 185 B.R. 580, 582–83 (B.A.P. 9th Cir. 1995).

[94] *Id.*

[95] Greenberg v. United States Tr. (*In re* Greenberg), No. SC-16-1350-BJuF, 2017 Bankr. LEXIS 2483, at *13 (B.A.P. 9th Cir. Aug. 31, 2017).

[96] *Id.* at *17.

court did not cite a specific list of factors it believed were important to its conclusion.[97] Instead, the bankruptcy court cited a series of facts that indicated there was no good faith motivation to reorganize by filing for bankruptcy.[98] Chiefly, this included the debtor's $1.00 plan payment offer on a secured debt of about $235,829, as well as the debtor's admitted intent in proposing such a low payment offer as a means to get evidence from the creditor regarding the validity of the loan ("an improper litigation objective").[99] Looking at these facts, the appellate panel found no abuse of discretion and affirmed the petition's dismissal for bad faith.[100]

A court is always examining the entirety of the facts and circumstances when assessing good faith. This does not mean a court must review all possible factors and balance them in some form, but instead that it can consider relevant facts to make an ultimate decision as to bad faith.[101] *In re Mahmood* was a decades-long dispute between a debtor, Iqbal Mahmood, and creditor, Adnan Khatib.[102] Through a series of legal claims, Khatib obtained a large money judgment against the debtor. After several years of legal stalling by the debtor, Khatib moved to have the debtor's property sold by writ of execution.[103] Faced with the likely sale of his property by the state court, the debtor filed for bankruptcy.[104] The debtor argued it was not in bad faith because he was complying with all procedural requirements, and he believed there were problems with the lien that needed to be resolved by the bankruptcy court.[105] After reviewing the various factors, the bankruptcy court and the reviewing appellate panel were not convinced and found bad faith largely because it was merely an attempt to frustrate the state proceedings and forestall the loss of his property.[106]

2. Not "Forbidden by Law"

Whether a plan is proposed by means "forbidden by law" is less intuitive than it initially sounds, and courts discuss its interaction with cannabis law less explicitly. The "forbidden by law" provision of Section 1129(a)(3) is focused on how the plan is proposed.[107] Under Section 1129(a)(3), the court will review whether there is unlawful "conduct in connection with obtaining confirmation of [a] proposal."[108]

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[97] *Id.* at *13.
[98] *Id.*
[99] *Id.* at *10.
[100] *Id.* at *17.
[101] Mahmood v. Khatib (*In re* Mahmood), No. CC-16-1210-TaFC, 2017 Bankr. LEXIS 724, at *10 (B.A.P. 9th Cir. Mar. 17, 2017).
[102] *Id.* at *2.
[103] *Id.* at *3.
[104] *Id.* at *4.
[105] *Id.* at *12, *20–21.
[106] *Id.* at *21.
[107] Irving Tanning Co. v. Me. Superintendent of Ins., 496 B.R. 644, 659–60 (B.A.P. 1st Cir. 2013).
[108] *In re* Buttonwood Partners, Ltd., 111 B.R. 57, 60 (Bankr. S.D.N.Y. 1990).

For example, one court refused to apply Section 1129(a)(3) as a reason for denial of plan confirmation because the objecting parties only raised an issue regarding the substance of the plan and not the "manner in which the Debtors [had] proposed it or attempted to obtain its confirmation."[109]

Despite limited explicit discussion in opinions, this aspect of the provision remains relevant to a scenario in which a cannabis-connected entity files for bankruptcy. Section 1129(a)(3) consists of both the "good faith" and "not by any means forbidden by law" requirements, so it makes sense why courts tend to discuss the two aspects of the provision as one.[110] As one court explains, the section generally requires courts to assure "that there exists a reasonable likelihood that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code."[111] And in fact, the Office of the U.S. Trustee has consistently maintained that federal bankruptcy is foreclosed to cannabis businesses because the businesses violate the CSA, notwithstanding state legalization.[112]

Some courts interpret this provision further to mean that the proposed plan cannot conflict with the law of the state where the business operates.[113] This interpretation raises several interesting questions, some with more definite answers than others. For example, in a state where cannabis remains outlawed on both recreational and medicinal bases, there is an open question as to whether confirmation is forbidden because it is not allowed by state law or because of the prohibition on the federal level, or both.

These open questions are not pressing in most circumstances because cannabis's illegal status creates a barrier to bankruptcy plan confirmation, whether due to state or federal law.[114] This question, however, will become more relevant should cannabis become legal on a federal level at any point in the future. If that happened, it would create a notable divide between states that have legalized cannabis and those that have not, whether the legalization is for recreational use or medicinal use.

In such a scenario, in states that have legalized cannabis, assuming all other bankruptcy requirements had been met, a cannabis business would be able to avail itself of bankruptcy law. Federal and state law would no longer forbid the operation of a cannabis business. Therefore, a federal bankruptcy court could hear a bankruptcy petition, and a reorganization plan could be proposed in good faith and compliance with the law. In the other states, where cannabis would remain (to some

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[109] *Irving Tanning Co.*, 496 B.R. at 660.

[110] 11 U.S.C. § 1129(a)(3).

[111] *In re* Charles St. Afr. Methodist Episcopal Church of Bos., 499 B.R. 66, 105–06 (Bankr. D. Mass. 2013) (quoting *In re* Weber, 209 B.R. 793, 797 (Bankr. D. Mass. 1997)).

[112] *See* Salzburg et al., *supra* note 18.

[113] Koelbl v. Glessing (*In re* Koelbl), 751 F.2d 137, 139 (2nd Cir. 1984); *see also In re* Alaska Fur Gallery, Inc., No. A09-00196-DMD, 2011 WL 4904425, at *7 (Bankr. D. Alaska 2011).

[114] *See* DAVID S. RUSKIN, COUNSELING A CANNABIS-RELATED BUSINESS: OVERVIEW, Westlaw: Practical Law w-019-3208 (updated 2022) ("A reorganization plan that permits or requires illegal activity (such as a violation of the CSA) cannot be confirmed. . . .").

degree) illegal, there would be further divisions. It may be surprising to see a bankruptcy petition by a cannabis business in a state where cannabis was still fully illegal. But there might be rare cases where an individual lives in one state and works for a cannabis business legally operating in another.

A more common situation would likely be a state where medicinal cannabis is legal but recreational use is still prohibited. This situation would create interesting questions for the court when reviewing a medical cannabis business' bankruptcy petition. For instance: Could a creditor successfully thwart a bankruptcy petition if it presented evidence of the business' connection to recreational use? Would a court have an obligation to consider this? Suppose the medicinal cannabis business is connected to a parent company with recreational operations in other states. Would the subsidiary's operations be legally related to the parent company? These questions would require a certain amount of speculation and are outside the scope of this discussion. If the federal law were to change, however, some forethought would be wise to create a consistent body of law as quickly as possible.

B. Application of Bankruptcy Code to Cannabis Businesses

Because cannabis is illegal at the federal level, it can run afoul of sections of the Bankruptcy Code that allow for dismissal of a bankruptcy case for cause, such as Sections 707(a)[115] and 1112(b).[116] In addition, Section 1129(a)(3) poses a particular threat to cannabis businesses seeking Chapter 11 relief, as it requires that a proposed plan of reorganization be "proposed in good faith and not by any means forbidden by law."[117] Courts have taken a notably broad view of this prohibition, barring tangential businesses (like landlords and equipment companies) from accessing federal bankruptcy benefits.[118]

Federal bankruptcy courts have not been friendly to companies associated with cannabis. *In re Arenas* provides a good example of the overall issue.[119] The matter consisted of debtors whose business consisted of producing and distributing cannabis.[120] The debtors owned a building where they operated their cannabis business in one unit, and they leased the other unit to a separate cannabis dispensary business.[121] The debtors' actions were clearly legal under Colorado law but illegal

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[115] 11 U.S.C. § 707(a) (noting that "[t]he court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—(1) unreasonable delay by the debtor that is prejudicial to creditors; (2) nonpayment of any fees or charges required under chapter 123 of title 28; and (3) failure of the debtor in a voluntary case to file . . . .").

[116] 11 U.S.C. § 1112(b) governs dismissal of a case under chapter 11 for cause unless doing so would not be in the best interest of the creditors and the estate. Joe Schomberg, *Major Buzzkill*, 108 Ill. B.J. 26, 28 (2020).

[117] 11 U.S.C. § 1129(a)(3). *See also supra* Part II.A.

[118] *See* Kittay, *supra* note 3.

[119] Arenas v. U.S Tr. (*In re* Arenas), 514 B.R. 887 (Bankr. D. Colo. 2014).

[120] *Id.* at 888.

[121] *Id.* at 889.

under the Controlled Substances Act (CSA).[122] The court was aware that this could put the cannabis business owners of Colorado like Mr. Arenas in a difficult legal position.[123] But it summarized its overall outlook when it said that "[a] state citizen that chooses to defy one federal law puts himself in an awkward position when he seeks relief under another federal statute—especially when granting that relief directly involves a federal court in administering the fruits and instrumentalities of federal criminal activity."[124]

Thus, the debtor could not receive protection under Chapter 7 because a trustee could not legally take possession and control of the property.[125] If the court permitted Chapter 7 proceedings to continue, the trustee would either become involved in federal crimes or be unable to liquidate the assets while the debtor was discharged of debts.[126] Further, the court could not grant the debtors' motion for conversion to Chapter 13 because none of the facts indicated that they could propose a plan in good faith or not forbidden by law.[127] Any reorganization plan would be "funded from the fruits of federal crimes."[128] The debtors further tried to argue that the CSA violated the Tenth Amendment, but the court looked to *Raich v. Gonzales* to find otherwise.[129] Through the Necessary & Proper Clause and Commerce Clause, Congress was within its rights to pass legislation that conflicted with state law.[130]

Under current federal law, this analysis is typical of cannabis-related bankruptcy cases.[131] Unless the law is changed, courts will be reluctant to force trustees to administer estates and assets when doing so would require them to commit or participate in federal crimes.[132]

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[122] *Id.*

[123] *See id.* at 895 ("The Court regards the legal analysis necessary for the resolution of this case to be relatively straight-forward while recognizing that the result is devastating for the Debtors. The Debtors' need the relief that would otherwise be available to them under the Bankruptcy Code. It is relief that, under the circumstances, the Court cannot provide. As a federal court, the Court cannot force the Debtors' Trustee to administer assets under circumstances where the mere act of estate administration would require him to commit federal crimes under the CSA. Nor can the Court confirm a reorganization plan that is funded from the fruits of federal crimes. The Debtors' ownership and control over premises that are used in the production and distribution of a Schedule I controlled substance as well as Mr. Arenas' direct involvement in the production and sale of a Schedule I controlled substance violate the CSA.").

[124] *Id.* at 891.

[125] *Id.* at 891–92.

[126] *Id.*

[127] *Id.* at 892–93.

[128] *Id.* at 895.

[129] *Id.* at 894–95.

[130] *Id.* at 894–95; s*ee also* Gonzales v. Raich, 545 U.S. 1 (2005).

[131] *See, e.g.*, *Arenas*, 514 B.R. at 894–95; *In re* Andrick, 604 B.R. 577 (Bankr. D. Colo. 2019); *In re* Basrah Custom Design, Inc., 600 B.R. 368 (Bankr. E.D. Mich. 2019); *In re* Way to Grow, Inc., 597 B.R. 111 (Bankr. D. Colo. 2018); *In re* Rent-Rite Super Kegs W. Ltd., 484 B.R. 799 (Bankr. D. Colo. 2012).

[132] *Arenas*, 514 B.R. at 895.

A recent case out of the 9th Circuit is one of the few cases in which a federal court was permissive towards a business's association with cannabis. Despite this less restrictive stance, its influence on the law moving forward is uncertain at present. In *Garvin v. Cook Investments*, five real estate companies managed by a single individual filed for Chapter 11 bankruptcy, and the bankruptcy court approved a reorganization plan.[133] The U.S. Trustee appealed the plan's approval because one of the companies leased property to a business that used the property to grow cannabis.[134] The Trustee argued that, even if cannabis was legal at the Washington state level, cannabis was still illegal at the federal level.[135] Thus, the plan was "proposed . . . by means . . . forbidden by law" and incompatible with 11 U.S.C. § 1129(a)(3).[136] The Ninth Circuit rejected this argument because it believed Section 1129(a)(3) directed bankruptcy courts "to police the means of a reorganization plan's *proposal*, not its substantive provisions."[137] The court framed the issue as "whether § 1129(a)(3) forbids confirmation of a plan that is proposed in an unlawful manner as opposed to a plan with substantive provisions that depend on illegality."[138] The court believed precedent pointed to the former over the latter and that the Trustee's interpretation of the statute would read "has been proposed" out of the statute.[139] Because the court believed the proposal was not unlawful, the court affirmed the bankruptcy court's plan of approval.[140]

This case is likely an anomaly. The Trustee failed to renew their motion to dismiss for "gross mismanagement of the estate" under Section 1112(b), thus waiving it on appeal.[141] And so, the court explicitly left the door open for a different result under that different standard.[142] The longstanding pattern is for federal courts not to permit companies based on cannabis commerce to seek relief under the U.S. Bankruptcy Code under 1112(b).

For example, *In re Way to Grow, Inc.* involved debtors who sold equipment for indoor hydroponic and gardening-related activities.[143] The debtors claimed they did "not own or do business with cannabis," but their expansion plans were dependent on potential sales to other customers who were involved in the cannabis industry.[144] When the debtors filed for bankruptcy, a secured creditor moved to dismiss "for cause" under 11 U.S.C. § 1112(b) because the creditor knew of the debtors'

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[133] Garvin v. Cook Investments, 922 F.3d 1031 (9th Cir. 2019).

[134] *Id*. at 1033.

[135] *Id.*

[136] *Id*.

[137] *Id.* (emphasis added).

[138] *Id*. at 1035.

[139] *Id*. at 1035 (citing Irving Tanning Co. v. Me. Superintendent of Ins., 496 B.R. 644, 660 (B.A.P. 1st Cir. 2013); *In re* Gen. Dev. Corp., 135 B.R. 1002, 1007 (Bankr. S.D. Fla. 1991)).

[140] *Id.* at 1036.

[141] *Id*.

[142] *Id*.

[143] *In re* Way to Grow, Inc. 610 B.R. 338, 342 (D. Colo.2019).

[144] *Id.*

connection to the cannabis industry.[145] The court agreed that there was cause for dismissal under 11 U.S.C. § 1112(b)(1).[146] Citing Section 1129(a)(3)'s "proposed in good faith" requirement, the court explained that "a Chapter 11 debtor cannot propose a good-faith reorganization plan that relies on knowingly profiting from the marijuana industry."[147] The court further said, "the Code is not blind to criminal behavior," and Congress never intended for approval of reorganization plans that rely on violations of federal criminal law.[148]

The *In re Way to Grow, Inc.* court cited *In re Rent-Rite Super Kegs W. Ltd.* (another bankruptcy case out of Colorado) and explained that the *Garvin* court misunderstood *In re Rent-Rite* to be an interpretation of the "forbidden by law" clause instead of the "good faith" clause.[149] *In re Rent-Rite* involved a debtor who received a quarter of their income by leasing space to tenants who grew cannabis.[150] In an opinion written by Chief Judge Tallman, the court explained that there was cause for dismissal (or conversion to a case under chapter 7 bankruptcy) under Section 1112(b) because the debtor knowingly violated federal law by renting space to cannabis growers.[151] Their conduct constituted "gross mismanagement of the estate," and the debtors did not have "clean hands."[152] The court further justified this conclusion by pointing out that the collateral would always be at risk of forfeiture.[153]

Another post-*Garvin* case was *In re Basrah Custom Design, Inc.*, where the court followed the pattern for these cases and dismissed a cannabis-related bankruptcy case.[154] At the behest of its sole shareholder, debtor Weaam Nocha filed for bankruptcy after losing a state court action that required Nocha to sell a piece of property to the plaintiff for $1.2 million.[155] Regardless of whether Nocha or the state court plaintiff owned the property, it would be used to operate a cannabis dispensary. Nocha wanted to avoid the state court judgment because it required him to lose a large amount of potential cannabis-related profit on the property.[156] The court understood the cannabis-commerce motivations and stated, "Nocha did not cause the Debtor to file this bankruptcy case for the benefit of the Debtor or the Debtor's creditors, but rather solely for his benefit—a benefit that depends on activity that is illegal under the CSA."[157] The court went on to state the debtor had "unclean hands"

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[145] *Id*. at 342–43.
[146] *Id*. at 346.
[147] *Id*. at 345–46.
[148] *Id*. at 346.
[149] *Id*. at 346–47 (discussing *In re* Rent-Rite Super Kegs W. Ltd., 484 B.R. 799 (Bankr. D. Colo. 2012); Garvin v. Cook Inv., 922 F.3d 1031 (9th Cir. 2019)).
[150] *Rent-Rite*, 484 B.R. at 803.
[151] *Id*. at 809.
[152] *Id*.
[153] *Id*. at 806–807, 809.
[154] *In re* Basrah Custom Design, Inc., 600 B.R. 368 (Bankr. E.D. Mich. 2019).
[155] *Id.* at 375.
[156] *Id.* at 382.
[157] *Id.*

due to their cannabis-commerce motivations, so there was "cause" to dismiss or convert under 11 U.S.C. § 1112(b)(1).[158]

The *Basrah* court questioned the *Garvin* decision, saying:

> The decision of the Ninth Circuit Court of Appeals in *Garvin* is not binding on this Court, and, with respect, this Court does not necessarily agree with the *Garvin* court's holding about § 1129(a)(3). . . . [O]ne might reasonably question whether the *Garvin* court should have refused to decide the § 1112(b) dismissal issue. That refusal, on waiver grounds, arguably is questionable, because it allowed the affirmance, by a *federal* court, of the confirmation of a Chapter 11 plan under which a debtor would continue to violate *federal* criminal law under the CSA.[159]

In sum, nearly all cases support the proposition that businesses operating in connection with cannabis commerce cannot seek protection under the federal bankruptcy laws. As the *In re Arenas* court neatly summarized: "Can a debtor in the marijuana business obtain relief in the federal bankruptcy court? *No*."[160]

Although bankruptcy availability for cannabis businesses is currently severely limited, the future may bring change. Despite ultimately dismissing the case, the court in *In re Burton* stated, "[t]he mere presence of marijuana near a bankruptcy case does not automatically prohibit a debtor from bankruptcy relief."[161] Similarly, while dismissing the case, the *In re CWNevada* court believed that "[t]here may be cases where Chapter 11 relief is appropriate for an individual or a non-individual entity directly engaged in a marijuana-related business."[162] Despite this postulation, that has not yet happened outside of *Garvin*. Because bankruptcy proceedings remain largely unavailable for cannabis businesses, another avenue for insolvency proceedings is needed: the ABC.

III. THE ALTERNATIVE OF AN ABC: THINKING OUTSIDE THE BOX

An ABC is essentially an insolvency proceeding that takes place in state courts.[163] The ABC process first requires the company to transfer its assets to a trust and select an assignee to manage the trust.[164] Then, the assignee must liquidate the

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158 *Id.* at 383.

159 *Id.* at 381 n.38.

160 Areans v. U.S. Tr. (*In re* Arenas), 535 B.R. 845, 847 (B.A.P. 10th Cir. 2015) (emphasis added).

161 Burton v. Maney (*In re* Burton), 610 B.R. 633, 637 (B.A.P. 9th Cir. 2020).

162 *In re* CWNevada LLC, 602 B.R. 717, 747 (Bankr. D. Nev. 2019).

163 Michael R. Herz, William Bogot & Joshua Horn, *Bankruptcy Isn't a Choice for the Cannabis Sector, But Options Exist*, FOX ROTHSCHILD (Apr. 3, 2020), https://www.foxrothschild.com/publications/bankruptcy-isnt-a-choice-for-the-cannabis-sector-but-options-exist/ [https://perma.cc/5MB5-ENKU].

164 *Id.*

trust and distribute proceeds to creditors.[165] It is also important to note that ABCs can "be used to facilitate a going-concern sale of the debtor's assets to a third-party."[166] Either way, the business will be sold or liquidated by the time the ABC process concludes.[167]

Attorney Bethany Laurence illustrates what an ABC looks like with the hypothetical business Angelo's Meatpacking, Inc. (Angelo's).[168] Angelo's first has to realize it is not in a position to carry on its operations, facing low capital reserves, low sales, and creditors demanding payment.[169] It then has to start searching for a potential assignee; in Laurence's hypothetical, the assignee is a company with prior experience in liquidating a meatpacking company.[170] Once Angelo's has decided it would like to make this company its assignee, they formalize the assignment of the business' assets while Angelo's provides the assignee with a list of creditors who will have an interest in the liquidation.[171] The assignee then notifies the creditors of the assignment and requests that each creditor submit a claim form.[172] At this point, the assignee will be responsible for liquidating Angelo's assets and obtaining the highest price possible.[173] Once this has been completed, the assignee takes a fee for its own services and distributes the remaining amounts to creditors according to their claims.[174] Laurence posits that the entire process will take only six months to complete.[175]

The ABC has existed under common law for over a century in the United States.[176] Practically, it is a more sophisticated, expense-reducing form of settlement.[177] Some states continue to have ABCs operate under common law, but other states have a statutory regime to guide the process.[178] These differences in law

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[165] *Id.*

[166] William Choslovsky & Eric Walker, *An Alternative to Bankruptcy: the ABCs of ABCs*, *in* THE AMERICAS RESTRUCTURING & INSOLVENCY GUIDE 2008/2009 92 (2009).

[167] *See* David S. Kupetz, *Assignment for the Benefit of Creditors: Effective Tool for Acquiring and Winding Up Distressed Businesses*, ABA: BUS. L. TODAY, (Nov. 15, 2015), https://www.americanbar.org/groups/business_law/publications/blt/2015/11/05_kupetz/ [https://perma.cc/99ZQ-92WD].

[168] Bethany K. Laurence, *Assignment for Benefit of Creditors: Alternative to Business Bankruptcy*, NOLO, https://www.nolo.com/legal-encyclopedia/free-books/small-business-book/chapter13-3.html [https://perma.cc/QX3H-6AJ8] (last visited July 5, 2022).

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] Melanie Rovner Cohen & Joanna L. Challacombe, *Assignment for Benefit of Creditors—A Contemporary Alternative for Corporations*, 2 DEPAUL BUS. L.J. 269, 269–70 (1990).

[177] *Id.*

[178] *Id.*

should warrant attention by any business seeking to use an ABC, as the requirements are not always uniform.

For example, some jurisdictions require certain court filings to begin or conclude an ABC while others do not. In Delaware, any individual who makes a voluntary assignment of their estate must file an inventory of the estate with the office of the Register in Chancery of their county.[179] Minnesota similarly requires the assignor to file the assignment with a county district court.[180] In contrast, California does not require any filing with the court.[181] This can affect the amount of court oversight expected in the assignment process. For example, New York law gives the court extensive control over the assignment process.[182] This level of control can compare to the seemingly limited powers of Minnesota courts, where a court is only explicitly permitted to remove and replace an assignee.[183] Should any dispute arise between creditors and the assignee over how the assignee manages the estate, courts could always become more involved.

The different degrees of guidance provided by state law bear emphasis. Massachusetts imposes a "good faith and . . . reasonable judgment and discretion" requirement, along with certain obligations to provide notice and disclosures to creditors.[184] There is also a single statute explaining how to terminate the trust upon settlement or full payment.[185] This meager guidance contrasts markedly with Colorado's detailed statutory scheme. Colorado's ABC statutory regime goes into much greater detail than the Massachusetts statute. Colorado imposes a four-week time limit for the assignor to disclose material such as inventory and its value, creditor information, and the value of their claims.[186] There are other time requirements, such as (assuming creditors received proper notice) a creditor's obligation to present their claim within three months.[187] A failure to do so means a creditor loses priority to those filed in the initial three months.[188] The assignee must keep the court updated with which creditors filed claims within the three-month window, as well as all proceedings related to the trust.[189] The court has the power to adjudicate disagreements between "[a]ny person interested" and creditors and the ability to oversee assignee compensation.[190]

As discussed in greater detail later, the Colorado statute will serve as the guiding statute for a hypothetical cannabis-associated business as it pursues an ABC. For now, the Florida and California statutory regimes for ABCs will be the focus,

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[179] Del. CODE tit. 10 § 7381.
[180] MINN. STAT. § 577.12.
[181] CAL. CIV. PROC. CODE § 493.010.
[182] N.Y. DEBT. & CRED. LAW § 15.
[183] MINN. STAT. § 577.17.
[184] MASS. GEN. LAWS ch. 203, §§ 40–41.
[185] *Id.* ch. 203, § 42.
[186] COLO. REV. STAT. § 6-10-103.
[187] *Id.* § 6-10-109.
[188] *Id.*
[189] *Id.* § 6-10-110.
[190] *See id.* § 6-10-111; *see also id.* § 6-10-112.

facilitating a better understanding of how states regulate ABCs. Florida's ABC laws are an example of a comprehensive regulatory scheme guiding the ABC process. In contrast, California is a state with a well-known history with ABCs, despite (or because of) its less comprehensive regulatory scheme. The comparison should illustrate some of the finer details of ABCs and the variety seen across different jurisdictions.

A. Florida Law on ABCs

The Florida ABC laws begin with an assignment of the company's assets.[191] The assignee then has ten days to file "in the public records of the county in which the assignor had its principal place of business."[192] Further, there must be a similar filing in each county where the business assets are located.[193] The assignee then files in court; this must be done in each county the assignor has a place of business, a chief executive office (if it has multiple places of business), or a residence (if the assignor is not in business).[194]

The statute provides a template that parties must "substantially" follow.[195] While mostly consisting of substantive provisions that constitute an enforceable assignment, the form provides blanks highlighting certain provisions that the written document must include.[196] Like the names of the relevant parties, some requirements are intuitive, but others are less obvious (such as the line of business and the original recording county).[197] Further, the assignment must also include two separate schedules: (1) a schedule listing all creditors and (2) a schedule listing all business assets.[198] Any entity in control or possession of the estate's assets has to turn them over to the assignee upon notice of the ABC.[199]

The assignment must provide for an "equal distribution" that complies with Section 727.114.[200] Section 727.114 lists the priority of claims on the assets from which distributions will be made.[201] Secured claims are first in priority, followed by claims resulting from administering the estate.[202] The remainder includes certain taxes, employee wages, and then unsecured claims.[203] If any amounts remain after

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[191] FLA. STAT. § 727.104.
[192] *See id.* § 727.104(2)(a).
[193] *Id.*
[194] *See id.* § 727.104(2)(b).
[195] *See id.* § 727.104(1)(b).
[196] *Id.*
[197] *Id.*
[198] *See id.* § 727.104(1)(d).
[199] *See id.* § 727.106.
[200] *See id.* § 727.104(1)(a).
[201] *See id.* § 727.114.
[202] *See id.* § 727.114(1)(a)–(b).
[203] *See id.* § 727.114(1)(c)–(f).

the distributions are made to satisfy all creditors, the assignor is entitled to that amount.[204]

The assignee is responsible for liquidating the estate's assets, and the statute gives guidance for how to do this.[205] The assignee must examine the "validity and priority" of all claims and give notice to all creditors.[206] The assignee's obligation to provide notice to various parties extends to many of the assignee's meaningful acts, such as the initial creation of the ABC, a potential sale of assets, or filing the final assignee report.[207]

The assignee can liquidate the assets through a private or public sale and pursue the assignor's legal claims (such as any previously held tort claims).[208] To accomplish this, the assignee can employ professionals, like accountants, auctioneers, or attorneys, and pay other administrative costs at the expense of the estate.[209] The assignee must keep regular accounts and give creditors the information they reasonably request regarding the estate.[210] The court is also entitled to a report of information after the first six months and at the conclusion of the entire process.[211]

Some of Florida's assignee's powers are noteworthy. For example, the assignee may, if it is "in the best interest of the estate," run the assignor's business for forty-five days.[212] Under certain circumstances, the court may approve an extension to this period to ninety days or more.[213] The assignee can abandon assets it views as burdensome or of inconsequential value to the estate and can reject certain unexpired non-residential leases.[214]

The court is broadly empowered to "enforce all [of this chapter's] provisions" and "[e]xercise any other powers that are necessary to enforce or carry out the provisions of [the ABC] chapter."[215] This broad power includes approving certain assignee requests discussed above, such as whether it may run the business for longer than forty-five days.[216] In addition, the court can disapprove any claims made by creditors and any arguments by an assignor that certain property is exempt.[217] In sum, the court generally resolves disputes arising from the ABC process, including enforcing the turnover of assets to the estate or ruling on motions to close or reopen an estate.[218]

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[204] *See id.* § 727.114(4).
[205] *See id.* § 727.108(1).
[206] *See id.* § 727.108(3) (2020); *see also id.* § 727.108(10).
[207] *See id.* § 727.111.
[208] *See id.* § 727.108(1).
[209] *See id.* § 727.108(6)–(7).
[210] *See id.* § 727.108(8).
[211] *See id.* § 727.108(9) (2020); *see also id.* § 727.108(13).
[212] *See id.* § 727.108(4).
[213] *Id.*
[214] *Id.* § 727.108(5); *see also id.* § 727.108(11).
[215] *See id.* § 727.109(1); *see also id.* § 727.109(15).
[216] *See id*. § 727.109(3) (2020).
[217] *See id.* § 727.109(4)–(5).
[218] *See id.* § 727.109(8)(a); *see also id.* § 727.109(11); *see also id.* § 727.109(13).

Creditors who have a lien on the estate's assets do not need to file a proof of claim.[219] All other creditors, however, must do so in writing within 120 days of the ABC's filing.[220] Once the time to file claims has run, the assignee consolidates all claims into a register to which all creditors and certain third parties may request access.[221] Importantly, the assignee can object to claims.[222] This objection must be filed with the court and sent to the creditor.[223] A party in interest may file an objection by following the same steps, but they also must provide the assignee with a copy of the objection.[224] Creditors whose claims are secured by liens and who face a deficiency after the sale of the secured assets are limited to a certain period (depending on whether the assignee has filed the ABC's final report) to file the deficiency; they cannot claim a deficiency if they fail to file on time.[225] The Florida statutes also provide for some final matters, such as when the assignee can be removed from their position and how to file the ABC's final report.[226] To conclude, the Florida law provides extensive guidance for ABCs in the state, especially compared to the California law below.

B. California Law on ABCs

In contrast to the Florida scheme, the California statutory regime for ABC's is notably meager. The California statutory law for ABCs is largely encompassed in six short statutes.[227] The law begins by explicitly allowing ABCs in the state.[228] It sets out three initial requirements.[229] First, the assignment must cover all transferable assets "not exempt from enforcement of a money judgment."[230] Second, it must be "for the benefit of all the . . . creditors."[231] And third, it must not create preference between creditors beyond what they otherwise would be entitled to.[232] The creation of the ABC can terminate a lien or attachment if either is created within ninety days before the ABC began.[233] There is further guidance on how to terminate liens or attachments and reinstate them.[234] This part of the law concludes by clarifying that

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[219] *See id.* § 727.112(1)–(3).
[220] *Id.*
[221] *See id*. § 727.113(2).
[222] *See id.* § 727.113(1).
[223] *Id.*
[224] *Id.*
[225] *See id.* § 727.113(4).
[226] *See id*. §§ 727.115–116 (2020).
[227] *See* CAL. CIV. PROC. CODE §§ 493.010–060.
[228] *See id.* § 493.020.
[229] *See id.* § 493.010.
[230] *Id.*
[231] *Id.*
[232] *See id*.
[233] *See id.* § 493.030.
[234] *See id.* §§ 493.040–050.

the assignee's rights are subrogated to those whose protective orders or attachments are terminated.[235]

A separate section of the California Code includes the other three statutes which primarily encompass ABC law for the state.[236] One provision broadly explains how to provide notice.[237] Another—Section 1800—clarifies some aspects of the assignee's role, particularly which prior property transfers the assignee has authority to recover.[238] The code speaks broadly regarding what can be recovered and specifically about what cannot be recovered; the tradeoff for this statutory structure is that the specific provisions that define what cannot be recovered take priority.[239] For example, the assignee is broadly empowered to "recover any transfer of property of the assignor that is . . . [t]o or for the benefit of a creditor."[240] The assignee, however, would not be able to recover property transfers stemming from certain unrelated, unsecured transfers.[241] Further, the assignee cannot recover a transfer that was a repayment of a debt incurred in the ordinary course of business.[242] One of the final sections of the law lists certain assignor property that can be held exempt from the entire process.[243]

Credit Managers Association of California v. Countrywide Home Loans provides an example of how an assignee in a California ABC can use this statute.[244] In *Countrywide*, the assignee brought an action under Section 1800 to recover a preferential transfer.[245] The assignor, Instafi, had transferred $267,051 to a creditor in the weeks leading up to the execution of an ABC.[246] The transfer was done while Instafi was insolvent.[247] Under Section 1800, the assignee can recover property transferred to a creditor while the assignor was insolvent.[248] The trial court had dismissed the matter because the creditor had successfully argued that federal bankruptcy law preempted the state provision.[249] On appeal, the court reversed and held that the state law provision was not preempted, so the provision was enforceable against the creditor.[250] The court voided the preferential transfer.

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[235] *See id.* § 493.060.
[236] *See id.* §§ 1800–1802.
[237] *See id.* § 1802.
[238] *See id.* § 1800(b)–(e).
[239] *See id*. § 1800(b)–(c).
[240] *See id.* § 1800(b)(1).
[241] *See id.* § 1800(b)(1).
[242] *See id.* § 1800(c)(4).
[243] *See id.* § 1801.
[244] *See* Credit Managers Ass'n of Cal. v. Countrywide Home Loans, 50 Cal. Rptr. 3d 259 (Ct. App. 2006).
[245] *Id.* at 261.
[246] *Id.* at 260.
[247] *Id.*
[248] *See* CAL. CIV. PROC. CODE § 1800(b)(3) (West 2022).
[249] *Countrywide*, 50 Cal. Rptr. 3d at 261.
[250] *Id.* at 266.

C. Comparing California and Florida Law on ABCs

The common characteristics of California and Florida's statutes are noteworthy. But the unique characteristics of each are more notable because they demonstrate the variety of ABC statutes that exist throughout the country. Both states require notice to various interested parties, but Florida's statute provides much greater detail on what proper notice should look like.[251] Both statutes provide guidance for how assignees are expected to carry out the ABC, but the guidance is focused on different aspects of the process. Florida's statute is much more comprehensive and addresses nearly every step of the process.[252] Meanwhile, some of the most specific guidance given for California assignees, discussed in the paragraph above, relates to whether the assignee can recover certain transferred property.[253] Both require the assignment to be for the benefit of all the interested creditors, but only Florida has a statute listing the priority of the creditor claims.[254]

The most apparent advantage of Florida's statutory regime is that the expectations are clearer; the ABC should be conducted a certain way, and deviation may face court sanction. Sophisticated creditors can be more confident that their rights will ultimately be protected, and assignees can hopefully have more amicable relationships with creditors (assuming a competent assignee) as the ABC runs its course.

On the other hand, California's more relaxed statutory regime may show that there is no need to provide comprehensive guidance. The state's approach may indicate confidence in the underlying principles of an ABC, whether it is contract law or trust law. In other words, well-established principles of common law make regulating the process unnecessary. The California law sets out broad principles and specific provisions that all ABCs in the state need to live up to, meaning creditors seeking redress for any potential issue are not without at least some statutory basis for their grievances.

Yet, the potential for collateral disputes speaks more to the benefits of the Florida system. In Florida, the ABC must be filed in court, and the court is explicitly given broad powers to resolve any dispute that could arise in the process.[255] There is no uncertainty about the court's authority to provide input on how to conduct the ABC. Compare this to what would happen during a California ABC. If a creditor believes the assignee has acted improperly (for whatever reason), the aggrieved creditor must take steps to move the matter to court. Some may view this distinction as one based more on form than substance, but the form will clearly affect creditor behavior. Further, there may be justified skepticism overall around the idea that ABCs will likely lead to separate legal disputes. Unless an assignee ignores an entire claim to an assignor's assets, there may not be sufficient motivation to pursue the

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[251] FLA. STAT. § 727.111; CAL. CIV. PROC. CODE § 1802.
[252] FLA. STAT. § 727.108.
[253] *See* CAL. CIV. PROC. CODE § 1800.
[254] FLA. STAT. § 727.114.
[255] *See id.* § 727.109.

matter when the creditor believes the assignor's assets will ultimately be drained by the end of the ABC.

If there is litigation associated with the ABC, it may be the assignee bringing suit, incentivized to protect the assigned assets. In *Sherwood Partners v. EOP-Marina Business Center*, the assignee initially found itself in an unexpected position when it tried to protect the assigned assets.[256] The assignee, Sherwood, had brought an action to recover the security deposit for the assignor's commercial lease.[257] This action was based on an alleged violation of state tenant law, not on any specific provision of the ABC statute.[258] The trial court ultimately ruled against Sherwood and held that it was jointly and severally liable with the assignor for the underlying contractual obligations.[259] With this amount valued at around $320,000, the assignee appealed the ruling that it would be personally liable.[260] The appellate court reversed the assignee's personal liability for this amount.[261]

In doing so, the court focused on the assignee's role in the ABC process. Since the assignee's duty was to gather and protect the assignor's assets, its duty and role would be undermined if the assignee could be held personally liable due to litigating the legitimate claims of the assignor.[262] Although there had been an assignment to Sherwood, the court was not convinced that Sherwood had also personally assumed the assignor's contractual obligations like the commercial lease in question.[263]

This case emphasizes that the assignee may be more likely to pursue litigation in relation to an ABC. The public policy rationale underlying the *Sherwood* decision demonstrates that the assignee has a duty to maximize the value of the assets, which may include recovering amounts wrongfully taken from the assignor prior to the assignment. This case may also indicate that extensive guidance for certain aspects of the process is not entirely necessary. The surrounding law may provide sufficient remedies for any concerned creditor, so a state that takes a minimalist approach to ABC regulatory schemes (like California) may not be putting any parties at any disadvantage.

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[256] Sherwood Partners, Inc. v. EOP-Marina Bus. Ctr., L.L.C., 62 Cal. Rptr. 3d 896, 896 (Ct. App. 2007).

[257] *Id.*

[258] *Id.* at 897.

[259] *Id.* at 896.

[260] *Id.*

[261] *Id*.

[262] *Id.* at 889.

[263] *Id.*

IV. ADVANTAGES AND LIMITS OF ABCS

A. Advantages of ABCs

Facing the reality that operations must wind down, a company's obligations must shift towards fulfilling its duties to creditors.[264] There are several interrelated advantages to ABCs over bankruptcy proceedings: (1) ABCs are more time efficient and, thus, less costly than bankruptcy; (2) ABCs limit the risk of collateral suit from creditors; (3) ABCs are more flexible than bankruptcy proceedings; and (4) ABCs generally have less judicial oversight than do bankruptcy proceedings.

1. ABCs Are More Time-Efficient and Less Costly

An ABC is an ideal solution for a business concerned with maximizing creditor recovery[265] because ABCs generally require less time and money than bankruptcy proceedings.[266] Consider the types of costs a company will face when filing bankruptcy under Chapter 11. Due to how notoriously complicated the bankruptcy process can be, attorneys' fees will be a significant cost.[267] Depending on the organization and size of the business, there will also likely be a need for the services of financial advisors.[268] So far, these costs are only those associated with assisting the business itself. The debtor will also face costs incurred by creditor committees for the legal and financial services they employed.[269] These costs will add up over time. The current Chapter 11 filing fee, $1,738, might seem trivial compared to the ultimate cost of every other aspect of the process.[270]

Of course, a party pursuing an ABC will incur some overlapping costs in retaining legal and perhaps financial advice.[271] But an ABC's relative speed should help counter this concern. In contrast, bankruptcy proceedings can take significant

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[264] David Kupetz, *Assignment for the Benefit of Creditors: Advantageous Vehicle for Selling and Acquiring Distressed Enterprises*, 6 J. PRIV. EQUITY 16, 16 (2003).

[265] *Id.*

[266] Herz et al., *supra* note 163.

[267] Nika Aldrich & Lawrence Ream, *Chapter 11 Bankruptcy Is Expensive; the Small Business Reorganization Act Provides a Realistic Opportunity for Small Businesses to Reorganize*, SCHWABE, WILLIAMSON & WYATT (July 2, 2020), https://www.schwabe.com/newsroom-publications-chapter-11-bankruptcy-is-expensive-the-small-business-reorganization-act-provides-a-realistic-opportunity [http://perma.cc/SSK3-ZTTT].

[268] Kenneth A. Rosen, *What Does Chapter 11 Really Cost?*, BLOOMBERG L. (Apr. 20, 2016, 1:28 PM), https://news.bloomberglaw.com/bankruptcy-law/what-does-chapter-11-really-cost [http://perma.cc/R4GJ-JKNM].

[269] Aldrich & Ream, *supra* note 267.

[270] *See Filing Fees: Petitions*, U.S. BANKR. CT.: DIST. OF MINN., https://www.mnb.uscourts.gov/court-fees-for-petitions [http://perma.cc/D7V9-RYG3] (last visited July 6, 2022).

[271] *See* STEVEN J. MITNICK & MARC D. MICELI, ASSIGNMENTS FOR THE BENEFIT OF CREDITORS: OVERVIEW, Westlaw: Practical Law W-006-7771 (updated 2022) (discussing the various costs for professional service providers in ABCs, including a percentage commission paid to the assignee and hourly-rate fees paid to various professionals).

time, leading to expert fees piling up. Although the length of Chapter 11 proceedings has decreased in recent years, these proceedings last many months and sometimes years, depending on the individual facts of the company in question.[272] For example, Caesars Entertainment Corp.'s bankruptcy proceedings lasted almost two years.[273] Caesars first filed for Chapter 11 bankruptcy in January 2015 when it was $18 billion in debt and facing claims from creditors that its parent corporation had misappropriated its funds.[274] It took until October of 2016 to finally reach a plan to which most of Caesar's creditors would agree.[275] It makes sense for a large corporation with billions of dollars at issue and hundreds of employees to expend significant amounts on legal and financial advisors to work towards reorganization in bankruptcy court. Many large corporations seeking bankruptcy protection may also secure "debtor in possession" financing agreements from current or new lenders.[276] The same may not be true for smaller businesses. Even if less expensive legal and financial services were available, those amounts might prove too burdensome for a small business should a bankruptcy proceeding last even a year.

A debtor-in-possession must also take into account the intangible costs of bankruptcy.[277] A significant amount of time will go towards dealing with the bankruptcy proceedings.[278] The debtor must communicate with attorneys, the bankruptcy court, and third parties like creditors and other expert advisors.[279] Whether a business owner manages business operations or not, the proceedings will dramatically shift the owner's attention, creating a risk that business operations may suffer. A business could mitigate harm if it sufficiently insulated management from the proceeding's issues.[280] Nevertheless, management of the company may find itself limited while in bankruptcy due to greater oversight, transparency, and court approval being necessary for certain actions.[281] For example, a debtor-in-possession

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[272] Foteini Teloni, *Chapter 11 Duration, Pre-Planned Cases, and Refiling Rates: An Empirical Analysis in the Post-BAPCPA Era*, 23 AM. BANKR. INST. L. REV. 571, 572–73 (2015).

[273] Reuters Staff, *Caesars Unit Seeking $3.8 Billion Cash to Exit Bankruptcy*, REUTERS (Nov. 3, 2016, 11:25 AM), https://www.reuters.com/article/caesars-bankruptcy-idUSL1N1D4164 [http://perma.cc/ZFY5-5MS5].

[274] *Id.*

[275] *Id.*

[276] Companies like Charlotte Russe and Innovative Mattress Solutions are examples of businesses that were able to acquire "debtor in possession" financing from existing or new lenders when they filed for Chapter 11 bankruptcy in 2019. Daphne Howland, Ben Unglesbee, Cara Salpini, Kaarin Vembar & Caroline Jansen, *The Running List of 2019 Bankruptcy Victims*, RETAIL DIVE (Oct. 23, 2019), https://www.retaildive.com/news/the-running-list-of-2019-bankruptcy-victims/545774/ [http://perma.cc/3N9K-QSJX].

[277] *Cf.* Kenneth Rosen, *What Does Chapter 11 Really Cost?*, BLOOMBERG L. (Apr. 20, 2016, 128 PM), https://news.bloomberglaw.com/bankruptcy-law/what-does-chapter-11-really-cost [https://perma.cc/TJ7F-6AJA].

[278] *Id.*

[279] *See id.*

[280] *Cf. id.*

[281] *Id*.

cannot sell property, lease property, or borrow money without first receiving approval from the court.[282] These restrictions and the proceeding's demands for attention and energy make a struggling business even less equipped to serve its customers while dealing with bankruptcy issues.

2. ABCs Limit the Risk of Collateral Suit

Another concern for businesses is whether any creditor would have grounds to object to the confirmation of a reorganization plan. Understandably, any objections would lengthen the amount of time and expenses required to resolve the bankruptcy proceedings. Chapter 11 bankruptcies are unique from Chapter 7 and 13 proceedings. In Chapter 11, if an objector wants to file a complaint, they must do so by the first hearing on the confirmation plan. In contrast, an objector has a sixty-day time limit from when the creditors first meet in Chapter 7 and 13 bankruptcy proceedings.[283] Several events occur before a Chapter 11 confirmation hearing, like the debtor interview, the creditor meeting, and the disclosure hearing, increasing the time creditors would have to object to any debt discharges.[284] These objections are adverse proceedings within the bankruptcy case and can be based on numerous sections of the Bankruptcy Code.[285]

For example, some debts cannot be discharged, and creditors will work to protect their interests in this debt.[286] Under Section 523(a)(2)(A), a creditor may argue that a debt cannot be discharged because it was "obtained by . . . false pretenses, a false representation, or actual fraud."[287] *In re Borschow* shows how this can create difficulties for debtors.[288] The bankruptcy debtors, Allen and Patricia Borschow, initially agreed to a $150,000 loan from the creditor plaintiff, Turbo Aleae Investments, Inc. (Turbo), in 2007.[289] The debtors then filed for Chapter 7 bankruptcy in 2009.[290] Turbo argued that the debt was non-dischargeable under Section 523(a)(2)(A) because the loan was obtained fraudulently.[291] The loan

[282] WILLIAM NEARY, U.S. DEPARTMENT OF JUSTICE, GUIDELINES FOR CHAPTER 11 CASES: NORTHERN & EASTERN DISTRICTS OF TEXAS REGION VI 3 (2020), https://www.justice.gov/ust-regions-r06/file/chapter11guidelines.pdf/download [https://perma.cc/D5WL-WL28].

[283] 11 U.S.C. § 4004.

[284] *See Chapter 11 Bankruptcy Timeline and Process*, ALLLAW, https://www.alllaw.com/articles/nolo/bankruptcy/chapter-11-timeline-and-process.html [https://perma.cc/M9KJ-USQP] (last visited August 1, 2022).

[285] Dave Burns, *Understanding Objections to Discharge in Bankruptcy*, DAVE BURNS L. OFF., LLC (Sept. 20, 2018), https://www.daveburnslaw.com/bankruptcy/2018/09/20/objection-to-discharge/ [https://perma.cc/Z46H-ZQWN].

[286] *Id.*

[287] 11 U.S.C. § 523(a)(2)(A).

[288] Turbo Aleae Invs., Inc. v. Borschow (*In re* Borschow), 454 B.R. 374 (Bankr. W. D. Tex. 2011).

[289] *Id.* at 380.

[290] *Id.*

[291] *Id.* at 379.

arrangement originally began as a personal loan between a Turbo director, Omar Koury, and Allen Borschow in 2006.[292] The loan was subsequently rolled into the 2007 agreement between Turbo and the Borschows.[293] When the Borschows' company went out of business and bankruptcy followed, the parties strongly contested the facts surrounding the alleged misrepresentations.[294] Omar and Turbo had continued to loan the Borschows money believing that it would be used, amongst various other alleged reasons, to pay off other creditors (such that Turbo would be able to put a first-in-priority lien on the Borschows' assets).[295] Allen Borschow had failed to pay the other creditors' loans, the most important being a Small Business Administration loan from State National Bank.[296] A director for Turbo disputed Borschows' claim that the reason for their loan with Turbo was to pay other loans, and the loaned amount was insufficient to pay its creditors. Instead, Turbo argued that their loan would be used as general working capital.[297] There were further disagreements about other alleged misrepresentations surrounding the Borschows' procurement of the loan, such as whether the Borschow house would be used to secure the loan or whether Allen Borschow was obligated to secure a life insurance policy.[298]

The Fifth Circuit determined that Turbo could not recover under Section 523(a)(2)(A) for a false representation because such recovery required the misrepresentation of past or current events, not future facts.[299] The court further found that Turbo could not establish "actual fraud" regarding a requirement to pay the bank loan. Without proper contemporaneous documentation of the agreement, Turbo could not show any reliance on the alleged misrepresentations or that Turbo was damaged by a failure to pay the bank.[300] The court, however, found Turbo could establish actual fraud based on a false representation that the Borschows would also use the Turbo loan to pay a debt owed to another party, Eureka Media Group (Eureka), who did marketing work for the Borschow business.[301] Thus, all debts owed to Turbo were dischargeable *except* the value that would have been used to pay Eureka.[302]

This discharge loophole highlights one of the many risks struggling businesses face when filing for bankruptcy. Put simply, creative creditors will find ways to recoup losses when regular business dealings go wrong and businesses fail. Although the Borschows could defeat most of the objecting creditor's arguments, there were still colorable claims (and one winning claim) of false representations

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[292] *Id.* at 381–82.
[293] *Id.*
[294] *Id.* at 384.
[295] *Id.* at 386.
[296] *Id.*
[297] *Id.* at 388.
[298] *Id.* at 393.
[299] *Id.* at 396–97.
[300] *Id.* at 398–99.
[301] *Id.* at 401.
[302] *Id.* at 404.

and actual fraud.[303] And although *Borschow* concerned a Chapter 7 petition, Section 523 also applies in the Chapter 11 context.[304] Because of this extra litigation, the Borschows faced a greater time and money investment than they initially anticipated when they filed for bankruptcy. In other words, bankruptcy difficulties are only compounded when an objection is filed; the potential for adverse proceedings should make any struggling business skeptical about whether they are positioned well for the process.

Other provisions in Section 523 may be additional fertile grounds for objecting to the discharge of debts.[305] For example, *Graham v. IRS* was an adversary proceeding instituted after the Grahams filed for Chapter 11 bankruptcy.[306] Before the Grahams' bankruptcy petition, the IRS had obtained a judgment against the Grahams in the United States Tax Court for fraudulent tax returns and income tax deficiencies.[307] As a result, the IRS filed a claim for the Grahams' unpaid income taxes in the bankruptcy proceeding.[308] The Grahams then instituted the adversary proceeding to dispute the IRS' claim hoping to discharge the debt.[309] As part of its argument, the IRS claimed their debt was non-dischargeable under Section 523(a)(1)(C), which exempts from discharge any amounts related to fraudulently filed tax returns.[310] Although the matter in *Graham* was ultimately remanded to litigate the issue with a proper standard of proof, the case still serves as an example of how bankruptcy proceedings can drag on longer than anticipated.[311]

Objections need not have a high likelihood of success to create issues for a debtor pursuing relief in bankruptcy court. In the case of *Kodsy v. Motors Liquidation Co.*, Sherif Kodsy had allegedly been injured in connection with the use of a Hummer H2 he had purchased in August 2008.[312] Kodsy had pursued a state action for this alleged injury, which was quickly followed by General Motors Corporation's 2009 collapse and bankruptcy.[313] Kodsy hoped to prevent bankruptcy discharge of his claim against General Motors under Section 523(a)(6), which makes debts resulting from willful and malicious injury by the debtor non-dischargeable.[314] Without obtaining a final judgment in his state action, Kodsy filed a claim for $15 million in the bankruptcy proceedings.[315] He "indicated that his claim was 'secured by a lien on property' and checked the boxes beside 'Motor Vehicle' and 'Other'

[303] *Id.*
[304] *Id.* at 383.
[305] *See* Burns, *supra* note 285.
[306] Graham v. IRS (*In re* Graham), 973 F.2d 1089, 1091 (3d Cir. 1992).
[307] *Id.*
[308] *Id.* at 1092.
[309] *Id.*
[310] *Id.*
[311] *Id.* at 1103.
[312] Kodsy v. Motors Liquidation Co. (*In re* Motors Liquidation Co.), No. 11 Civ. 4180, 2012 U.S. Dist. LEXIS 5145 (S.D.N.Y. 2012).
[313] *Id.* at *2–3.
[314] *Id.* at *4.
[315] *Id.* at *2.

when prompted to describe the '[n]ature of [the] property' but provided no further information."[316] His claimed was filed January 4, 2010, and it wasn't until May 3, 2011, that the Bankruptcy Court reclassified his claim.[317] The court explained, "whatever you have, it's an unsecured claim."[318] On appeal, realizing the weakness of his claim, Kodsy then argued that his claim could not be discharged because of Section 523(a)(6).[319] This section, however, required the debtor to be an individual debtor.[320] Despite Kodsy's weak claim, it took more than a year to dispose of it effectively.[321] Thus, *Kodsy* highlights that a bankruptcy claim does not need to have much merit for it to seriously delay the overall process.

For a small business, the potential for a collateral suit objecting to a bankruptcy plan confirmation would create unnecessary burdens compared to an ABC's simplicity. ABCs provide a path that is not as ripe as bankruptcy proceedings for suits that frustrate the process. While all transactions in this context have some potential for legal disputes that slow down the process, the risk is reduced in an ABC. In the bankruptcy examples above, the legal disputes were lawsuits within ongoing legal proceedings. The lawsuit would either be directly targeted at the transaction or the parties in an ABC. In other words, any potential litigation surrounding an ABC would likely take less time and money than potential lawsuits that could arise in bankruptcy. While an adversary proceeding's resolution in a bankruptcy case would not end the ultimate legal matter, an ABC-related dispute's resolution could be the end of the legal dispute. In summary, a company already in financial stress will want to avoid incurring unnecessary costs, and pursuing an ABC instead of Chapter 11 protection might be one alternative.

Compare the different means the Bankruptcy Code provides to creditors to regain their losses to Colorado's ABC statute simply providing that "[w]hen an assignment of property for the benefit of all the creditors of the assignor is made, the assent of the creditors shall be presumed."[322] Juxtaposed to the numerous grounds for creditor objections under Section 523 of the Bankruptcy Code, a provision like the Colorado statute gives the assignee greater power. Consider another state's ABC statute, Kentucky, which only explicitly allows creditors to object to a failure to include their claim in the process.[323] While other provisions, whether common law or statutory, could be relevant to a creditor's rights, they would be inherently different from Section 523 objections.

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[316] *Id.* at *2–3.
[317] *Id.* at *7.
[318] *Id.*
[319] *Id.* at *10.
[320] *Id.* at *10–11.
[321] *Id.* at *11.
[322] COLO REV. STAT. § 6-10-105.
[323] KY. REV. STAT. § 379.120.

3. *ABCs Are More Flexible Than Bankruptcy*

A key advantage of an ABC is the relative flexibility in comparison to going through bankruptcy.[324] Whereas a Chapter 7 filing means an unknown person will be appointed as the trustee for liquidation, an ABC allows the assignor to pick the assignee.[325] The assignor's power to choose the assignee gives the company the freedom to pick someone it believes has the proper experience and expertise to carry out the liquidation process in a way that is most suitable for the circumstances.[326] A buyer and an assignee can even negotiate the terms of a transaction before the assignment.[327] Thus, once the assignment is made, the liquidation of the assets can coincide with the assignment.[328] Alternatively, the assignee might conduct a going concern sale of the business while running the business in question.[329]

A key practical advantage is that the ABC can effectively "cleanse" burdened assets.[330] Some businesses may be so burdened with debt that an acquisition of the business by another person or entity is extremely unlikely; it would simply not be an attractive target for interested parties.[331] Bankruptcy would be one way to cleanse the assets, separate creditor claims from the assets, and make an acquiring entity feel comfortable with making a purchase.[332] If bankruptcy is not available as an option, an ABC can serve the same function, as a purchaser can take ownership of assets freed of unsecured creditors' claims.[333] While the availability of this function would certainly require the ABC to be conducted properly and competently, it is still an important feature of the ABC. A cannabis operation seeking to wind down its operations should be able to find an interested buyer that sees potential in the assets in question.

4. *ABCs Have Decreased Judicial Oversight Compared to Bankruptcy*

Another, jurisdiction-specific, advantage of the ABC is the decreased court oversight compared to a bankruptcy proceeding. A debtor entity is far more likely to find a court questioning the bankruptcy process than the ABC process because bankruptcy proceedings have such numerous and clear guardrails. Many points in the bankruptcy process could complicate life for debtors and creditors alike, including the bankruptcy trustee. A Chapter 7 trustee has extensive powers and is

[324] Kupetz, *supra* note 9.
[325] *Id.*
[326] *Id.*
[327] *Id.*
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] *Id.*
[333] *Id.*

selected to administer the estate without input from the debtor.[334] These powers are so broad that, with court authorization, they extend so far as to allow the trustee to operate the debtor's business.[335] Further, there are clear incentives for the trustee to challenge claims from creditors. 11 U.S.C. § 704(5) provides that a trustee must "examine proofs of claims and object to the allowance of any claim that is improper."[336] The trustee's duty to maximize distributions from the estate means the trustee will be critical of debtors and creditors while administering the estate.[337] A Chapter 11 trustee (or an examiner) is more of a rarity, as Chapter 11 debtors are typically debtors-in-possession through the proceeding.[338] When a court appoints a Chapter 11 trustee for a plan that establishes a liquidating trust, the trustee has a significant amount of discretion.[339]

Some statutes create considerable power for assignees in ABCs compared to a liquidating trustee in bankruptcy proceedings.[340] For example, some assignees are legally equipped to review claims and object when necessary to protect the estate's assets.[341] Although an ABC lacks the official designation of a federal bankruptcy proceeding, the ABC can mimic it in certain ways while also avoiding some of its drawbacks. An ABC can also circumvent the negative press that usually comes with a bankruptcy filing.[342] Assuming it is not one of the few jurisdictions in which the state courts provide some amount of oversight (*i.e.*, where there will be filings in state court), the result of this circumvention is that, relative to what takes place during a bankruptcy dissolution or reorganization, a business' affairs are less open to the public eye through an ABC.[343] While the debtor in bankruptcy may accept the potential for public scrutiny as the necessary sacrifice for bankruptcy protections, the ABC allows the business to remain closed-off from the view of curious competitors and uninterested parties.[344] This privacy should be a welcome feature of

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[334] Hon. Steven Rhodes, *The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee*, 80 AM. BANKR. L.J. 147, 152 (2006).

[335] *Id.* at 162–163; 11 U.S.C. § 721 (1978).

[336] Rhodes, *supra* note 334, at 175–76.

[337] *Id.* at 164–168.

[338] *See* John Ayer, Michael L. Bernstein & Jonathan Friedland, *Bad Words to a Debtor's Ear,* 24 AM. BANKR. INST. J. 1, 1 (2005).

[339] *See* Ryan C. Beil, *Under a Confirmed Chapter 11 Plan a Liquidating Trustee May Have Sole Authority to Review and Object to Claims*, 11 ST. JOHN'S UNIV. SCH. L. BANKR. RSCH. LIBR., no. 4, 2019, at 9.

[340] *See* JEFFREY BAST & JAIME LEGGETT, ASSIGNMENTS FOR THE BENEFIT OF CREDITORS: FLORIDA, Westlaw: Practical Law w-023-1232 (updated 2022).

[341] FLA. STAT. § 727.108(10).

[342] Kupetz, *supra* note 264, at 18 ("Unlike bankruptcy, where the publicity for the company and its officers and directors will be negative, in an assignment, the press generally reads 'assets of Oldco acquired by Newco,' instead of 'Oldco files bankruptcy' or 'Oldco shuts its doors.'").

[343] Sharyn B. Zuch, *Alternatives to Franchisee Bankruptcy: Workouts, Compositions of Creditors, Assignments for the Benefit of Creditors, and Receiverships*, 33 FRANCHISE L.J. 359, 360 (2014).

[344] *Id.*

the ABC for any failing business. The disappointment of going out of business could be compounded by the stressful idea that interested strangers could inquire into the business's decline. Further, starting a new operation comes with one less obstacle, as there may be less public awareness of a prior failed venture.

B. Limitations of ABCs

For cannabis companies, the reasons discussed above illustrate why ABCs are the more optimal route for mitigating debt burden. Yet, while ABCs provide many advantages for cannabis businesses relative to a bankruptcy proceeding, many struggling non-cannabis businesses still choose bankruptcy over an ABC process. Still, businesses operating without friction with federal law may initially seem well-suited for ABCs, and the utility of ABCs was proven in the wake of high-profile crises like the dot-com bubble burst.[345] So why aren't ABCs seen as the norm instead of as an alternative?[346] Beyond perhaps a certain lack of awareness by some attorneys, there are other legitimate reasons why an attorney directs clients to bankruptcy over an ABC.

1. Federal Law Governs Bankruptcy Courts, While State Law Governs ABCs

Bankruptcy courts are governed by federal law, while ABCs are an issue of state law. This difference makes bankruptcy more appealing on a practical level for a business with assets in multiple states or if a business would like to avoid any uncertainty surrounding conflicting state laws. Under the Supremacy Clause, federal law can override and preempt state law.[347] The U.S. Constitution explicitly grants the federal government the power to create "uniform Laws on the subject of Bankruptcies."[348] As a result, with certain exceptions, federal courts are skeptical of any state law that creates conflict or encroaches on matters of bankruptcy.[349]

Recall the *Countrywide* case discussed above and how the lower court had initially ruled that federal bankruptcy law preempted the state provision.[350] While the appellate court reversed that holding, there will always be questions regarding how the laws of different jurisdictions will interact regarding ABCs. This is not an argument that the Bankruptcy Code preempts ABCs or that states inherently have conflicting laws on this issue. Instead, it recognizes the possibility that, because state

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[345] *See* Kupetz, *supra* note 9 (referencing the prevalence of ABCs in California following the dot-com bubble); Andrew B. Dawson, *Better than Bankruptcy?*, 69 RUTGERS UNIV. L. REV. 137, 138–39 (2016) (discussing the efficacy of ABCs as small businesses were recovering from the Great Recession).

[346] *Cf.* Kupetz, *supra* note 9 (framing ABCs as an alternative to bankruptcy).

[347] *See* Puerto Rico v. Franklin Cal. Tax-Free Trust, 579 U.S. 115, 115 (2016).

[348] U.S. CONST. art. 1, § 8, cl. 4.

[349] Old Carco LLC v. Kroger (*In re* Old Carco LLC), 442 B.R. 196, 207 (S.D.N.Y. 2010) (citing Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 263–64 (1929)).

[350] *See* Credit Managers Ass'n of Cal. v. Countrywide Home Loans, Inc*.,* 50 Cal. Rptr. 3d 259 (Ct. App. 2006).

laws govern ABCs, a debtor in one state may not be confident that another state will respect the terms of the ABC in the same way. By being a single federal law, the Bankruptcy Code has greater uniformity (while acknowledging that various federal jurisdictions have interpreted provisions of the Bankruptcy Code differently). Because they are governed by state law, ABCs have less inherent uniformity. Each state still operates under its own (somewhat similar) law, not one federal body of law.

While this may be a concern for non-cannabis businesses, the case is different for cannabis operations, as they are already operating in conflict with federal law. Starting a cannabis operation inherently places a great amount of reliance on the state's laws compared to the relevant federal laws, so this conflict is something cannabis businesses may find acceptable as they seek liquidation under the ABC. In other words, that kind of uncertainty is arguably insignificant at that point. Further, knowing the primacy of state law in ABCs could help direct *ex ante* business decisions to maximize the efficacy of a possible ABC should the business fail.

2. *ABCs Do Not Allow Companies to Continue to Operate*

ABCs have an obvious limitation in that they are a liquidation (although, as noted above, ABCs can take the form of going-concern sales[351]); the company typically does not continue its operations once the proceedings have been finalized.[352] This liquidation makes an ABC unappealing to the business operator who would like to find an avenue for restructuring their business. It is difficult to explain this issue away; if the business had been able to seek federal bankruptcy protection, perhaps it would be capable of reorganizing and beginning anew. Yet that is not what will happen with an ABC; the business will be liquidated or, at the very least, wholly sold to a new owner.[353]

This liquidation does not mean the former business owner is restricted in their future actions. If, for example, a cannabis business owner seeks to liquidate the operation through an ABC, the owner could pre-negotiate with a purchaser who would be open to the idea that the former owner could continue in some important role in whatever new business that follows the ABC. While this would depend on the reasons the purchaser had decided to buy the business assets and the relationship the former owner had with the purchaser (among many other factors), it illustrates that liquidation can be just one step in a broader business plan. Further, that same former owner is free to start another business, whether in the cannabis industry or not.

The liquidation issue relates to another more general disadvantage: an ABC does not come with the same types of protections as a bankruptcy proceeding.[354] The

[351] Choslovsky & Walker, *supra* note 166.

[352] Herz et al., *supra* note 163.

[353] *See supra* Part III.

[354] Carly Landon, *Making Assignments for the Benefit of Creditors as Easy as A-B-C*, 41 FORDHAM URB. L.J. 1451, 1457 (2014).

automatic stay is the most notable of these protections found in the Bankruptcy Code (but not in ABC proceedings).[355] The automatic stay works to prevent enforcement of rights or creation of rights against entities that have filed for bankruptcy.[356] No one can commence an action or proceeding, seize property from a bankruptcy estate based on prior judgment, or create liens on property.[357] On a practical level, the automatic stay gives the debtor some time and breathing room to get its affairs in order for reorganization. For example, consider the landlord who discovers their tenant business entity has filed for Chapter 11 bankruptcy. This landlord may feel eviction is necessary to protect the waste of its real estate, but the automatic stay prevents them from doing so.[358] If the same landlord were to learn of a debtor business's ABC, they might want to evict, and nothing would prevent that from happening (beyond the lease terms). Further, a cannabis business choosing to utilize the ABC process would not be able to reject leases and other executory contracts that are too burdensome—a protection afforded to those in the bankruptcy process.[359]

A business owner should also be aware of certain risks related to their debts. Those pursuing an ABC will want to avoid being liable for any debts at the conclusion of the process. If the owner of a cannabis business has personally guaranteed a business loan, they might face this reality. In this scenario, such debts would be the owner's responsibility if left unpaid.[360] Separately, there is risk to creditors if the assets securing the debt have lost value. If there is a risk of not being paid in full, secured creditors may not consent to an ABC.[361]

3. ABCs Force Businesses to Assign Assets

Choosing who will conduct the ABC can be a limitation or benefit. If a cannabis business only has relatively non-valuable items that make up its assets, assigning the assets to an experienced and successful party would be the primary goal. Whether it is through their familiarity with the market, their relationships with regular buyers, or something as simple as location, the assigning business will want to ensure the assignee is well-equipped to protect the assignor from any personal liability. For

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[355] *Id.*

[356] 11 U.S.C. § 362(a).

[357] *Id.*

[358] Zuch, *supra* note 343, at 360.

[359] *See* RUSKIN, *supra* note 114 ("Cannabis companies also cannot benefit from: . . . [t]he ability to reject burdensome executory contracts and unexpired leases.").

[360] Nicholas Gebelt, *What Are ABCs? Assignment for the Benefit of Creditors*, S. CAL. BANKR. L. BLOG (July 18, 2011), https://www.southerncaliforniabankruptcylawblog.com/2011/07/18/what-are-abcs/ [https://perma.cc/TXE2-C6YB] ("[I]f the [cannabis business] owner has signed a personal guarantee, the owner will still be liable for the unpaid portion of the debt at the conclusion of the ABC.").

[361] *See id.* ("In an ABC a secured creditor is entitled to payment in full upon the liquidation of the asset securing the debt. Therefore, if a secured creditor's debt is undersecured, it must consent to the ABC before the ABC can proceed.").

example, suppose a cannabis business has valuable property that will likely pay all creditors to their satisfaction. In that case, there may be less concern with the quality of the actual assignee chosen. While it would be foolish to choose an assignee that could potentially fail to live up to its obligations, the situation in which the business is asset-rich would simply allow the assignor to focus on other matters as it faces liquidation.

Determining who is chosen as an assignee also requires a consideration of their competency to comply with the law when conducting the ABC. The need for competency means the distressed entity may need to use even greater discretion when it chooses an assignee. If the jurisdiction where the ABC takes place has a comprehensive regime for ABC procedure, the assigning business will want to be confident its assignee is up to the task. This concern may be less potent in jurisdictions where the ABC process is governed by common law and less dependent on state-exclusive statutes. If an entity finds itself working with an attorney who is unfamiliar with the process, it may take longer for the ABC process to reach its conclusion. Because this would increase the amount of time and resources required, it would reduce the overall attractiveness of the ABC option.

4. Creditors May File for Involuntary Bankruptcy

Another risk of opting for an ABC is angering creditors who are unsure what kinds of protections they will receive through the ABC process. Creditors may opt to file for the entity's involuntary bankruptcy, believing such a step is necessary to protect their claim. If the business were not connected to cannabis, the creditor would not have to worry about this involuntary bankruptcy case being dismissed for one of the various cannabis-specific reasons discussed above. The creditor could cite Section 303(h) of the Bankruptcy Code to support the propriety of the filing.[362] But if the creditor tried to file involuntary bankruptcy for a cannabis business, the bankruptcy filing could not lead anywhere productive; a cannabis business owner would have some confidence that its ABC would not be permanently frustrated. Setting aside the fact that cannabis businesses cannot seek bankruptcy protections, courts would be reluctant to disrupt a process already in motion to provide recovery for creditors from the debtor's assets.[363] Under Bankruptcy Code § 305(a)(1), the court should abstain if the "interests of creditors and the debtor would be better served by such dismissal or suspension . . . ."[364] Courts can consider a variety of factors when deciding whether to abstain. One such factor is the existence of alternative means that sufficiently protect the relevant parties' interests.[365] In other

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[362] *See* 11 U.S.C. 303(h) (directing that if the debtor contests the petition, the creditor must show that "a custodian . . . was appointed or took possession" within 120 days prior to the involuntary bankruptcy filing); *see also* Ayer et al., *supra* note 338.

[363] Kupetz, *supra* note 264, at 20.

[364] 11 U.S.C. § 305(a)(1).

[365] *In re* Spade, 258 B.R. 221, 231 (Bankr. D. Colo. 2001).

words, courts will likely abstain if an ABC is already in place to liquidate the assets and pay creditors.[366]

Even with this in mind, an involuntary bankruptcy filing could slow the ultimate conclusion of the ABC. To prevent such a filing, it might be important to explain to all creditors why an ABC is the chosen route for administering the estate. Thus, clear communication to these creditors that cannabis businesses cannot find relief in federal bankruptcy courts could prove prudent. Time and resources would be wasted in the bankruptcy court, leading all interested parties back to the ABC process no matter what.

5. ABCs May Require Shareholder Approval to Initiate

Another relatively minor downside of an ABC is that, under certain circumstances, it can take more time and resources to initiate the process.[367] Corporations do not typically need the approval of their shareholders to file for bankruptcy, but an ABC would require shareholder approval because it would be a transfer of all the corporation's assets.[368] For example, to sell all or substantially all the assets of an organization in Florida, the business must first have shareholder approval.[369] Thus, a company board that approves a bankruptcy filing could immediately work towards complying with the bankruptcy process and restructuring. In contrast, an ABC-approving board would still need to convince its shareholders.[370]

One argument that may alleviate this minor concern is that cannabis businesses may not have many shareholders, assuming they are structured as corporations. In other words, having the necessary votes to approve the ABC would not be in question; the concern would be the amount of time required to take a shareholder vote. Further, proactive corporate organization could minimize the number of necessary shareholder votes if corporate boards and founders understand the importance of creating a fragmented corporate structure.[371] For businesses that operate outside of a corporate structure, shareholder approval may be less of a concern.

6. ABCs May Not Allow Cannabis Businesses to Sell Assets Out-of-State

One final drawback relates more to the limitations of the cannabis industry than ABCs. During the dot-com crash, when ABCs were used frequently (at least in California), potential buyers were largely interested in still being able to use the

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[366] Kupetz, *supra* note 264, at 21.

[367] Kupetz, *supra* note 9.

[368] *Id.*; *see, e.g.*, DEL. CODE. tit. 8, § 271(a).

[369] FLA. STAT. § 607.1202(1).

[370] *Cf. id.*

[371] *See generally* Kittay, *supra* note 3 (discussing how cannabis companies often use subsidiaries to horizontally and vertically fragment themselves, unlocking a host of benefits).

technology assets from the struggling businesses.[372] Unlike these technologies, cannabis is not equally legal throughout the United States. If a cannabis entity is looking to sell its assets (via an assignee), many potential buyers may be uninterested unless they can profitably deploy the cannabis assets. In other words, the scope of potential buyers is somewhat limited by who might be able to make use of a cannabis company's assets. Instead of negotiating with the entirety of the country, a cannabis company assignee may only find itself in conversation with those who operate within states with more relaxed cannabis laws. If this involves the actual transfer of cannabis to a party outside the state, that entity would have to accept that transportation of cannabis across state lines could risk serious criminal sanctions. This concern is less meaningful for more commonplace assets (*i.e.*, assets any retail or manufacturing business would own).

V. CANNABIS, ABCS, AND THE FUTURE

A. Applying an ABC Statute to a Cannabis Business

It is worth discussing what the ABC process would mean for a cannabis operation. To explore this, consider the below hypothetical company and its business trajectory.

Glass Trees, Inc. (GT) sells cannabis-related products (but not cannabis itself) in the Denver area. It starts its business after Colorado legalized medical cannabis use for a limited group of individuals. This owner saw an opportunity to serve the emerging cannabis market (partly expecting recreational use to follow in legalization at some uncertain point) while also avoiding any licensing and regulatory difficulties that may come with selling or growing cannabis. To finance the beginning of this operation, the owner receives loans from several creditors, including a bank and some business associates.

At first, things go well as both medical cannabis consumers and retailers go to GT to get needed products. The state then legalizes recreational use. Realizing the opportunity, large investors begin investing in the state's cannabis market. Unimpressed with GT's prospects, they finance GT's competitors. GT begins to see its sales decline as larger, more successful businesses begin to replace it in the local market. Several loans remain unpaid, and the owner is concerned about how long GT can stay open. The owner seeks legal counsel and is referred to a bankruptcy attorney. After explaining GT's business and situation to the attorney, the owner is surprised to learn that GT, a business that operates in connection to the cannabis market, may not be entitled to bankruptcy protections. This would be the point where an explanation of an ABC would be warranted. If GT, as an entity, elects to move forward with the ABC, the next steps could diverge depending on the jurisdiction in question.

As discussed above, some jurisdictions provide more guidance than others, meaning there may be more or less freedom for conducting the assignment process.

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[372] Landon, *supra* note 354, at 1454.

Since GT is in Colorado, Colorado's ABC statute would apply. It provides considerable guidance for parties, laying out a clear roadmap for the ABC process.

Several preliminary steps would be necessary to begin an ABC. The first practical step would be to choose an assignee for GT and its asset. The ideal assignee would likely be someone in the area who is already familiar with Colorado law for this type of matter and is capable of quickly disposing of assets fruitfully. In some instances, that may be an experienced attorney, but it might also be someone with a connection to potential buyers. Choosing a competent assignee may also be relevant when the parties have already structured a sale of the assets to particular parties. In the matter of GT, the owner decides a local company familiar with the Denver-region cannabis market will do a sufficient job liquidating GT's assets.

Before making the assignment, GT must also remember that this ABC will be a disposition "of all, or substantially all" of GT's property; thus, it would need shareholder approval before moving forward.[373] For a small company like GT, the corporation would likely be closely held, so the shareholder approval requirement would not be cumbersome. One noteworthy aspect of the Colorado statute is that GT need not seek the assent of creditors before moving forward with the ABC; the assent of creditors is presumed upon the creation of an ABC.[374]

At this point, GT has chosen an assignee and approved the disposition of its assets. GT then officially makes its assignment in the form of (what Colorado refers to as) a deed.[375] Because ABCs occur under the jurisdiction of the courts in Colorado, the assignment must be recorded "in the office of the clerk and recorder of the county where the assignor resides;" so, GT would accordingly file this assignment in Denver County.[376] Then, within four days, GT would need to provide the assignee with an inventory of its assets, the value of those assets, the creditors with claims, and the number of the respective creditors' claims.[377] The assignee would then be obligated to file the inventory with the clerk of the district court of the recording county.[378] While serving in their role, the assignee is deemed an officer of the court.[379] Further, the assignee is subject to the court's supervision at all times and may be required to provide the court updates as the ABC proceeds.[380]

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[373] COLO. REV. STAT. § 7-112-102(1).

[374] *Id.* § 6-10-105.

[375] *Id.* § 6-10-102 ("Any person may make a general assignment for the benefit of his creditors by deed duly acknowledged. When filed for record in the office of the clerk and recorder of the county where the assignor resides or, if a nonresident, where his principal place of business is in this state, such deed shall vest in the assignee in trust for the use and benefit of such creditors all the property of the assignor, excepting only such as is by law not subject to levy and sale under execution, subject, however, to all valid and subsisting liens.").

[376] *Id.*

[377] *Id.* § 6-10-103.

[378] *Id.* § 6-10-106 ("The assignee shall file with the clerk . . . of the county . . . a true and complete inventory and valuation of the property . . . .").

[379] *Id.* § 6-10-107.

[380] *Id.* § 6-10-116.

GT's assignee may consider an alternative path at this point. Now that the assignment has been made, the assignee may seek to have all proceedings in court waived. In other words, the process would no longer be within the court's jurisdiction.[381] Waiving the court proceedings would require obtaining consent from both GT and GT's creditors.[382] Whether the parties could agree to this kind would depend on the facts of each matter.

The owner may withhold consent because of the owner's desire to ensure the process is conducted without fault. The owner may fear their own personal liability may be greater after the ABC has concluded if it does not have a court overseeing it until the end. The owner's original desire to have filed for bankruptcy may also play a role, because if the owner only reluctantly agreed to the ABC, moving the process further from court may be undesirable. Yet, the owner withholding their consent may be unlikely because removing the process from court could speed up the final resolution.

The more likely parties to withhold consent are the creditors. Creditors may be concerned that their claims lack adequate protection if the assignee does not have to account to the court regularly. If the matter is already in court, the creditors do not risk having to return to court if the assignee fails to conduct the ABC properly. Under some circumstances, the creditors may have no concerns and may be willing to consent. But if there is any distrust about how the assignee may dispose of the company's assets and pay back creditors, it may be difficult to reach an agreement. This creditor skepticism may lie behind the ABC statute's provision allowing creditors to appoint an attorney to represent their interests in the proceedings. If most creditors agree, the attorney may be appointed to review the assignee's conduct and reports.[383] If any suit arises concerning the estate, the attorney may represent all the creditors in the suit.[384] In the matter of GT, we can assume the parties do not reach an agreement and instead remain subject to the court's authority.

In order to give proper notice of GT's ABC, the assignee must publish notice in a county newspaper for four weeks.[385] Further (and likely with greater effect), the assignee must mail notice to each creditor notifying them of GT's assets and liabilities.[386] If any realty is conveyed in the ABC, the assignee must record a separate notice by filing in the county where the real estate is located.[387] Creditors who properly make their claim (per the assignee's instructions) within three months will have priority over those who fail to present their claim in the initial three months.[388] Once the assignee has provided notice to GT's creditors, the assignee can then turn to the task of liquidating GT's assets.

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[381] *Id.* § 6-10-126.
[382] *Id.*
[383] *Id.* § 6-10-125.
[384] *Id.*
[385] *Id.* § 6-10-109.
[386] *Id.*
[387] *Id.* § 6-10-108.
[388] *Id.* § 6-10-109.

Under the statute, the assignee has "all the rights, power, and authority of the assignor necessary to fully execute" the trust and convey property.[389] In other words, the assignee steps into GT's shoes under the ABC and acts in its place. The assignee will work to maximize the value of GT's assets in its dispositions to ensure that all GT creditors see sufficient compensation for their claims. The assignee would need to be careful with GT property that would not be sold in the usual course of business. Under the Colorado ABC statute, the assignee needs court approval to dispose of any real or personal property that is not conveyed in the usual course of business.[390] In the case of GT, it could likely dispose of its inventory without difficulty, as the inventory would be sold in the usual course of business. Everything else, however, would likely need to go through the court approval process. This process could include things like its computers or related technology, like an iPad or tablet that GT allowed customers to order from. This process could also include cabinets, desks, or any other basic furniture a business would use. If GT manufactures any of its products, the tools and machines used in that process would need court approval before disposition. This requirement would extend to any real property that GT operates from if it also owned the property in question.

GT's assignee should be aware that the ABC statute sets a deadline, and as a result the trust must be closed within one year of the assignment's filing date.[391] The assignee, however, could seek an extension showing good cause.[392] Throughout this period, the assignee should be disposing of GT's assets and paying GT's creditors in proportion to their claims (at least all legitimate claims).[393] Recall that GT's creditors are limited to some business associates and a bank. If GT's assets are sufficient to repay all its debts, the proportionate repayment may be a mere formality in the grand scheme of GT's ABC. Lastly, the assignee must remember its duty to render a full account of the trust to the court, explaining what has happened to assure the court that everything has been conducted appropriately.[394] By the end of this process, all of GT's creditors should be paid, and GT's owner can walk away to, hopefully, start a new, more successful venture.

B. Considerations for Cannabis Businesses Contemplating ABCs

GT's hypothetical ABC raises important considerations, some more relevant to cannabis-associated business than others. First of all, parties should evaluate the desirability of escaping court supervision. For the foreseeable future, all cannabis associated businesses will have to operate with the understanding that cannabis remains illegal at the federal level. For more cautious clients, there may be some apprehension about entering and staying in a legal system that may be unaccepting

[389] *Id.* § 6-10-119.
[390] *Id.* § 6-10-116.
[391] *Id.* § 6-10-128.
[392] *Id.*
[393] *Id.* § 6-10-112.
[394] *Id.*

of their business. While a quick explanation of the distinction between state and federal systems may alleviate their concern, some may remain unsure of what legal consequences could follow from allowing a court to become intimately aware of how their business functions. On the other hand, those same clients have likely already come to accept their precarious legal position. Further, few are likely to operate under the illusion that federal authorities cannot determine their source of income.

Conversely, removal from court supervision could greatly simplify and streamline the ABC. For a state like Colorado, removal from court supervision could help assignees avoid some of the more onerous requirements discussed above. The question that follows is: which parties benefit from streamlining the process? The assignee and assignor benefit by no longer being required to seek court approval before acting. But the assignee may find it would like a court to act as a mediator for disputes regarding claims and certain property transfers. The issue is not the assignee's ability to seek court approval; the issue is it may take longer to resolve the issue if the ABC has been removed from the court's initial supervision.

The creditors would likely be the parties most skeptical of removing the case from the court's supervision. Considering the surrounding incentives, it is unclear why creditors would like to give the assignee more power when it comes to repayment of the assignor's debt. On the other hand, numerous states already do not require the court to oversee an ABC, indicating some respect for the competency of those who execute ABCs. Creditors may share this trust and be willing to give assignees more freedom in conducting the liquidation. This trust may also stem from a desire to have the assignee work as quickly as possible.

Further, as discussed above, the ABC process can provide great flexibility in its restructuring path. For example, consider an alternative path for GT's business: assignees can negotiate with a buyer before any assignment is made, creating a scenario in which a business purchaser can take over without the operations being uninterrupted.[395] Had GT been able to pre-negotiate its ABC, the timeline to conclude would be shortened, creditors would face less uncertainty, and it could more easily convince all parties to avoid staying in court.

Further, because ABCs are a matter of state law, creating a unified body of law for ABCs seems unlikely. The statutes and common law of each state provide sufficient guidance to practitioners such that no large-scale overhaul of this relatively niche area of law seems necessary. Further, such a determination would depend on the needs of any particular cannabis operation. Florida's stricter guidance may work better for large cannabis operations, while small businesses will question why the state has made it so complicated to liquidate a small operation. Such strict rules could disincentivize those small businesses' use of an ABC. For California, the relaxed provisions may not work for large cannabis businesses that want to pursue an ABC because those assignees may prefer more statutory-based powers. On the other hand, relaxed provisions may be the desired scheme, as all interested parties are free to work matters out among themselves.

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[395] Kupetz, *supra* note 9.

For the foreseeable future, cannabis businesses in states with legalized cannabis will have to operate with the knowledge that the federal government merely tolerates their activities. Until the federal law changes, ABCs can serve as the ideal alternative to filing for bankruptcy. Several potential legal reforms are relevant to the future of cannabis law, but the one most worthy of discussion is the Marijuana Opportunity, Reinvestment and Expungement Act (the MORE Act). At its core, the MORE Act legalizes cannabis on the federal level and removes the substance from inclusion in the Controlled Substances Act.[396] The bill successfully passed through the House of Representatives but it faces an uncertain future in the Senate.[397] Another similarly situated bill is the SAFE Banking Act, which would allow banks in states with legal cannabis to work with cannabis businesses.[398] Even if unlikely to succeed in the near future, these recent efforts show there is momentum towards legalizing cannabis at the federal level.

If cannabis were to become legal at the federal level, this would only allow businesses in states with legalized cannabis to avail themselves of federal bankruptcy law. Unless some broad preemption occurred, many states would still have cannabis-prohibiting laws. But for states where cannabis is legal both statewide and federally, there would be two avenues open: federal bankruptcy proceedings or state law alternatives like an ABC. ABCs would still be a realistic solution for a struggling cannabis company in such states. With legalization, ABCs may become less attractive for cannabis businesses if filing for federal bankruptcy protection is an option. Because federal legalization of cannabis seems unlikely in the near future, this question will not receive much discussion here.

Another important consideration of legalization is its effects on consumer behavior. If there were to be federal legalization, many new operations would open in new markets to meet consumer demand. If cannabis consumers were able to sustain many different businesses in a small geographic area, the relatively few businesses that fail may resort to an ABC, confident in their ability to offload assets to other businesses in the area at higher amounts than a bankruptcy trustee could secure.[399] But, if consumers seem to gravitate towards a smaller concentration of cannabis businesses, a failing business may feel federal bankruptcy protections are

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[396] Berkeley Lovelace Jr., *House Committee Approves Landmark Bill Legalizing Marijuana at the Federal Level*, CNBC (Nov. 20, 2019), https://www.cnbc.com/2019/11/20/house-committee-approves-bill-decriminalizing-marijuana-on-the-federal-level.html [https://perma.cc/DG5W-P7MA].

[397] *See* Andrew Smith, *Federal Cannabis Legalization: Policy Issues to be Addressed*, JD SUPRA (Jan. 15, 2021), https://www.jdsupra.com/legalnews/federal-cannabis-legalization-policy-7061834/ [https://perma.cc/E4UK-VCQS].

[398] Jason Schott, *Marijuana Industry Scores Big Win as House Passes SAFE Banking Act*, FOX BUS. (Sept. 25, 2019), https://www.foxbusiness.com/politics/marijuana-industry-scores-big-win-as-house-passes-safe-banking-act [https://perma.cc/7TTJ-WUCY].

[399] *See* Laurence, *supra* note 168 ("An ABC company will almost always get more for your assets than a bankruptcy trustee will, and it may be able to sell any intellectual property you own to help pay debts, something a bankruptcy trustee usually will not do."). Of course, those higher values are only achievable with willing buyers.

more prudent. The lower bankruptcy asset sale values and increased time and resource commitments may be offset by the increased legal protections afforded during bankruptcy.[400] Such a change in the market is more an economics issue than a legal one, but federal legalization would undoubtedly cause the market to shift in unexpected ways.

CONCLUSION

Cannabis policy has shifted dramatically across the country in recent decades. What began merely as a push to make medical cannabis available to a certain few has led to legal recreational cannabis being available to millions across the United States. More states are joining this trend, increasing the market for both medical and recreational cannabis. Meanwhile, the federal government has remained firm in its position that cannabis should remain illegal. This dichotomy has pushed cannabis businesses into an uncomfortable position: they operate under the license of state law, but they cannot seek federal bankruptcy protections.

Whether cannabis will become legal on a federal level and resolve this stalemate remains an open question. While cannabis businesses wait for the day that bankruptcy laws open to them, they should remember the advantages that come with an ABC. The primary convenience of the ABC is that the proceeding should be able to conclude very quickly. Compared to a bankruptcy proceeding, the ABC can allow parties to move-on from their business while assuring creditors' repayment. The ABC can serve as a relatively quick solution for a failing cannabis business that needs to wind down.

This shortened timeline, as compared to federal bankruptcy proceedings, can be attributed to both the difficulties of bankruptcy proceedings and the flexibility that ABC laws give to businesses. Whether it is the power of the assignee or the ability to pre-negotiate the purchase of the assets prior to the ABC's execution, ABCs provide ample room for both creativity and predictability. The result should be the same after every ABC (*i.e.*, liquidation and repayment of creditors). The parties are given great freedom to obtain a result that accounts for everyone's interests. Ultimately, the ABC allows a cannabis company access to a legal remedy mimicking many aspects of bankruptcy law.

Because ABC laws are not uniform across the country, the variety counsels against drawing general conclusions. The overall similarities and underlying history still demonstrate the particular strengths of the ABC, especially how struggling cannabis businesses can utilize it. Their drawbacks include the lack of certain federal procedural protections like the automatic stay in bankruptcy proceedings and that it is still a liquidation of the business assets—a result that may be unappealing to many.

This leads back to the ultimate issue: federal bankruptcy courts are currently closed to cannabis businesses. Thus, these businesses should keep the ABC in mind

[400] *See id.* (referencing different asset value outcomes between ABCs and bankruptcy); *supra* Part V (discussing four advantages that ABCs have over bankruptcy proceedings, as well as six counters that cause consumers to use bankruptcy more often).

if they begin to struggle. As the cannabis industry becomes a greater part of our economy, more practitioners need to be aware of the solutions to risks that come with running a business associated with cannabis. While the federal government appears to have taken a mostly hands-off approach with states with their own regulatory schemes, that does not address the concerns of a failing cannabis business. The ABC addresses those concerns and can serve as a valid substitute for filing for bankruptcy.