Study D-400 April 7, 1997

First Supplement to Memorandum 97-7

Assignment for Benefit of Creditors:
Organization of Study (Additional Letters)

We have received several letters commenting on general assignment for benefit of creditors issues raised in Memorandum 97-7:

Exhibit pp.

1. John A. Lapinski, Clark & Trevithick, Los Angeles (March 31, 1997) 1
2. Leslie R. Horowitz & John A. Lapinski, "Assignment for the Benefit of Creditors: An Alternative to Bankruptcy in the '90's," *Los Angeles Lawyer*, May 1993, pp. 21-23, 45-47 [forwarded by both Mr. Lipinski and Mr. Hamer] 6
3. Frederick Hamer, The Hamer Group, Los Angeles (April 1, 1997) 12
4. Geoffrey L. Berman, Development Specialists, Inc. (April 2, 1997) [cc. page omitted] 15
5. Geoffrey L. Berman, Development Specialists, Inc. (April 4, 1997) — corrections to item 4 [cc. page omitted] 17
6. Letter from Geoffrey L. Berman, Credit Managers Association, to Howard Kollitz (February 24, 1997) — relating to Kollitz & McNutt article attached as exhibit to Memorandum 97-7 [this letter was forwarded by Mr. Berman, attached to item 4] 18
7. Richard Kaufman, Credit Managers Association, Burbank (April 2, 1997) 21

These letters are all from attorneys who practice in the field of general assignments. The writers cite the advantages of general assignments (e.g., efficiency, flexibility, lack of procedural encumbrances as in bankruptcy) and question whether abuses are occurring or, if they are, whether a statute could solve the problem. There is concern that legislation may impede rather than promote progress in the field and that regulation would stifle use of general assignments. Two writers suggest consideration of a bonding requirement to meet the potential for abuse by insolvent or irresponsible assignees. (See Exhibit p. 4 (Lapinski), pp. 15 & 20 (Berman).) There is general agreement that specific problems (at most) should be addressed in any Commission study rather than general overhaul of the law.

The article set out on Exhibit pages 6-11 provides a useful overview of the GABC process. Mr. Berman's letter to Mr. Kollitz provides a response to a

number of issues raised in the article attached to Memorandum 97-7. The staff has not reached the point of attempting to evaluate the points made on either side.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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JOHN A. LAPINSKI
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ROBERT F. DEMETER

*ALSO ADMITTED IN NEW YORK

800 WILSHIRE BOULEVARD, TWELFTH FLOOR,
LOS ANGELES, CALIFORNIA 90017

(213) 629-5700 • FAX (213) 624-9441

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Law Revision Commission
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APR 04 1997

File:

March 31, 1997

Mr. Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Memorandum 97-7(SU)
Item No. 6 on Agenda for April 10, 1997 Meeting

Dear Mr. Ulrich:

Frederick Hamer of The Hamer Group provided me with a copy of your letter of March 24, 1997 to him and the Memorandum 97-7, Assignment for Benefit of Creditors: Organization of Study. I am familiar with Colin Wied's letter to the Commission dated November 6, 1996. Similarly, I am familiar with correspondence sent to the Commission by Geoffrey Berman, Ben Seigel, David Gould and Arthur Greenberg. I have also read the article co-authored by Howard Kollitz & Scott McNutt in the State Bar Business Law News.

I am one of "the lawyers . . . who are in the business of handling general assignments" as referred to in Memorandum 97-7. By way of background, I am, like David Gould, a former Chair of the Debtor/Creditor Relations and Bankruptcy Committee of the Business Law Section ("Committee") having served on the Committee from 1981 through 1984. I was actively involved in the Committee work with the Law Review Commission to revise the entire Enforcement of Judgments Law in California. This work continued the Law Review Commission's earlier work of the late 1970's in attempting to streamline creditor's rights and debtor's remedies

to facilitate the use of various procedures and to eliminate archaic and obsolete provisions in the law. In connection with the Enforcement of Judgment Legislation, the Committee continued to deal with areas directly involving General Assignment law, i.e., Code of Civil Procedure §§ 1800 and 1801. The Committee also dealt with clean up legislation and other technical amendments clarifying earlier legislation in order to conform to the global effort concerning the Enforcement of Judgment Law.

Over the years since my involvement with the Committee, various legislation has been enacted to enhance, clarify and facilitate general assignment proceedings so that they could be utilized in the most efficient manner and to avoid the fate of what occurred to the repealed and archaic statutory assignment provisions. Indeed, these enactments were of maximum benefit to utilization of the general assignment proceeding when California began its economic decline in the early 1990's. Four years ago, I co-authored an article published in the Los Angeles Lawyer Magazine on general assignments. A copy is enclosed for your review. Clearly general assignments have been of significant value to creditors and assignors during the 1990's. While I believe that there is no statute(s), that does not from time to time need to be fine tuned, it is clearly troublesome to me to see the pendulum swing from promoting, facilitating and utilizing to a potentially rigid and burdensome procedure that might be intimated from the article authored by Kollitz and McNutt.

General assignments have distinct benefits over Chapter 7 bankruptcy proceedings. Primarily these benefits lie in the ability of the assignee to act significantly faster than a bankruptcy trustee and free from questionable benefits that are derived from compliance with bankruptcy rules and procedures. In the last few years numerous commentators have questioned the historical assumptions that underlie the purpose of the bankruptcy rules. All too frequently bankruptcy trustees follow the letter of the bankruptcy rules as a safe haven from potential liability to creditors at the substantial expense of the debtor's

creditors. Unfortunately, in most circumstances the bankruptcy trustee's hands are tied preventing them from exercising any discretion on acting in a manner that might yield a maximum recovery for creditors in the liquidation of debtor's assets. I am also involved in bankruptcy practice and appreciate the limited options that are available to trustee's exercise of their discretionary actions. Commentators have questioned the wisdom in some of the notice requirements to creditors as well as the auction procedures utilized in the sale of assets. For example, the inability of a trustee to consummate a quick sale in many instances costs the creditors dearly. A buyer is interested in obtaining assets which are of maximum value where a quick sale can minimize the detriments of the company's failure. Often customer bases are lost because of the substantial delay in the trustee's ability to sell assets to a buyer and the buyer is further chilled by the overbidding procedures mandated in bankruptcy court. Contrary wise, an assignee is probably the only seller who could optimize the intangible value to customer bases and business continuity by charging a buyer a premium for expedited sale of the assets with full elimination of a buyer's uncertainty at being a successful bidder. Accordingly, were some of the provisions enacted as suggested by Kollitz & McNutt relating to perceived protections for creditors such as notice requirements, the result would be to gut the benefits I have noted in general assignments over Chapter 7 bankruptcy.

I have been involved in general assignments in other states such as Washington, Oregon, Colorado, Arizona, Utah, Ohio and Florida. In states which codify general assignment law into a rigorous statutory procedure requiring strict compliance, general assignments appear to be seldom utilized. This, for example, occurs in Colorado. In that state various provisions of its general assignment law have been held unconstitutional by the Colorado Supreme Court because portions of the law violate the United States Constitution, i.e., attempting to discharge debt or interference with contract rights. While I appreciate Colin Wied's request for a look at the general assignment law, I am

highly suspect of any attempt to utilize general assignments for anything other than liquidation.

The comments of Kollitz and McNutt relating to the absence of criteria for protection of creditors from an insolvent or fraudulent assignee are meritorious. Accordingly, I believe that some form of blanket bond requirement would be appropriate, however, this should be posted with the state rather that in each assignment case. Such a one time bond could protect the interests of creditors much like other bond requirements for other professions such as contractors and realtors. In states which require an action to be commenced in state court and a bond posted in that action, the benefits of general assignment become emasculated. An assignment subject to a state court proceeding at the outset will, in due course, devolve into a procedure much like the existing bankruptcy procedure with similar consequences. Our state courts do not need further proceedings to tie up their dockets. I note that your Memorandum 97-7 at page 5 indicates that the staff does not think a major codification should be undertaken. I strongly support this finding. I also agree that monitoring the work underway by the American Bankruptcy Institute Task Force should be continued.

I would appreciate your advising me of further action concerning this matter undertaken by the Law Review Commission.

Very truly yours,

John A. Lapinski

JAL/lab

hq\lapinski\ulrich.328

cc: Frederick Hamer
Geoffrey L. Berman
Howard Kollitz, Esq.
Scott H. McNutt, Esq.
Benjamim S. Seigel, Esq.
David Gould, Esq.
Arthur A. Greenberg, Esq.
Leslie R. Horowitz, Esq.

Leslie R. Horowitz and John A. Lapinski

An alternative to bankruptcy in the '90s

ASSIGNMENT FOR THE BENEFIT OF CREDITORS

Bankruptcy petition filings in the Central District of California have reached a record high. In 1992 filings were up more than 26 percent from 1991, and in 1991 more bankruptcy petitions were filed than in any other previous year.[1] The economic downturn of the past two years continues to create record business failures. For the forseeable future, as the option of bankruptcy becomes more of a business tool and less of a social embarrassment, exponential increases in bankruptcy filings are certain to occur.

Bankruptcy is, however, not always the best solution for a distressed business that has decided to liquidate. Upon filing, the debtor faces a Bankruptcy Court that is already overburdened with its caseload. Equally overburdened Chapter 7 trustees, serving by appointment, rarely are able to devote the attention needed to tailor the liquidation effort to options other than auction sales. The process of liquidating the assets is often slow and costly, because Chapter 7 trustees generally must seek Bankruptcy Court approval for each transaction they undertake. Chapter 7 trustee sales often result in lower recoveries due to this bulk sale process, as well as the necessity of following Bankruptcy Court-approved sale procedures. These procedures are calculated to conform to adequate notice concerns of the Bankruptcy Court but frequently fail in realizing the maximum recovery for the assets being sold.

An Assignment for the Benefit of Creditors ("Assignment") is another option that can be utilized to help overcome the problems often incurred in Chapter 7

John Lapinski and Leslie Horowitz are partners at Smith & Smith specializing in Assignments for the Benefit of Creditors, insolvency, bankruptcy, and commercial litigation. Lapinski is a former member of the Association's Board of Trustees.

trustee liquidation sales.

An Assignment is a business liquidation device available as an alternative to bankruptcy.[2] It is, however, analogous to bankruptcy under the United States Code but, unlike a Chapter 7 bankruptcy, should only be considered if there are assets to liquidate. The significant difference is the ability to avoid following all of the administrative procedures that govern Bankruptcy Court proceedings. Assignments lessen the time required to sell assets, increase the liquidation options, and keep the costs substantially lower, often resulting in a greater return for creditors. There are many reasons for this result, including the flexibility in the method of sale, the ability to act quickly and the greater time the assignee will generally devote to the liquidation effort. The ability to utilize Assignments in California can be traced to Civil Code Section 22.2, which incorporates English common law: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or the laws of this State, is the rule of decision in all the courts of this State."[3] Assignments are favored in the law and are construed so that they may stand rather than fall.[4]

Assignments are recognized in the Code of Civil Procedure, which states that "[n]otwithstanding any other provision of the Code of Civil Procedure, [a] defendant may make a general assignment for the benefit of creditors."[5] Other statutory provisions in the Civil Code and Code of Civil Procedure have been implemented to assist the assignee. However there is no comprehensive statutory scheme similar to those for attachments or writs of possession.[6]

An Assignment is simply a contract whereby the troubled entity ("assignor") transfers legal and equitable title, as well as custody and control of its property, to a third party ("assignee") in trust, to apply the proceeds to the payment of the assignor's debts.[7] The assignee liquidates the property and distributes the proceeds among the assignor's creditors in accordance with priorities established by law.[8]

Virtually any transfer to a trustee, by which the debtor seeks to divest itself of both title and control of *all* assets and intends to create an absolute conveyance for the purpose of distributing proceeds among its creditors, is in legal effect an Assignment, no matter what the parties call it.[9] An Assignment must vest *all* interest in the property transferred to the assignee;[10] however the assignee takes only that property that the assignor may legally convey or assign.[11] A surplus of property over the total debts does not render the Assignment invalid and is held in trust by the assignee and returned to the assignor, whether or not expressly stated in the instrument.[12]

An Assignment is most successful when there is cooperation among the debtor, the secured creditors and the assignor. For example, an assignee of a manufacturing business may, with the cooperation of the secured parties and the principals, operate the business for a limited time to complete work in process and to maximize recovery of accounts receivable. An assignee often will be able to employ the principal of the assignor who can be invaluable in clarifying business records and liquidating assets at the highest possible price. A Chapter 7 trustee seldom is in a position to avail the bankruptcy estate of this option, tending instead to liquidate in bulk or mass rather than employ what may otherwise be more rewarding methods.

PARTIES WHO MAY ASSIGN

A debtor is any individual, partnership or corporation that owes anything to anyone. Any debtor owning property has, as an incident of ownership, the inherent common law right to make an Assignment. The general rule is that any insolvent debtor may make an Assignment.[13]

An Assignment is not feasible (and thus discouraged) for individuals, because individuals do not receive discharges as they would in a Chapter 7 Bankruptcy. Although a creditor may not pursue *assets* assigned to the assignee, a creditor may continue to pursue the assignor's *post-assignment assets* in the absence of a discharge. In most instances, it would be very difficult to determine at what point an individual assignor's liability ends. However, an individual assignor does have the right to claim property as exempt for debts under California law.[14]

Partnership property may be assigned by a partner.[15] The partner needs the express consent and authorization of other partners to make an Assignment. An Assignment is not within the contemplation of an ordinary partnership or the usual course of business and therefore is beyond the scope of agency arising from the partnership.[16] The consent need not be in writing[17] and is not necessary if other partners have abandoned the partnership business.[18] An Assignment of both partnership property and an individual partner's property will be construed to give partnership creditors priority on partnership assets and an individual partner's creditors priority on the individual's assets.[19]

Corporations may make Assignments unless restricted by their articles or some statutory provisions.[20] A corporate resolution is required since an Assignment is a disposition of all of the corporation's assets.[21]

ASSIGNABLE PROPERTY

Any non-exempt property that the debtor can sell or convey or would be subject to execution may be assigned. Real, personal, and general intangible property are assignable. When a corporation makes an Assignment, all corporate property, tangible and intangible, is transferred to the assignee,[22] including choses in actions, customer lists, book accounts, and rights and credits of all kinds, both in law and equity.[23] A cause of action in tort, such as a business tort, that survives to a personal representative can be enforced in the name of an assignee.[24]

An Assignment of real property that purports to pass all interest of the assignor is a conveyance[25] and is subject to all the provisions of the Civil Code relating to transfers of real property.[26] The failure to record a transfer does not render the conveyance invalid against subsequently attaching creditors, since an unrecorded deed or Assignment is sufficient to pass title against such a creditor.[27]

The goodwill of a business (even one closed and in liquidation) is an asset that an assignee will not only recognize but attempt to utilize when liquidating the assets of business. Goodwill is seldom of any value in a Chapter 7 trustee's liquidation sale. Goodwill may be a significant asset whose value can be realized through a turn-key sale to someone interested in the assignor's business. While going-concern value seldom is obtained, an assignee could keep the assignor's assets in place for a period while seeking to find a purchaser. An assignee thus may try to operate a business in order to sell it as a going concern in order to realize the goodwill value. A Chapter 7 trustee has no incentive to undertake that extra work or spend the time and money required to seek the necessary court approval.

A trademark or trade name that is not personal but is connected with tangibles such as location, leasehold or goods, constitutes a part of the assets of the estate. The right to use a trademark or trade name will pass in an Assignment even though it is not specifically mentioned.[28]

The interest of an insured in a life insurance policy having a cash surrender value may be included in an Assignment, but where the interest of the insured is merely a right to exercise an option to surrender the policy for the cash surrender value, and the interests of innocent third persons named as beneficiaries would be affected, an Assignment has been held not to carry with it the insured's interest.[29] The assignee is the equivalent of a loss payee and makes notification to the insurer.

DISCHARGE OF DEBTOR AND CONSENT OF CREDITORS

Assignments *do not* discharge a debtor, except to the extent of the actual amount of any payments made by the assignee.[30]

A conditional sale vendor, lessor or secured creditor elects whether to retake

its property or collateral or utilize the assignee for purposes of liquidation procedures. Such creditors, in fact, are often the greatest beneficiaries of the Assignment and usually consent to the proceeding since this procedure generally realizes more on their collateral or property than from a Chapter 7 bankruptcy. These obligations nearly always are personally guaranteed by the company's principals who benefit from the better liquidation results.

While not required to consent to an Assignment, secured creditors often must agree in advance of the Assignment since their cooperation frequently affects the liquidation of the assets.[31]

The acceptance of an Assignment by unsecured creditors is not necessary since under common law the proceedings are deemed to benefit them through equality of treatment.

Creditors who file claims under an Assignment waive all objections to any Assignment form irregularity, title of the assignee to the assets, or validity of the Assignment.[32]

An Assignment is not a fraudulent transfer if there is immediate delivery and change of possession of all personal property of the assignor.[33] The funds realized on liquidation by an assignee cannot be claimed by a single creditor or jointly by all creditors since the assignee holds the funds in trust.[34]

SELECTION AND PERSONAL LIABILITY OF ASSIGNEE

The assignee generally is selected by the assignor, although a court may remove an assignee for violations of the Assignment contract or nonfeasance. The assignee may not give up his duties under the Assignment without liability or a superior court order until creditors receive distribution.[35]

The assignee is entitled to compensation either as stated in the contract of Assignment or as negotiated with creditors. Even if the contract is silent on the assignee's fees, the superior court has equitable power to grant reasonable compensation to the assignee.[36] The compensation issue thus should be resolved in advance and in the contract.

The standard of care for an assignee is an ordinary prudent person who would make the same decisions in his or her own affairs under like circumstances.[37] The assignee may be liable for losses occasioned if the standard is not met or for failure to observe statutory priority given debts owed to the U.S.[38]

POWERS AND DUTIES OF ASSIGNEE

The assignee's duties include protecting the assets of the estate, administering them fairly and representing the estate. The exact duties depend on the type of case.

The assignee is the representative of the assignor and not a bona fide creditor,[39] and so acquires no greater right in the property assigned than the assignor had at the time of the Assignment. In this respect, although the assignee may be a trustee and the creditors may be considered the beneficiaries of the Assignment, the assignee is no more than a representative of the assignor and does not technically represent the creditors.[40]

Prior law held that an assignee may not maintain an action to set aside a fraudulent conveyance made by the assignor, since such a conveyance was binding on the assignor;[41] however this changed with the enactment of Civil Code Section 3439.07(d). Section 3439.07(d) holds that a creditor who is an assignee may exercise any and all of the rights and remedies specified under the section, if they are available to the creditors, 1) only to the extent the rights or remedies are so available and 2) only for the benefit of those creditors whose rights are asserted by the assignee.

A transfer of assets to the assignee does not violate the requirements of bulk sale transfers;[42] the assignee becomes a lien creditor who takes ahead of all other creditors. If a secured creditor's lien has not been perfected the Assignment cuts off such an interest.[43]

The assignee can file a quiet title action against a grantee of real property that is alleged to have been fraudulently conveyed.[44]

An assignee may recover any preferential transfer of property but must commence the action within one year of taking the Assignment.[45] To be preferential and thus avoidable, the transfer must be made within 90 days of the Assignment, or one year if the creditor is an insider, and the transfer must have been made while the assignor was insolvent.[46]

An assignee is often able to pursue causes of action where a Chapter 7 trustee could not or would not. The assignee is free to enter into contracts to recover assets or liquidated claims. Thus, an assignee may hire an attorney on a contingent fee basis to pursue claims that may be theoretically possible but impractical for a Chapter 7 trustee to pursue in a bankruptcy. The assignee has the flexibility to contract with one or more creditors or even shareholders to fund expenses to pursue a valuable cause of action without the need to seek court approval.

Notwithstanding any provision in a lease for its termination upon the making of the Assignment, the insolvency of the lessee, or other provision relating to the financial condition of the lessee, for a period of up to 90 days after the date of the Assignment, the assignee may occupy any business premises held under a lease by the assignor upon payment when due of the monthly rental reserve in the lease for the period of the occupancy.[47]

New procedures effective this year require the assignee to give written notice to the assignor's creditors, equity holders and other interested parties within 30 days of acceptance of the Assignment. In addition, the assignee must establish a date between 150 and 180 days after publication by which claims against the estate must be filed.[48] These procedures benefit the assignee and the creditors by establishing deadlines and safe harbors.

EFFECT OF BANKRUPTCY

If a creditor or creditors file an involuntary bankruptcy petition, the Bankruptcy Court will enter an order for relief only if the court finds the requirements of Section 303 have been met and no abstention motion has been filed by the assignee.[49]

The Bankruptcy Court may abstain from accepting jurisdiction if the Assignment essentially treats creditors in a manner similar to a Chapter 7 bankruptcy and acceptance of jurisdiction brings no additional benefits to creditors.[50] Where Bankruptcy Court jurisdiction may be beneficial to prevent fraud or injustice, an Assignment may be avoided by a bankruptcy trustee, even if the Assignment occurred more than 120 days before the involuntary bankruptcy petition was brought.[51]

PROPERTY UNDER ATTACHMENT OR SUBJECT TO OTHER LIENS

At common law, the attachment provisions provided that a defendant may also make an Assignment notwithstanding any remedies available to a plaintiff contained in the provisions.[52]

If an Assignment is created within 90 days of a creditor being awarded a temporary protective order or writ of attachment, the lien created by the attachment is terminated.[53] The lien may be reinstated under certain circumstances.[54] By subrogating the assignee to the rights of the plaintiff whose lien is terminated, the priority of the lien may be preserved for the benefit of the estate.[55] The assignee has priority over subsequent attaching creditors.[56]

A judgment lien obtained before the Assignment may be a lien on assigned property but may be subject to preference attack; however, a judgment lien obtained after Assignment creates no lien since title already passed to an assignee.[57] Therefore, prior valid liens or mortgages on property are unaffected by an Assignment. A conditional sale agreement, valid and enforceable against the assignor (vendee), is enforceable against the assignee.[58] On the other hand, the assignee does not take property as a bona fide purchaser for value; the assignee takes subject to every equity

(Continued on page 45)

BANKRUPTCY ASSIGNMENTS

(Continued from page 23)

that might have been enforced against the assignor.[59]

DISTRIBUTION PRIORITIES

Secured creditors retain their collateral, or its value, generally as a lien on the proceeds. The costs and expenses of the Assignment, including the assignee's fees, legal expenses and costs of administration, are paid first, just as in a Chapter 7 bankruptcy. Accordingly, in situations where the assets are overencumbered it is necessary to obtain the subordination of the secured creditor(s) to such expenses, which generally is resolved by agreement prior to acceptance of the Assignment. Thereafter, distribution is generally made in accordance with the following priorities established by law:

1) Obligations owing to the U.S. (interest and penalties stop as of the date of the Assignment).[60]

2) Labor wages and benefits.[61]

3) Sales and use taxes (interest and penalties continue after the Assignment.[62]

4) Income taxes (interest and penalties continue after the Assignment).[63]

5) Bank and corporate taxes.[64]

6) Employment insurance contributions.[65]

7) Unsecured creditors arising from deposits for specified purposes.[66]

8) General unsecured claims.

Interest is paid only after the principal is paid for all claims filed. Interest rates are computed according to the original agreement between the vendor and the assignor. Thereafter, interest claims are computed and prorated if necessary.[67] Surplus is returned to the assignor after nonparticipating creditors have had an opportunity to reach surplus.[68]

An assignee must render an accounting to creditors within a reasonable time and generally does so when the estate is closed. In many instances periodic bulletins are sent to creditors.[69]

An Assignment for the Benefit of Creditors is an old common law tool that is not utilized as often as it should as an alternative to bankruptcy. It can save time and expenses and is often beneficial to principals who have personally guaranteed company obligations or have personal liability on tax claims. It may be of substantial benefit to secured creditors by relieving them of the costs and risks of liquidation where the creditor is not readily able to comply with the requirements of Commercial Code Section 9504[70] or wishes to avoid foreclosing on its collateral for other reasons.[71] ◆

[1] ANNUAL REPORT OF THE U.S. DIST. CT., REPORT ON THE BUS. OF THE CT., MANUEL REAL, CHIEF JUDGE (Jan. 1993).

[2] 15 CAL. LAW REVISION COM. ANN. REP. 2212 (1979);

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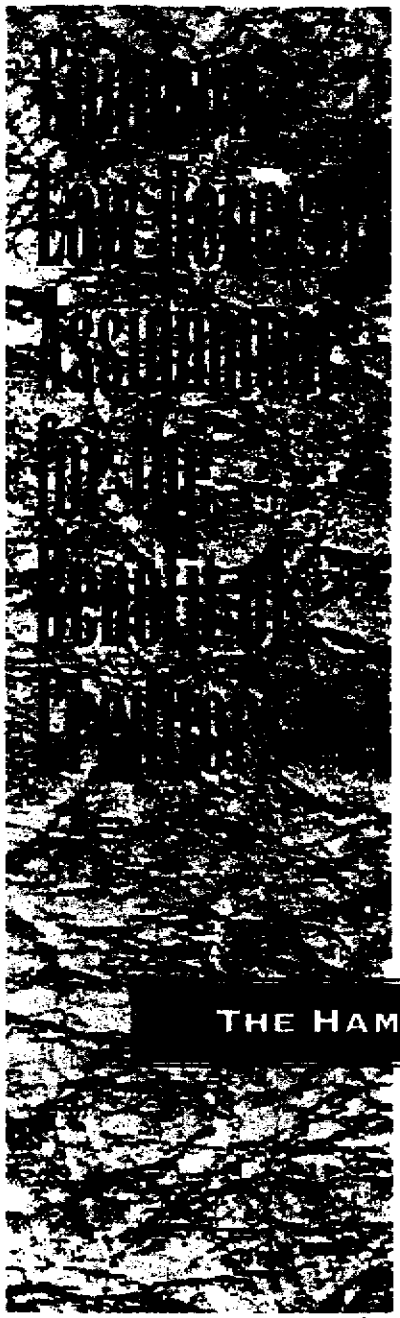

The Hamer Group and its principal have over 20 years experience with liquidations, insolvency consulting and **Common Law General Assignments for the Benefit of Creditors with a track record of increasing the liquidation options and consequential recovery.** The Hamer Group is an active Disbursing Agent in bankruptcy cases. Frederick Hamer is a Superior Court Receiver, and an experienced AAA Commercial Arbitrator.

The Hamer Group has a full staff of accountants, adjusters and appraisers well versed in **Common Law General Assignments for the Benefit of Creditors** backed by attorneys whose experience in this area more than complement the process.

We welcome the opportunity to consult with you and your clients concerning Insolvency problems as they may relate to the **Common Law General Assignments for the Benefit of Creditors.**

THE HAMER GROUP

Frederick Hamer
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Credit Managers Association v. National Independent Business Alliance, 162 Cal.App.3d 1166 (1984). For a review of Chapter 7 liquidation procedures, *see* COLLIER BANKRUPTCY MANUAL (3d ed. 1992) *and* COLLIER BANKRUPTCY PRACTICE GUIDE (1992) both multi-volume looseleaf services. For insights into the requirements of the Central District, *see* FENNING & GOULD, LOCAL BANKRUPTCY PRACTICE MANUAL (1991).

[3] Added by Stats. 1951, ch. 655 §1, at 1833 – derived from Stats. 1850, ch. 95, Pol. C. 4488, at 219. The Mexican legal system was superseded by the adoption of the common law on Apr. 13, 1880. People ex rel. Vantine v. Senter, 28 Cal. 502, 505 (1865) gives an especially good history of the takeover of the Mexican legal system in 1850. See Credit Managers, 162 Cal.App.3d at 1169-70; Bumb v. Bennett, 51 Cal.2d 294 (1958).

[4] Muller v. Norton, 132 U.S. 501 (1889). California formerly had statutory provisions that provided for Assignments but CIV. CODE §§3449 to 3473, inclusive, were repealed in 1980. Statutory assignments were complicated, more expensive and rarely in use. The legislature recognized this as a problem, and now only common law assignments are utilized.

[5] CODE CIV. PROC. §493.020. CODE CIV. PROC. §§493.010 *et seq.* (1979) codifies the leading case on Assignments, Brainard v. Fitzgerald, 3 Cal.2d 157 (1935).

[6] CODE CIV. PROC. §§482.010 *et seq.* sets up a detailed scheme for prejudgment attachments. Within the Ninth Circuit, the states of California, Hawaii, Idaho, Alaska, Nevada and Oregon are governed by common law authority authorizing Assignments. Arizona, Washington and Montana are governed by statutory authority creating the right to make an Assignment.

[7] Brainard, 3 Cal.2d at 162-63; Fenton v. Edwards & Johnson, 126 Cal. 43, 46, 47 (1899).

[8] Bumb, 51 Cal.2d at 298-99; Mechanics Bank v. Rosenberg, 201 Cal.App.2d 419, 421-24 (1962).

[9] Sabichi v. Chase, 108 Cal. 81 (1895).

[10] Brainard, 3 Cal.2d at 163; Mechanics Bank, 201 Cal. App.2d at 424.

[11] Peterson v. Ball, 211 Cal. 461 (1931); 16 CAL.JUR. 3d *Creditors' Rights and Remedies* §44.

[12] Heath v. Wilson, 139 Cal. 362, 369 (1903).

[13] It is not clear whether or not a solvent debtor has the right to make such an assignment. *See* CODE CIV. PROC. §1800 for a definition of insolvency.

[14] See CODE CIV. PROC. §§493.010 and 493.020 (1979). In any Assignment, the assignor, if an individual, may choose to retain as exempt property either the property that is otherwise exempt in CODE CIV. PROC. §703.010 (1987) or, in the alternative, the exemptions as provided for in CODE CIV. PROC. §1801 (1982). The assignee would have difficulty determining exempt property and undoubtedly would require a state court ruling on any exemption claimed.

[15] Brainard, 3 Cal.2d 157 (1935); Richlin v. Union Bank & Trust Co., 197 Cal. 296 (1925).

[16] CORP. CODE §15009(2) and (3) (1991); Bumb, 51 Cal.2d 294 (1958).

[17] Bumb, 51 Cal.2d at 301.

[18] CORP. CODE §15009(3) (1991); Forbes v. Scannell, 13 Cal. 242 (1859).

[19] Forbes, 13 Cal. at 287.

[20] Bank of Visalia v. Dillonwood Lumber Co., 148 Cal. 18 (1905); First National Bank of Stockton v. Pomona Tile Mfg. Co., 82 Cal.App.2d 592 (1947); 16 CAL. JUR. 3d *Creditors' Rights and Remedies* §31.

[21] CORP. CODE §1001 (1990).

[22] Bumb, 51 Cal.2d at 299.

[23] Fenton, 126 Cal.43 (1899).

[24] 6 AM. JUR. 2d *Assignments for the Benefit of Creditors* §24 (1963).

[25] CIV. CODE §1215 (1982).

[26] Moore v. Schneider, 196 Cal. 380 (1925); and Bumb, 51 Cal.2d at 299-300.

[27] Bumb, 51 Cal.2d at 299, 300.

[28] 6 AM. JUR. 2D *Assignments for the Benefit of Creditors* §25.

[29] *Id.* at §26.

[30] Boteler v. Robinson, 105 Cal.App. 611 (1930).

[31] Lacy v. Gunn, 144 Cal. 511, 517 (1904); CODE CIV. PROC. §493.020 (1979).

[32] Lacy, 144 Cal. at 516, 517.

[33]CIV. CODE §3440.01 (1970). Creditors would voice their objection by refusing to participate in an assignment and instead bringing an action in the superior court. Rapp v. Whitten, 113 Cal. 429(1896).
[34]Dunsmoor v. Furstenfeldt, 88 Cal. 522 (1891).
[35]Handley v. Pfister, 39 Cal. 283, 287 (1870).
[36]Menke v. Miller, 56 Cal. 628 (1880).
[37]Sweet v. Markwart, 158 Cal.App.2d 700, 707 (1958).
[38]31 U.S.C. §3713 (1983); Holywell Corporation v. Fred Stanton Smith, ___ U.S. ___, 112 S.Ct. 1021 (1992).
[39]First National Bank of Stockton, 82 Cal.App.2d at 608; Moore, 196 Cal. at 385-86. A similar standard is used for trustees. PROB. CODE §16040.
[40]Mechanics Bank, 201 Cal.App.2d at 424-25.
[41]Moore, 196 Cal. at 385-87.
[42]COM. CODE §6103(c)(6)(1964).
[43]COM. CODE §§9301(d)(3);9302(1)(f) (1990).
[44]Moore, 196 Cal. at 388.
[45]CODE CIV. PROC. §§1800 and 1800(9)(1982).
[46]CODE COV. PROC. §1800(b)(4)1982).
[47]CODE CIV. PROC. §1954.1(1985). This is similar to the preference provisions under the Bankruptcy Code, 11 U.S.C. §547.
[48]CODE CIV. PROC. §1802.
[49]11 U.S.C. §303(h)(2)(1979). *See* the general abstention provision for the best interests of the creditors, pursuant to 11 U.S.C. §305 (1979).
[50]Bankruptcy Court judges generally will abstain from accepting jurisdiction on involuntary bankruptcy petitions filed after a valid Assignment is made.
[51]11 U.S.C. §543(d)(2)(1979).
[52]Brainard, 3 Cal.2d at 159, 163.
[53]CODE CIV. PROC. §§493.030*et seq.* (1979).
[54]CODE CIV. PROC. §493.050(1979).
[55]CODE CIV. PROC. §493.060(a)(1979).
[56]Handley, 39 Cal. 283 (1870); Fento, 126 Cal. 43 (1889).
[57]Lacy, 144 Cal. 511 (1904).
[58]Southern California Hardware & Mfg. Co. v. Borton, 46 Cal.App. 524 (1920). *See also* Stoody Co. v. Valley Pipe & Welding Co., 20 Cal.App. 2d 580 (1937).
[59]Ferger v. Allen, 35 Cal.App. 738 (1917).
[60]31 U.S.C. §3713 (1983). United States v. Harold Bloom, General Assignee for the Benefit of Creditors of Pavone Textile Corp. No. 100, 97 N.E.2d 755 (1950), *aff'd*,342 U.S. 912 (1952); Lapadula & Villani, Inc. v. United States, 563 F.Supp. 82 (S.D.N.Y. 1983).
[61]CODE COV. PROC. §1204(1982).
[62]REV. & TAX CODE §6756(1987).
[63]REV. & TAX CODE §18933(1983).
[64]REV. & TAX CODE §26312(1992).
[65]UNEMP. INS. CODE §1701 (1986).
[66]CODE CIV. PROC. §1204.5 (1982). The claim for Unfunded Vested Pensions Liability (UVL) under ERISA statutes and MEPPA Amendments of 1980 should be treated as general unsecured claims. There will be a subordination of 50 percent of a UVL claim if distribution to unsecured creditors is not 100 percent.
[67]McDougal v. Fuller, 148 Cal. 521 (1906).
[68]Heath, 139 Cal. 362 (1903).
[69]Schneider v. Moncur, 30 Cal.App. 734 (1916).
[70]Assignees are experienced in liquidations and are required to comply with commercially reasonable standards in such efforts. Sweet, 158 Cal.App.2d at 707; *see also*Security Pacific National Bank v. Geernaert, 199 Cal.App.3d 1425 (1988).
[71]*See* Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). 42 U.S.C. §9601-75; EPA Rule 40 C.F.R. §300.100(1992).

COMMON LAW ASSIGNMENTS FOR THE BENEFIT OF CREDITORS

"An Assignment for Benefit of Creditors is a business liquidation device available to an insolvent debtor as an alternative to formal bankruptcy proceedings." (162 Cal. App. 3d 1166)

THE LEGAL RAMIFICATIONS SURROUNDING AN ASSIGNMENT FOR BENEFIT OF CREDITORS MAKES IT IMPERATIVE THAT THE ASSIGNEE BE A LAWYER, FAMILIAR WITH THE LAWS PERTAINING TO INSOLVENCY MATTERS.

As one of the few law firms in California which specializes in the handling of Common Law Assignments for Benefit of Creditors, we are in a position to consult with you concerning insolvency problems which may exist as to your client, or as to those who are indebted to your client.

An Assignee for Benefit of Creditors can, among other things:

- Recover Preferential Transfers (Code of Civil Procedure, § 1800 et seq.)
- Recover Fraudulent Transfers (Civil Code, § 3439 et seq.)
- Set Aside Security Interests which are unperfected or defective (Uniform Commercial Code, § 9301)
- Terminate an Attachment levied on the Debtor's property within 90 days of the date of the Assignment (Code of Civil Procedure, § 493.010 et seq.)
- Enjoin a Landlord from evicting an Assignee, even though the Debtor may be in default on its lease (Civil Code, § 1954.1)
- Establish a date by which creditors must file their claims to be able to share in any distribution made in the Assignment Estate (Code of Civil Procedure, § 1802—enacted January 1, 1993)
- Terminate a Judgement Lien on the Debtor's property created by a noticed filing with the Secretary of State. (Code of Civil Procedure, § 697.620 (c))

Our staff of attorneys, in-house accountants, appraisers, adjusters, and inventory personnel are available to analyze and administer the insolvency situation which may confront your client.

LAW OFFICES
DAVID BLONDER
SUITE 1130 ROOSEVELT BUILDING
727 WEST SEVENTH STREET
LOS ANGELES, CA 90017-2715
TELEPHONE (213) 622-4364

The Hamer Group

11500 West Olympic Boulevard • Suite 605
Los Angeles, California 90064

Telephone: 310•477•4533
Facsimile: 310•477•9626

April 1, 1997

Law Revision Commission
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APR 03 1997

File:

Mr. Stan Ulrich,
Assistant Executive Secretary
California Law Revision Commission.
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

RE: Memorandum 97-7 (SU)
Item No. 6 on Agenda for April 10, 1997 Meeting

Dear Mr. Ulrich,

Thank you for your letter of March 24th regarding the forthcoming meeting of the California Law Revision Commission.

I have read the article published by Messrs. Howard Kollitz & Scott H. McNutt. While they must be complimented for a well written and well thought out article, I must take issue with some of their thoughts. I do not believe that legislation is created merely on "hypothetical." They cite two possibilities for abuse yet do not state that there have been any proven abuses in recent years which would mandate new legislation. It is quite obvious that abuses of any system can occur, but laws do not necessarily prevent abuses when the abusers are of such an ilk that they desire to subvert the system. One has only to look at many of the cases which are brought into Federal Court under Chapter 11 to be aware that many of them should never have been filed in the first place and the filers have "used" the system merely as a device to gain time and as a convenient umbrella for reasons which would normally not be used by most professionals. The Bankruptcy laws, as good as they are, do not prevent such abuse.

General assignments for the benefit of creditors is a very effective process, which on its face, permits an orderly "burial" of a troubled business when performed by the Assignees with which the "insolvency industry" in California is familiar. It is a process which is economically beneficial to the assignor and more especially creditors. For most situations it provides a forum for creditors to be treated in a reasonable and "business like manner." It permits them to share pari passu in the liquidation of assets which have been disposed of in a "business like" timely manner and certainly in a manner far quicker and with much better results than if the case were to be handled under a bankruptcy Chapter 7. Chapter 7 is a forum which inhibits a good recovery, prevents a business from being sold as a "going concern", and is weighted down by every conceivable type of code.

The perception of creditors is always immediately quite negative. After all they have "lost money" and feel that they have been "taken." so they tend to complain. Yet when creditors are treated fairly, and have been provided with well written information, as is the practice of California assignees, they do understand the realities. Personally I feel the "sigh of relief" from creditors when they are made aware of the situation as seen from an independent professional. Whether the creditor is a Bank, a State or Federal Agency, or an unsecured creditor, it is my personal experience that even though they are not "happy campers" they do understand and are generally pleased that some entity other than the debtor is now in charge. I have not personally nor have the professionals with whom I have been in discussion heard, of any substantive or valid complaints relating to abuses of the system.

Finally I wish to draw the Commissions attention to a well written treatise which was published some time ago. It is written by two very knowledgeable lawyers, John Lapinski, Esq. and Leslie Horowitz, Esq. who currently are partners in Clark & Trevithick in Los Angeles. Although the article was published some time ago and may in some very minor degree be outdated, it clearly delineates the process and has become somewhat of a "bible" for Assignees. I am enclosing a copy of this article.

Although the codes are limited, much case law does assist the Assignee in the general assignment for the benefit of creditors process. New laws may very well impede rather than assist the process and have a "cooling" effect. Thus throwing cases into an overloaded and cumbersome bankruptcy system.

In conclusion, I believe that the State Courts do not need additional proceedings to further tie up their dockets and I am relieved to note that the staff does not believe major rule changes are necessary. I further believe that the American Bankruptcy Institute Task Force, who have thus far been actively involved in the general assignment for the benefit of creditors, should continue with their efforts.

Sincerely,

Frederick Hamer

cc: John Lapinski, Esq.
Mr. Geoffrey L. Berman
Howard Kollitz, Esq.
Scott H. McNutt, Esq.
Benjamin S. Seigel, Esq.
David Gould, Esq.
Arthur A. Greenberg, Esq.
Leslie R. Horowitz, Esq.

Development Specialists, Inc.
2 April, 1997

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Mr. Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: ***Memorandum 97-7***
Item No. 6 on Agenda for April 10, 1997 Meeting

Dear Mr. Ulrich:

My previous correspondence to Mr. Sterling and others involved in the general assignment was while I was affiliated with Credit Managers Association of California. I have recently joined Development Specialists, Inc., which also regularly acts as an assignee for the benefit of creditors in matters across the country.

I received a copy of John A. Lapinski, Esq.'s to you in response to the Memorandum 97-7 addressing the Organization of Study re Assignments for the Benefit of Creditors, as well as the Memorandum itself. I appreciate your including my earlier comments in the position you took in the Memorandum. However, I believe a couple of points need additional clarification. As I advised previously, there is an effort currently underway to update California law in this area. The changes brought to the Bankruptcy Code in October 1994, specially where it affects the dollar limits to priority wage claims and exemptions need to be reflected in California law.

The positions taken by Mr. Kollitz and Mr. McNutt and Mr. Lapinski's response thereto highlight the difficulty practioners face when only one side to an issue is addressed. The problem of assignees who are not responsible are not objectionable. There is a concern that almost anyone can claim to understand what it means to be an assignee and bring havoc to the liquidation of any distressed business. That does not mean however that the State should bring regulation to the "industry". The concept of a bond or insurance policy to protect creditors of an estate is reasonable, so long as the requirement.

However, the issue of reasonable notice to creditors of the liquidation of assets in an estate is a different problem. The concern here is the ability of an assignee to maximize value where delay may greatly diminish asset value. Building notice provisions into the statutory scheme is bringing us back to the bankruptcy system that has been avoided so well. The fiduciary nature of the assignee and the responsibility that burden brings is the reason there is an exception to the Bulk Sales requirements of UCC Article 6 (103).

Reply to:

☐ LOS ANGELES	333 South Grand Avenue	Suite 2010	Los Angeles, California 90071-1524	Telephone 213.617.2717	Telecopier 213.617.2718
☐ CHICAGO	Three First National Plaza	Suite 2300	Chicago, Illinois 60602-4205	Telephone 312.263.4141	Telecopier 312.263.1180
☐ MIAMI	200 South Biscayne Boulevard	Suite 900	Miami, Florida 33131-2321	Telephone 305.374.2717	Telecopier 305.374.2718
☐ BOSTON	Two Oliver Street	Fifth Floor	Boston, Massachusetts 02109-4901	Telephone 617.423.2717	Telecopier 617.423.2718

I addressed these points in significantly greater detail, in a letter I sent to Mr. Kollitz and Mr. McNutt on February 24, 1997. I am enclosing a copy of that letter for your information, as well as for the members of the Commission.

I agree with Mr. Lapinski in his statement agreeing with your recommendation that a major codification should be undertaken. Your recommendations however also state that you believe the work underway by the American Bankruptcy Institute's Task Force may be of limited value "...since the model statute is based on existing California law". I respectfully disagree. The fact that a number of practioners around the country believe the state of California law is substantially better that it exists elsewhere in the country should not limit the range of the proposal. In fact, the members of the Task Force agree with the Kollitz/McNutt comment regarding a bonding or insurance requirement.

I would appreciate being kept informed as to the progress of the Commission's actions in this area.

Very truly yours,

By Geoffrey L. Berman
Geoffrey L. Berman
Vice-President

Enclosure

\GLB:CLRC\Ulrich.402

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4 April, 1997

By Facsimile Transmission Only

Mr. Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

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APR 04 1997
File:

Re: ***Memorandum 97-7***
Correction to Correspondence of 2 April, 1997

Dear Mr. Ulrich:

In reviewing my letter to you of April 2, I found two items that needed correction. These are 1) in the third paragraph, I refer to the concept of a bond requirement is reasonable, "...so long as the requirement." The sentence should be completed with the phrase "...is not burdensome to the administration of each respective assignment case, or effectively eliminates the assignment from going forward.

The other correction is on the second page, last full paragraph, wherein I stated my agreement with Mr. Lapinski's statement as to your recommendation about revision to existing law. That sentence should read "I agree with Mr. Lapinski in his statement agreeing with your recommendation that a major codification should **NOT** be undertaken.

I apologize for the errors and appreciate your noting the corrected statements for the record.

Very truly yours,

By Geoffrey L. Berman
Geoffrey L. Berman
Vice President

VRB:bjddsh Ulrich 404

Reply to:

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MAILING: P.O. BOX 7740 • BURBANK, CA 91510-7740
TELEPHONE (818) 972-5300

FAX NUMBERS:
ADJUSTMENT BUREAU (818) 972-5301 • COLLECTIONS/ACCOUNTING (818) 972-5302
CREDIT INFORMATION SERVICES (818) 972-5303 OR (818) 972-5305

February 24, 1997

Direct Dial No. (818) 972-5315
e-mail address: gberman@cmaccom.com
BY FACSIMILE TRANSMISSION

Howard Kollitz, Esq.
Danning, Gill, Diamond & Kollitz
2029 Century Park East
Suite 1900
Los Angeles, CA 90067

Re: ***"Trust Them, This is an Assignment for the Benefit of Creditors"***

Dear Howard:

I read the article you and Scott McNutt authored for the Business Law *News* Fall 1996 issue. I assume that the positions you espouse in that article were the basis for the questions you raised to me earlier this past week in out telephone conversation, especially as considers the notice to creditors of the disposition of assets concept.

I think the concept that general assignments have regained some respect in the debtor-creditor community is without dispute. Certainly, the number of general assignments the Association has seen over the last few years has grown, as have the complexity of the distressed debtor. The Association has always been concerned with the quality of the parties that act in the assignee's capacity, for respect of the assignment as a viable alternative to Chapter 7 depends really on how well the least competent assignee performs as the fiduciary. The reality is that a debtor is the party that selects the fiduciary.

In many respects, the value of the California assignment process is that the overlay of the court system is not present. That enables the assignee to act with significantly more speed to preserve asset value and minimize costs. Your article suggests that because there is no court supervision, the process becomes ripe for abuse, whether it be by the assignee through the retention of professionals who overcharge an estate, an assignee who is overpaid or allows expenses to diminish the recovery by creditors. I don't see the difference here from chapter 7 trustees who spend every available dollar in an estate (when they get an estate with equity over a secured creditor claim). The bankruptcy court is no protection for unsecured creditors from trustees and their professionals. I don't believe court supervision is the answer.

The better answer is the marketplace (whether it be unsecured creditors who don't allow incompetent assignees from liquidating estates or lawyers representing debtors or secured creditors preventing the selection of an incompetent assignee) insuring that competent, qualified assignees administer estates. The capitalistic theory of the national economy will support those who act, in this instance, as a fiduciary should and should keep those who do not belong out of the business.

Your article reiterates the concept of notice to creditors in connection with the disposition of assets of the estate. The bulk transfer laws do not apply because the assignee is in a fiduciary capacity that is not otherwise present when a debtor sells out of the ordinary course. It is this responsibility the creditors have a right to rely on - so that the failure of the fiduciary is the act to give rise to liability. Those states that require court approval of the sale of assets on notice have lost the means to efficiently sell assets and some could argue are nothing more than a means for *lawyers* to ensure that they receive the lions share of an estate, for documenting the sale and getting the court approval. Where is the efficiency in that?

You also raise an issue as to the impact of the filing of a claim with an assignee. I believe the fact that certain assignees seek to have the filing of a claim in their respective assignment estates is deemed a "consent " to the assignment is a poor argument to change the system. I believe the "consent" issue is akin to the parking ticket stub one gets whenever one parks in a parking lot, namely a form of adhesion contract. Even if a creditor were to file a claim with an assignee that uses such language in its proof of claim, if that creditor felt the case was better served in a bankruptcy, it would join other petitioning creditors to see that eventuality become reality. Or, as an alternative, I would defer the filing of any claim until the 120 day period ran, which would still enable a claim to be filed within the statutory period of CCP Section 1802.

The concerns over the objection to claim process are speculative. Yes, in rare instances the assignee objects to a claim and that objection cannot be resolved. In that instance, the matter is interplead to the Superior Court. In all my years with the Association taking assignments, we have **never** had to take such a step. Business solutions are reached so that the estate as a whole does not suffer. I grant you that other assignees may not act in that manner, but should we legislate because a few do not protect the efficiency of the process?

Addressing the other areas of concern you have raised, I agree that those assignees who sell the assets of a distressed debtor to the principals of the assignor, without a public sale or notice to creditors, claiming that they have received an offer that "in their opinion is the best offer available", without any independent due diligence should be surcharged. The assignment process should not be used to effect a recapitalization of a business, at the expense of unsecured creditors.

The general assignment that becomes one for the benefit of a secured creditor should not be a reason by itself to void the general assignment. The use of a competent fiduciary, who validates the secured creditor claim and acts to effectively liquidate assets should be a protection in and of itself to all creditors rather than having the secured creditor foreclose and without any effective notice to the creditors of the debtor sell assets or even credit bid its debt. There is no law that says a general assignment must have value for unsecured creditors to be effective! Rather, an assignment must be of all assets of a debtor or it becomes a specific assignment and all of the powers granted an assignee fail. Further, because the assignment is of all assets, the assignee **must** follow the rules in place, including notice to creditors under CCP §1802. An assignee that effects a sale without advising creditors of that fact should not be an assignee. Further, your example ignores the question of recovery of potential preferential transfers, which are not subject to the secured lender's lien the same as in bankruptcy cases. If preferences are recoverable, that

value belongs to unsecured creditors, be it priority claims or general unsecured claims. Failure of an assignee to maximize value should result int he assignee being subject to breach of fiduciary duty allegations. Your last hypothetical raises an ethical question: should an assignee make an agreement with the principals of an assignor to resolve claims of the principals before it has accepted the responsibilities of being an assignee. I don't think so - it is a conflict of interest.

The proposed changes we have discussed before. The bond or insurance requirement does not affect the Association and if it will help keep those who are not financially responsible from acting as a fiduciary and doing so at the expense of the estate, then the idea has merit. But it will not stop someone from bleeding an estate for their personal gain and at the expense of creditors if enough money is at stake. Second, the propose notice requirement before the sale of assets is not workable. As we discussed, the fiduciary can not delegate the responsibility for the disposition of the assets. Notice only delays the process, adds professional fees where creditors seek input beyond their stake in the process and will eventually paralyze assignees from performing their fiduciary responsibilities. How can an assignee explain the complexities of litigation over something such as antitrust litigation, or legal malpractice, to the affected creditors without losing control over the litigation, opening the process to failure, added costs, breach of confidentiality clauses and more. I agree that assignee must be accountable, but not by having every decision approved in advance.

Lastly, requiring written reports to creditors is not necessarily objectionable (and of course is a practice the Association already adheres to). But giving creditors information, including a statement of condition of the assignor as of the date of the assignment and a statement of receipts and disbursements at the conclusion of the case administration should not replace the responsibility of the assignee to act as a fiduciary, in the best interests of all creditors of the estate.

No law will be foolproof and protect creditors from unscrupulous individuals who seek to gain from others. But proposing rules that keep the assignment process from being an effective alternative to a bankruptcy is legislating the alternative away. Lawyers make plenty of money in cases where bankruptcies are filed. Better we police the existing practices of practioners and enforce the need for financially responsible parties who act with the best interests of ***all*** creditors in mind.

Very truly yours,

By Geoffrey L. Berman, Assistant Secretary
and Manager, Adjustment Bureau

\GLB:psa\Kollitzl.215

cc: Scott McNutt, Esq.
Benjamin S. Seigel, Esq.

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MAILING: P.O. BOX 7740 • BURBANK, CA 91510-7740
TELEPHONE (818) 972-5300

FAX NUMBERS:
ADJUSTMENT BUREAU (818) 972-5301 • COLLECTIONS/ACCOUNTING (818) 972-5302
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April 2, 1997

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File:_____

Stan Ulrich, Asst. Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Memorandum 97-7

Dear Mr. Ulrich:

Thank you for the copy you sent on March 24 to Geoffrey L. Berman at this office, of Memorandum 97-7 relating to general assignments for the benefit of creditors.

Mr. Berman has left Credit Managers Association of California, but we remain deeply interested in the work of the Law Revision Commission concerning general assignments. Would you please note your records to continue to send information on this subject to us, but mark it to my attention rather than Mr. Berman's. Thank you.

We shall not attend the April 10 meeting of the Commission nor submit additional written comments for the Commission's review at this time, particularly because we agree substantially with the following staff conclusions as expressed in the final section of your Memorandum:

- "The staff does not think that a major codification effort should be undertaken."
- "The staff suggests focusing on particular problems and working with the GABC community and others to come to an appropriate resolution."

At this time we neither agree nor disagree with the other conclusions in the memo:

- "The staff believes the Commission should contract with an expert academic consultant to prepare a background study and advise the Commission."
- "The staff sees the question of expanding GABCs from a liquidation role to foster reorganization, subject to appropriate limitations, as a secondary study."

Thank you for continuing to keep us informed.

Yours very truly,

Richard Kaufman

Richard Kaufman, CAE
President

adj\LawRevCm.chg

OFFICES IN: **San Leandro (510) 632-7500 • Las Vegas (702) 259-2622 • Sacramento (916) 686-1222**

cc: John Lapinski, Esq.
Howard Kollitz, Esq.
Scott H. McNutt, Esq.
Benjamin S. Seigel, Esq.
David Gould, Esq.
Arthur A. Greenberg, Esq.
Leslie R. Horowitz, Esq.
The Hamer Group