No Exit: When Chapter 11 Cannot Unwind a Functioning ABC

By David J. Kozlowski and Dawn R. Sudama

The assignment for the benefit of creditors (ABC) is having a moment. The Uniform Law Commission's 2025 Uniform Assignment for the Benefit of Creditors Act has been enacted in six states (AL, AZ, DE, IA, NE, and UT), while economic concerns are pushing distressed middle-market companies toward this faster and less expensive bankruptcy alternative. See Nelson Mullins Riley & Scarborough LLP, Delaware's New ABC Act and What It Means for Company Fiduciaries, Nelson Mullins (July 6, 2026). But with the resurgence of the ABC comes a predictable byproduct: forum fights.

When a debtor (or controlling principal) grows dissatisfied with the direction of a pending ABC, can a later-filed bankruptcy pull the assets back into federal court and start the wind-down over?

Judge Sean H. Lane's Aug. 14 decision in *In re Nussbaum Lowinger LLP*, 2026 WL 2364645 (Bankr. S.D.N.Y. 2026), supplies an answer that covers many cases: no, where the ABC has already done substantial work. The opinion assembles a coherent playbook on the interplay of Section 305 abstention, Section 543(d)(2)'s turnover excuse, and a bad-faith analysis under Section 1112. It also disposes of the contractual "right to terminate on bankruptcy" clause that practitioners routinely include in agreements.

Background: *In re Nussbaum Lowinger LLP*

The debtors were a commercial real estate law firm formed by Mark J. Nussbaum (Nussbaum). At some point the firm began hard-money lending, making liquidity-enhancement loans and short-term bridge loans with third-party funds flowing through the firm's escrow accounts against promises of substantial returns.

The assignee described the enterprise as, essentially, a Ponzi scheme run by Nussbaum and a since-deceased real estate operator that funneled hundreds of millions of dollars out of escrow. When the escrow accounts emptied in 2025, the firm collapsed, and Nussbaum was indicted and disbarred.

The wind-down began in June 2025, when Nussbaum executed a general assignment to ABCMN LLC under Article 2 of the New York Debtor and Creditor Law. Following the out-of-court assignment, in August 2025, the New York State court granted the assignee's petition and commenced the ABC proceeding.

Eight months later, the debtors filed the Chapter 11 cases. Four days after that, the debtors' chief restructuring officer sent a letter to the assignee purporting to terminate the assignment agreement. The assignee moved to dismiss, to abstain under Section 305, and to be excused from turning over the assets it held under Section 543(d)(2). The court granted the assignee's motion to dismiss for the reasons set forth below.

Abstention Turns on What the Assignee Has Actually Done

The court began with Section 305, the "extraordinary remedy" that permits dismissal only where both the debtor and its creditors would be better served in the other forum. Applying the seven-factor totality test drawn from *In re Paper I Partners*, 283 B.R. 661 (Bankr. S.D.N.Y. 2002), Judge Lane found the factors "overwhelmingly" favored abstention.

The decisive fact was the assignee's progress. Although the debtors argued the ABC had "stalled," the court found that contention was "flatly belied by the record." In a single year, the assignee established a bar date, conducted an investigation and depositions, filed a lawsuit against the estate of the alleged co-conspirator (among other lawsuits), negotiated over $16 million in settlements, and obtained default judgments exceeding $300 million.

Lane found that a Chapter 11 trustee, who would be "a stranger to these cases," would cost the estate significant time and money simply to "catch-up" to the assignee's existing command of the facts.

Helpfully, Lane drew a clean line against the leading contrary authority. In *In re Nogin Commerce*, 670 B.R. 711 (Bankr. S.D.N.Y. 2025), the court declined to abstain in favor of a pending ABC proceeding.

There, the assignment happened less than a month before the bankruptcy petition, and the ABC proceeding had not formally commenced. "Nothing substantial" had occurred. Nussbaum is the opposite: the assignment was executed roughly ten months before the petition, a formally commenced ABC proceeding was in place when the petition was filed, and since the assignment, the assignee had made significant progress, including obtaining concrete recoveries.

The takeaway for practitioners is that the abstention question is answered by a fact-intensive look at how far the state-law process has actually progressed, notwithstanding abstract comparisons of what the bankruptcy process can offer in a Ponzi case. Assignees should be building that record from day one of the assignment.

Section 543(d)(2) Turnover is Temporally Limited

Turnover is similarly fact-intensive, and runs on a tight clock. Section 543(d)(2) directs that a bankruptcy court "shall excuse" a custodian's turnover obligations where the custodian is an assignee who took possession more than 120 days before the petition, "unless compliance… is necessary to prevent fraud or injustice." The assignee here was appointed roughly eight months pre-petition, and the court found no basis for a fraud-or-injustice finding. In fact, Lane noted that forcing turnover would delay creditor distributions "to the detriment of everyone except Mr. Nussbaum."

The practical effect is that once turnover is excused, there are no assets for the bankruptcy court to administer. The estate is, functionally, empty. For assignees, the 120-day rule is a powerful shield that pairs well with a strong abstention record. For debtors and their principals, it means the window to reconsider forum is measured from the assignee's appointment, and it closes quickly.

The Termination Clause is Basically Decorative

The debtors' attempt to terminate the assignment agreement fell flat. They invoked a reservation that purported to allow the debtors to file for bankruptcy and terminate the assignment. Lane found this bankruptcy escape hatch largely illusory, rejecting the argument on three independent grounds, each of which is instructional.

First, a unilateral termination would effectively vacate the state court order appointing the assignee. The debtors offered, and the court independently found, no authority to support this. Once assented to by creditors, an assignment is irrevocable, and the transferred property sits in custodia legis; it cannot be clawed back "without the consent of the State Court being first obtained."

Second, and more broadly, parties cannot contract around the Bankruptcy Code. *Citing In re Intervention Energy Holdings*, 553 B.R. 258 (Bankr. D. Del. 2016), the court held that a contractual escape hatch cannot override Section 543(d)(2)'s mandatory "shall excuse." This is the holding to flag for anyone who drafts or reviews assignment agreements: the boilerplate reservation of a right to terminate upon a bankruptcy filing is, as against the turnover excuse, essentially unenforceable.

Third, the timing was fatal. The debtors' purported termination came four days after the petition, so the assignment was still in force when the estates were created. Terminating it would have been outside the ordinary course of business under Section 363.

That requires notice, a hearing, and court approval that the debtors never sought. Applying the vertical and horizontal tests, the court observed that a debtor that had ceased operations had no "ordinary course" to speak of, and that unwinding a year-old assignment would expose creditors to the very added delay and cost condemned in the abstention analysis.

Bad Faith as the Overlay

Having resolved the case on abstention and turnover, Judge Lane then addressed the assignee's Section 1112 argument and found cause for dismissal, noting that the totality pointed to "an intent to abuse the judicial process" rather than genuine reorganization.

The debtors were not operating, had no employees, and filed solely to "efficiently wind down" affairs already being wound down through the ABC. Tellingly, they filed only after the assignee sued to unwind asset diversions, and they installed a CRO handpicked by Nussbaum with familial ties to his former partner. Echoing *In re JJ Arch LLC*, 663 B.R. 258 (Bankr. S.D.N.Y. 2024), the court read the filing as forum shopping—an effort "to restart the process, with no plausible rationale other than to delay the discovery of additional assets."

The Practical Bottom Line

As ABCs grow in popularity as a bankruptcy alternative, Nussbaum will serve as a clear marker of how the SDNY (or at least, Judge Lane) approaches the collision. For assignees and the creditors who back them, the message is to move quickly and document progress: a formally commenced proceeding, real investigation, and actual recoveries convert Sections 305 and 543(d)(2) into a defensive wall.

For principals weighing a subsequent bankruptcy, the message is that timing controls. Neither a termination clause nor a post-petition letter will claw assets back once an assignee has taken possession and gone to work, and sufficient time has passed.

David J. Kozlowski is partner with Morrison Cohen's Bankruptcy, Restructuring & Governance practice. Dawn R. Sudama is an associate with the firm.