BE CAREFUL WHAT YOU WISH FOR: ELEVENTH CIRCUIT FINDS THAT AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS CANNOT BE CONVERTED INTO A BANKRUPTCY WITHOUT SPECIFIC AUTHORIZATION

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By: Paul A. Avron and Zachary P. Hyman

The Eleventh Circuit's recent decision in Ullrich v. Welt (In re NICA Holdings, Inc.), Case No. 14-14685, 2015 WL 9241140 (11th Cir. Dec. 17, 2015) demonstrates the importance of carefully selecting legal regimes when deciding to place a company in an insolvency proceeding, such as an Assignment for the Benefit of Creditors ("ABC"), a bankruptcy proceeding, or possibly both with one as an alternative.

In Ullrich, Nica Holdings, Inc. ("Nica Holdings") executed an ABC, a state court liquidation proceeding which is an alternative to bankruptcy. "To establish an ABC, one irrevocably assigns their assets to another then the assignee in turn disposes of those assets in accordance with state law." Id. at *1. After executing an assignment agreement which tracked the language of the Florida ABC statute and receiving the assignment of all of Nica Holdings' assets, the Assignee elected to file a bankruptcy petition and place Nica Holdings in a chapter 7 case.

An interested party sought to dismiss the chapter 7 bankruptcy case, arguing that the Assignee lacked authority to file it. However, the bankruptcy court determined that the Assignee had the authority to file for bankruptcy because of broad power of attorney language in the assignment agreement. The interested party appealed the bankruptcy court's decision. On intermediate appeal, the District Court affirmed. Id. at *3.

On further appeal, the Eleventh Circuit noted that "[e]ntities may use the ABC process because it may be flexible, more private and less supervised than bankruptcy," and that an entity deliberately choses to pursue either an ABC or a bankruptcy proceeding. Id. at *6. It then found that Florida Statute § 727.104(b), the ABC Statute, did not contain the required language which authorized the Assignee to file Nica Holdings for bankruptcy. The assignment agreement at issue tracked closely the wording of the official form for assignments set forth in the ABC statute. Importantly, it also lacked specific language authorizing the Assignee to institute a bankruptcy proceeding for Nica Holdings.

After examining the actual assignment agreement, the Eleventh Circuit rejected the proposition adopted by the bankruptcy court that language in the power of attorney paragraphs of the assignment agreement permitted the Assignee to file for bankruptcy, as he was granted 'full power and authority' to do anything, including signing Nica Holding's name to 'any instrument in writing' — such as a voluntary bankruptcy petition." Id. at *7. The Eleventh Circuit found that such power was limited to acts necessary to carry on the ABC and did not permit the Assignee to unilaterally override the assignor's original choice of legal regime to liquidate Nica Holdings' assets. Id. The Eleventh Circuit made clear that "[t]o the extent any entity would ever to desire to

confer such a power in these circumstances [to subsequently place an assignor in an ABC proceeding into a bankruptcy proceeding], it must do so explicitly and plainly." Id. at 6.

The Ullrich decision demonstrates the importance of assessing alternative insolvency practices and procedures. The Eleventh Circuit's holding implies that a Florida assignee could initiate subsequent bankruptcy proceedings if there exists explicit and plain authorization to do so in the assignment document. To provide an assignee with the flexibility to choose remedies of liquidation, entities considering liquidation should therefore consider obtaining a board resolution in connection with an ABC to authorize the filing of any bankruptcy, and to include language in an assignment agreement memorializing that authorization. Id. at 6.

For more information about this topic, please contact the authors Paul Avron and Zach Hyman, on the firm's Business Reorganization Team.

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Paul A. Avron

Zachary P. Hyman