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BULK TRANSFERS: WHAT HATH THE UNIFORM COMMERCIAL CODE WROUGHT?

LEONARD LAKIN*

INTRODUCTION

Today, the law of bulk transfers is governed in all states, except Louisiana, by Article 6 of the Uniform Commercial Code. The purpose of this commentary is to examine the provisions and evaluate the effectiveness of Article 6 and to analyze the judicial response in the approximately twenty-five cases that have construed Article 6.

The experience and approach of the then forty-eight states, each of which previously had enacted what was generally termed a Bulk Sales Act, provided a foundation upon which the draftsmen of Article 6 were able to build. Aggressive lobbying by the National Associa-

* Associate Professor of Law, Bernard M. Baruch College, City University of New York; B.B.A., City College of New York, 1953; J.D., New York University School of Law, 1956; Member New York and Hawaii Bars; Co-Author of L. LAKIN & H. BERGER, A GUIDE TO SECURED TRANSACTIONS (1970); Author of numerous other articles and lecturer to professional groups.

1. Article 6, entitled "Bulk Transfers," consists of eleven sections. Although, shorter than the other substantive articles of the Code, Article 6 is considerably more detailed than the old bulk sales laws. Unless otherwise indicated, all Uniform Commercial Code citations contained herein are to the 1972 Official Text.

2. The term "Bulk Sales Acts" is a generic term descriptive of a class of statutes designed to prevent the defrauding of creditors by the secret sale in bulk of substantially all of a merchant's stock of goods. See 27 C.J. Fraudulent Conveyances § 881 (1922). The various Bulk Sales Acts were passed in rapid succession between 1896 and 1913. See generally Billig, Bulk Sales Laws: A Study in Economic Adjustment, 77 U. Pa. L. Rev. 72 (1928) [hereinafter cited as Billig]. Another writer on this subject categorized the principal forms of Bulk Sales Acts as the Pennsylvania, New York, Connecticut, or Montana form. W. MONTGOMERY, BULK SALES, A COMPARATIVE STUDY OF THE STATUTES AND DECISIONS 1, 11 (1925) [hereinafter cited as MONTGOMERY].

3. Professor Charles Bunn of the University of Wisconsin Law School, the Reporter for Article 6, began his work in 1947 and carried the Article through its
tion of Credit Men\(^4\) provided the impetus for the adoption of these acts by the several states. The Association was concerned with the increasingly frequent occurrence of dishonest debtors defeating their creditors by effective bulk sales to bona fide purchasers, vanishing with the proceeds, and leaving their unsuspecting creditors unpaid.\(^5\)

Those bulk sales statutes were not designed to prohibit a merchant from selling his stock of merchandise and fixtures to another but only to require that the seller’s creditors be given notice of the proposed sale. The statutory purpose of requiring notice to the seller’s creditors was to afford them an opportunity to examine the facts concerning the sale, to determine whether the proposed transfer was to be made in good faith and for adequate consideration, and then to protect their interests in accordance with local procedural rules.\(^6\)

Under the bulk sales statutes, once due notice of the proposed sale was given, the transfer could take place in most states with no more formality than required for any ordinary sale. However, even if adequate notice of the proposed transfer was given, the transfer could still be challenged by the seller’s creditors under the general provisions of the law of fraudulent conveyances, assuming the seller’s intent in transferring his stock in merchandise was to hinder, delay or defraud creditors.\(^7\)

Thus, what existed under pre-Code law was

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\(^4\) For a history of the work of the National Association of Credit Men in promoting adoption of bulk sales acts, see Billig, *supra* note 2, at 81–99.

\(^5\) The following cases, concerning bulk sales in which the creditors alleged that they were defrauded, are indicative of the situation giving rise to the need for bulk sales legislation: Nelms v. Steiner, 113 Ala. 562, 22 So. 435 (1897); Carl & Tobey Co. v. Beal & Fletcher Grocer Co., 64 Ark. 373, 42 S.W. 664 (1897); Bliss v. Crosier, 159 Mass. 498, 34 N.E. 1075 (1893); Schloss v. Estey, 114 Mich. 429, 72 N.W. 264 (1897); Wright v. Hart, 182 N.Y. 330, 346, 75 N.E. 404, 410 (1905) (Vann, J., dissenting); Fisher v. Stout, 74 App. Div. 97, 77 N.Y.S. 945 (1902). See also G. Glenn, *Fraudulent Conveyances and Preferences* § 309 (rev. ed. 1940).

\(^6\) Because the various Bulk Sales Acts placed serious restrictions on the free right to transfer property, attempts were made in certain states to have the Bulk Sales Act declared unconstitutional. The courts, relying upon the police power of the state, generally held the various Acts constitutional. *E.g.*, Kett v. Masker, 86 N.J.L. 97, 90 A. 243 (1914); Steele, Hopkins & Meredith Co. v. Miller, 92 Ohio 115, 110 N.E. 648 (1915); W. Tackabera Co. v. German State Bank, 39 S.D. 185, 163 N.W. 709 (1917); Cantrell v. Ring, 125 Tenn. 472, 145 S.W. 166 (1912); *Contra*, Block v. Schwartz, 27 Utah 387, 76 P. 22 (1904).

a patchwork quilt of forty-eight state legislative acts embroidered with approximately two thousand judicial decisions that could not be reconciled by rhyme or reason.8

Against this legislative backdrop and judicial framework, the draftsmen of the Bulk Transfers Article undertook to bring order out of chaos9 and to provide a uniform law that would protect creditors against two common forms of commercial fraud: (1) the merchant-debtor who sells his stock in trade to a friend for less than fair value, obtains a composition of creditors, and hopes eventually to re-enter the business and (2) the merchant-debtor who liquidates his stock in trade and absconds with the proceeds, leaving his creditors unpaid.10 As noted in the Official Comment to Article 6, "[t]he second form of fraud . . . represents the major bulk sales risk, and its prevention is the central purpose of the existing bulk sales laws and of this Article."11 Thus, functionally, the Bulk Transfers Article is designed to afford creditors a reasonable opportunity to secure and collect their claims.12

**WHAT CONSTITUTES A BULK TRANSFER**

Article 6 defines a bulk transfer as "any transfer in bulk and not in the ordinary course of the transferor's business of a major part of

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10. **Uniform Commercial Code** § 6-101, Comment 2. The first form of commercial fraud is within the purview of the Uniform Fraudulent Conveyance Act which is not affected by Article 6. The second form of commercial fraud is the evil that the various Bulk Sales Acts were designed to prevent.

11. **Uniform Commercial Code** § 6-101, Comment 4. The prophylactic mechanism contained in the Code, at least in those states not adopting section 6-106 providing for application of proceeds (see notes 160–175 infra and accompanying text), is the notice requirement. **Uniform Commercial Code** § 6-105, Comment 1. Beyond this, a creditor of a bulk transferor has no protection under Article 6 and must avail himself of the protection provided by other local statutes such as the Uniform Fraudulent Conveyance Act. See 3 R. Duesenberg & L. King, **Sales and Bulk Transfers Under the Uniform Commercial Code** § 15.04[3] (1972) [hereinafter cited as Duesenberg & King]; W. Hawkland, *A Transactional Guide to the Uniform Commercial Code* 831–32 (1964) [hereinafter cited as Hawkland]; **Uniform Commercial Code Commentary, Article 6: Rights of an Aggrieved Creditor of a Bulk Transferor**, 10 B.C. Ind. & Com. L. Rev. 281, 285 n.26 (1969) [hereinafter cited as Commentary].

the materials, supplies, merchandise or other inventory . . . of an enterprise subject to this Article." Inherent in this definition is the requirement that there be an actual transfer of property. Additionally, the Code expressly provides that the transfer must be "not in the ordinary course of the transferor's business." The definition of a bulk transfer is further restricted by the quantitative requirement that the transfer be of "a major part" of the described property and by the qualitative requirement that the property transferred in bulk be "materials, supplies, merchandise or other inventory."

**Transfer**

In *Danning v. Daylin, Inc.*, the Ninth Circuit, construing California law, considered the question of whether an exchange of inventory and fixtures for other inventory and fixtures constituted a transfer within the meaning of subsection 6-102(1). The transferor's trustee in bankruptcy challenged the exchange for noncompliance with the Bulk Transfers Article. The transferee defended on the theory that the exchange, being merely a replacement of assets of equivalent value and, thus, causing no depletion of inventory, did not operate to the detriment of the transferor's creditors. The transferee, therefore, contended that the exchange did not constitute a transfer under Article 6. The court, relying upon the scheme and purpose of Article 6, as well as extrinsic definitions of the term "transfer," rejected the transferee's argument:

Article 6 requires, however, that creditors be allowed to police bulk sales, to make certain that the consideration paid in return is indeed equal in value to the inventory transferred. [Transferee] would have the transferor act as the "policeman" of his own sale.

The dangers of a bulk transfer — either fraud or mere inadequacy of consideration — can as easily occur with an ex-

13. **Uniform Commercial Code** § 6-102(1). The words "in bulk" are not defined in the Code. However, the term "in bulk" would seem to describe a sale "where separating, counting, measuring, weighing or dividing in parcels, packages or barrels does not take place but where the mass and the heap are sold as one." Feldstein v. Fusco, 205 App. Div. 806, 809, 201 N.Y.S. 4, 6 (1923), *rev'd on other grounds*, 238 N.Y. 58, 143 N.E. 790 (1924).

14. The term "bulk transfer" is much broader than the frequently used pre-Code term "bulk sale." While every sale is a transfer, not every transfer is a sale. For example, a gift on a lease involves a transfer but not a sale.

15. **Uniform Commercial Code** § 6-102(1).

16. 488 F.2d 185 (9th Cir. 1973).

17. Specifically, the court stated: "[W]hile the term 'transfer' is not expressly defined in the California Commercial Code, it is defined elsewhere in California law and the Bankruptcy Act to include an exchange . . . Bankruptcy Act Section 1(30), 11 U.S.C. Section 1 (30) (1970)." *Id.* at 188.
change of assets as with a cash sale. When creditors have advance notice of a bulk sale, either for cash or assets, they can investigate before it is completed and then determine whether they should intervene. That the trustee in bankruptcy subsequently receives the exchanged assets, as he did here, is of small consolation to creditors if the assets are of less value or salability than those looked to by the creditors when they extended credit.  

Quantitative Requirement

Although subsection 6-102(1) defines a bulk transfer in terms of "a major part" of the described property, neither the Code nor the Official Comment offers any insight into what constitutes "a major part." Resort to the Bulk Sales Acts yields no more than four states that employed either the same or similar language in their Acts. In *Zenith Radio Distributing Corp. v. Mateer*, the only case interpreting a Bulk Sales Act utilizing this term, the court held that the sale of fifty percent of a business did not involve a major part of the seller's business. This holding was premised on the court's adherence to what it characterized as the clear and definite meaning of the word "major" — "greater or larger." While one commentator has suggested that the draftsmen of Article 6, by employing the term "major part," did not intend to adopt a standard of greater than fifty percent, the dictionary definition of "major" would seem to support the Illinois court's conclusion in *Zenith Radio*. Thus, more than fifty percent of the described property must be transferred to bring the transfer within the provisions of Article 6.

The California version of the Uniform Commercial Code substituted the words "substantial part" for "major part." This modi-
fication was necessary to preserve prior California case law holding that sales of approximately six percent,²⁶ fifteen percent,²⁷ and sixteen percent²⁸ of the total inventory constituted a "substantial part," thereby invoking the Bulk Sales Act. Two California Code decisions have held that sales of five percent²⁹ and twenty-five percent³⁰ of total inventory were substantial parts of the transferors' inventories and, thus, subject to the bulk transfer provisions of the California Commercial Code.

Moreover, the Code does not state whether a "major part" of the described property is to be determined on the basis of the value or the quantity of the described property. The more reasonable view, however, is that this term refers to the dollar value of the described property.³¹ While this position is favored by the Permanent Editorial Board for the Uniform Commercial Code,³² there have been no reported Code decisions on this question. In enacting Article 6, Idaho,³³ Iowa,³⁴ and Wisconsin³⁵ avoided this ambiguity by adding the words

26. Markwell & Co. v. Lynch, 114 F.2d 373 (9th Cir. 1940).
27. Jubas v. Sampsell, 185 F.2d 333 (9th Cir. 1950).
28. Schainman v. Dean, 24 F.2d 475 (9th Cir. 1928).
31. Under the bulk sales statutes having similar statutory language, the courts generally adopted a comparison of value test, comparing the value of the stock of inventory transferred with the value of the stock of inventory remaining in the transferor's possession. See Billig & Branch, The Problem of Transfers Under Bulk Sales Laws: A Study of Absolute Transfers and Liquidating Trusts, 35 Mich. L. Rev. 732, 742-45 (1935) [hereinafter cited as Billig & Branch]. Some courts, however, did not apply this test to the transfer of an independent unit of a chain business. When such a transfer occurred, a court may have considered the value of the goods of each unit as opposed to the value of the several units in their entirety. E.g., Young v. Lemieux, 79 Conn. 434, 65 A. 436 (1907), aff'd 211 U.S. 489 (1909). See generally Weintraub & Levin in Coogan, Hogan & Vagts, supra note 9, § 22.07; Lamey, supra note 12, at 69. Furthermore, certain courts held that successive transfers, not large enough individually to be subject to the bulk sales statutes, were to be considered as one transfer in determining whether a major or substantial part of the stock had been transferred. Thus, a sale of one type of stock and equipment to one party and a sale of another type of stock and equipment to a different party, the two sales constituting a major part of the seller's business and not being made in the ordinary course of business, were subject to the bulk sales law and were void where there was noncompliance with such law. E.g., Corrigan v. Miller, 338 Ill. App. 212, 86 N.E.2d 853 (1949). See also 3 R. Anderson, Uniform Commercial Code § 6-102(2), at 443-44 (2d ed. 1971) [hereinafter cited as Anderson]; Raff, Bulk Transfers Under the Uniform Commercial Code, 17 Rutgers L. Rev. 107, 108 (1962) [hereinafter cited as Raff].
32. See Commentary, supra note 11, at 281 n.4.
34. Iowa Code § 554.6102 (1967).
“in value” following “major part,” thereby plainly adopting the dollar value standard. The Permanent Editorial Board, adhering to its position that “major part” means dollar value, labeled this statutory amendment “redundant.”

Qualitative Requirement

Qualitatively, subsection 6-102(1) mandates that a transfer, to be within Article 6, involve “the materials, supplies, merchandise or other inventory” of an enterprise governed by the Article. Thus, transfers of investment securities, money, accounts receivable, chattel paper, contract rights, negotiable instruments, and things in action are not within the scope of Article 6. The courts, with rare exception, have had no difficulty recognizing the foregoing differences. For example, in Credithrift Financial Corp. v. Guggenheim, the court properly held that a transfer by a small loan company of its business, consisting of promissory notes, furniture and fixtures, and a small loan operating license, was not controlled by Article 6 because the “promissory notes and other items included in the transfer were not such ‘materials, supplies, merchandise or other inventory’ as are kept for sale in the ordinary course of business of a small loan company.”

The Code use of the phrase “materials, supplies, merchandise or other inventory” is more explicit and broader than the language of

36. PERMANENT EDITORIAL BD. FOR THE UNIFORM COMMERCIAL CODE, REP. NO. 2 at 105 (1965). For a well reasoned argument that the additional words, “in value” are material, see DUSENBERG & KING, supra note 11, § 15.02[1]. The authors cite the hypothetical case of a jeweler whose inventory consists quantitatively of a major portion of inexpensive costume jewelry and a minor portion of valuable jewelry, which value exceeds the value of the costume jewelry. The authors suggest that the Code’s omission of the value test in subsection 6-102(1) leaves open the possibility that a court might, contrary to the view of the Permanent Editorial Board, use the quantitative test rather than the value test. Interestingly, no Code decisions on this quantitative value test have been found. The prudent counsel, however, should comply with Article 6 when the transferor is transferring a major part of his inventory, measured quantitatively, while retaining a minor part of his inventory, which exceeds in value the major part transferred.

37. UNIFORM COMMERCIAL CODE § 6–102, Comment 3. The stated reason for their exclusion: “such transfers are dealt with in other articles, and are not believed to carry any major bulk sales risk.”


39. 232 So. 2d 400 (Fla. 1970).

40. Id. at 401. The various bulk sales laws were generally held not to apply to intangibles such as notes receivable. See Annot., 168 A.L.R. 762, 786–87 (1947) and cases cited therein.
the various Bulk Sales Acts; the pre-Code acts referred to "stock in trade,"41 "stock of goods, wares and merchandise,"42 "stock of merchandise,"43 and "merchandise or other goods and chattels of the vendor's business."44 The preceding phrases, thus, limited the applicability of the Bulk Sales Acts to transfers involving finished goods.45 The term "inventory," as used in the Code, expands the scope of the bulk transfer law. The Official Comment to the Code definition of "inventory" provides: "[t]he principal test to determine whether goods are inventory is that they are held for immediate or ultimate sale."46 In accordance with this test, both raw materials and goods-in-process, as well as finished goods, are brought within the ambit of Article 6.47

In addition, Article 6 stipulates that a transfer of equipment48 may, under limited circumstances, constitute a bulk transfer. Subsection 6-102(2) states: "A transfer of a substantial part of the equipment . . . of such an enterprise is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise."49 Here again, a quantitative determination must be made in each case. Apparently, a "substantial part," as used in connection with the transfer of

41. MONTGOMERY, supra note 2, at 23 (citing three states using this term).
42. Id. (citing twelve states and the District of Columbia using this term).
43. Id. (citing thirty states using this term).
44. Id. (citing two states using this term).
45. MONTGOMERY, supra note 2, at 24.
46. UNIFORM COMMERCIAL CODE § 9-109, Comment 3.
47. See UNIFORM COMMERCIAL CODE § 9-109(4), which states that goods are "inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business." The word "goods" also includes materials used or consumed in a business such as "fuel to be used in operations, scrap metal produced in the course of manufacture, and containers to be used to package the goods." UNIFORM COMMERCIAL CODE § 9-109, Comment 3.
48. UNIFORM COMMERCIAL CODE § 9-109(2) defines "equipment" as goods that are "used or bought for use primarily in business (including farming or a profession) or by a debtor who is a non-profit organization or a governmental subdivision or agency or if the goods are not included in the definitions of inventory, farm products or consumer goods." Comment 5 thereunder indicates "the principal definition of equipment is a negative one: goods used in a business (including farming or a profession) which are not inventory and not farm products. Trucks, rolling stock, tools, machinery are typical."
49. The California Commercial Code, contrary to the Uniform Commercial Code, provides that a transfer of equipment may be a bulk transfer even though there is no transfer of inventory. CAL. COMM. CODE § 6102(2) (West 1964). The Washington Code has a provision similar to the California modification: "A transfer of all or substantially all of the equipment of such an enterprise is a bulk transfer whether or not made in connection with a bulk transfer of inventory, merchandise, materials or supplies." WASH. REV. CODE ANN. § 62A.6-102(2) (1967).
equipment, may be less than a “major part,” the principal standard for determining whether a transfer of inventory is a bulk transfer. And, while it is not clear from the language of the Code whether “substantial part” refers to the value or the quantity of the transferor’s equipment, the more persuasive view holds that value is the litmus test. Typically, a transfer of equipment in bulk will involve trade fixtures. Unless made in connection with a transfer of inventory, a sale of trade fixtures is outside the coverage of Article 6. All Nite Garage, Inc. v. A.A.A. Towing, Inc., emphasizes this point by holding that the sale of a tow truck used to tow disabled or abandoned vehicles, not made in connection with a bulk transfer of inventory, is not governed by Article 6.

Enterprises Subject to Article 6

The provisions of Article 6 are restricted to those “enterprises ... whose principal business is the sale of merchandise from stock, including those who manufacture what they sell.” Unfortunately, despite the difficulty of determining the seller’s principal business, the Code does not define the term “principal business.” Nevertheless, only one Code decision has been found interpreting this phrase.

50. See Weintraub & Levin in Coogan, Hogan & Vagts, supra note 9, § 22.06[1][b] nn.52-54 and cases cited therein; Raff, supra note 31, at 108.

51. Some bulk sales legislation covered sales of fixtures. See, e.g., N.Y. Pers. Prop. Law § 44(1) (repealed 1964). See Montgomery, supra note 2, at 23-24 wherein the author lists twenty-nine states that specifically included fixtures in their bulk sales statutes and nineteen states and the District of Columbia that did not include fixtures in their bulk sales statutes. The Code definition of equipment, supra note 48, suggests that the word has a far broader meaning than the word “fixtures.”

52. See Hawkland, supra note 11, at 836. However, whether the bulk transfer of equipment alone is a fraudulent conveyance must be determined under non-Code law, typically the Uniform Fraudulent Conveyance Act.


54. Id. at 198, 452 P.2d at 905.

55. Uniform Commercial Code § 6-102(3). The term “enterprise” is not defined in the Code.

56. As stated in Dueenberg & King, supra note 11, § 15.02[2]: What the principal business of the enterprise is may present some difficulty of interpretation and application. No indication is given in the Code as to how a determination should be made in this connection. Thus, this is another situation where the terms are indefinite. A particular enterprise may be selling goods as a sideline of its major business, but in such a case or in any other case, is one expected to look at the percentage of the business, the gross receipts, the net profits, or anything else to determine what is the principal business of the enterprise in order to see if a particular transfer would fall within the scope of Article 6?
Danning v. Daylin, Inc.\textsuperscript{57} presented the interesting question of whether a transferor, a retail merchant at the time it purchased its inventory, ceased to be a retailer by subsequently divesting itself of its retail business and operating instead as the lessor of a chain of discount stores. The federal district court held that, at the time of the transfer of the inventory, the transferor was no longer engaged in the principal business of a retail merchant and, therefore, was not subject to the bulk transfer law of California.\textsuperscript{58} The Ninth Circuit reversed, stating:

The district court's conclusion emasculates the policies underlying the bulk transfer statute by allowing [the transferor] to acquire inventory as a merchant, change its principal business to that of lessor, and then dispose of its "merchant's inventory" in bulk without notice.

"While some bulk sales risk exists in [those businesses excluded from the scope of Article 6], they have in common the fact that unsecured credit is not commonly extended on the faith of a stock of merchandise." . . . In the present case, credit was presumably extended on the faith of [the transferor's] stock. Since protection of creditors is the main concern of Article 6, [the transferor's] subsequent change of business to that of a lessor should not affect its duty to notify creditors who extended credit while it was a retail merchant.\textsuperscript{59}

Relying upon the rationale that "unsecured credit is not commonly extended on the faith of a stock of merchandise,"\textsuperscript{60} Article 6 departs from several Bulk Sales Acts which had expressly covered certain specified service enterprises.\textsuperscript{61} However, although the drafts-

\textsuperscript{57} 488 F.2d 185 (9th Cir. 1973).
\textsuperscript{58} Id. at 187-88.
\textsuperscript{59} 488 F.2d at 188 (quoting from Uniform Commercial Code § 6-102, Comment 2). Additionally, the appellate court noted:

We have found only two cases that have considered situations analogous to this, and both support our analysis. They held that the mere fact that a merchant terminates his business or engages in other lines of employment does not free him from the requirements of a bulk sales statute as applied to the sale of stock of his former business. Davidson v. Heyman, 243 App. Div. 546, 275 N.Y.S. 870 (1934); Teich v. McAuley, 212 S.W. 979 (Tex. Civ. App. 1919).

\textsuperscript{60} Uniform Commercial Code § 6-102, Comment 2.

\textsuperscript{61} The Washington Bulk Sales Act, in 1943, was extended to cover restaurants, cafes, beer parlors, taverns, hotels, clubs, or gasoline stations. Wash. Stat. Ann. Section 5832 \textit{et seq.} (1932), \textit{as amended}, Wash. Laws 1943, c. 98 (revised as Wash. Rev. Code Ann. § 63.08 \textit{et seq.}; repealed 1967). The statutes of other states, by including sales of only equipment, brought service enterprises within the ambit of the bulk sales law. E.g., N.Y. Pers. Prop. Law § 44(1) (repealed 1964). Where the Bulk Sales Act did not expressly include a specified service enterprise, the tendency
men intended to exclude service enterprises from the requirements of Article 6, six states have similarly amended their bulk transfer provisions to include restaurants and other specified service enterprises.

Finally, a limited number of manufacturers are covered by Article 6. The words "including those who manufacture what they sell" in subsection 6-102(3) could be interpreted to encompass all manufac-

of the courts was to hold that the bulk sales law did not apply to businesses that sold services rather than merchandise. See, e.g., O'Connor v. Smith, 188 Va. 214, 49 S.E.2d 310 (1948).


63. California's version of subsection 6-102(3) subjects the following types of enterprises to the provisions of Article 6: "that of a baker, cafe or restaurant owner, garage owner, cleaner and dyer, or retail or wholesale merchant." CAL. COMM. CODE § 6102(3) (West 1964). The Idaho section includes "hotel, restaurant, barber shop or beauty salon business, whether or not said business is the sale of merchandise from stock." 28 IDAHO CODE § 28-6-102(3) (1967). In 1970, New York amended section 6-102(1) to read: "'Bulk Transfer' shall also include a transfer out of the ordinary course of business of a major part of the goods, wares and merchandise of a restaurant and other food dispensing establishment." N.Y.U.C.C. § 6-102(1) (McKinney 1974). Oregon amended subsection 6-102(3) in a similar fashion by adding the phrase "restaurants or other food dispensing establishments," ORE. REV. STAT. § 76.1020(3) (1963). Finally, the Washington Code provides: "[t]he enterprises subject to this Article are all those of a vendor engaged in the business of buying and selling and dealing in goods, wares or merchandise, of any kind or description, or in the business of operating a restaurant, cafe, beer parlor, tavern, hotel, club or gasoline service station." WASH. REV. CODE ANN. § 62A.6-102(3) (1967).

64. UNIFORM COMMERCIAL CODE § 6-102(3).
turers because every manufacturer must sell its products. However, the quoted words modify the scope of “all those whose principal busi-

ness is the sale of merchandise from stock.” Therefore, the words “including those who manufacture what they sell” should mean that only those manufacturers, such as a bakery, who are principally en-
gaged in the sale of merchandise from stock are subject to Article 6. The Code, thereby, broadens the description of businesses that were covered under the various Bulk Sales Acts which had generally ex-
cluded manufacturers.

Not in the Ordinary Course of Business

The verbiage found in the Code, “any transfer in bulk and not in the ordinary course of the transferor’s business,” closely parallels the terminology of many Bulk Sales Acts which designated a transfer as being in bulk if made “otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller’s business.” Unfortunately, neither the Code nor the Bulk Sales Acts defines “ordinary course of business.”

The cases under the various Bulk Sales Acts were often con-

tradictory. For example, a New York court held a single sale of 1,300 pairs of shoes to be in the ordinary course of business while a Mississippi court determined that a business, preparing to change its location, that sold a portion of its stock of dresses was subject to the state’s Bulk Sales Act. One federal court, faced with the question twice in the same year, demonstrated the difficulty of interpreting

65. See Hogan, The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code, 48 CORNELL L.Q. 1, 36 (1962) [hereinafter cited as Hogan].

66. See HAWKLAND, supra note 11, at 839; Shanker, Bulk Transfers under Article 6 of the Uniform Commercial Code, 67 COM. L.J. 249, 250 (1962).

67. See, e.g., Frederick v. Dettary Eng’r Co., 318 Mich. 252, 28 N.W.2d 94 (1947). Occasionally, wholesalers were also found to be beyond the scope of a Bulk Sales Act. See, e.g., Connecticut Steam Brownstone Co. v. Lewis, 86 Conn. 386, 85 A. 534 (1912).

68. UNIFORM COMMERCIAL CODE § 6-102(1) (emphasis added).

69. For a comprehensive discussion of the phrase “out of the ordinary course of trade” as used in the pre-Code laws, see Miller, Bulk Sales Laws: Meaning to be Attached to the Quantitative and Qualitative Requirements Phrases of the Statutes, 1954 WASH. U.L.Q. 283, 298–312 [hereinafter cited as Miller].

70. See Weintraub & Levin in COOGAN, HOGAN & VAGTS, supra note 9, § 22.06[4]. The phrase “buyer in ordinary course of business” is defined by UNIFORM COMMERCIAL CODE § 1-201(9), but this definition is not applicable to bulk transfers because the definition provides that the term “buying” does not include a transfer in bulk.


72. Cohen v. Calhoun, 168 Miss. 34, 150 So. 198 (1933).
"ordinary course of business." Applying the Alabama statute, the court held the sale by an automobile dealer of approximately fifty percent of his automobiles, together with a substantial inventory of repair parts, to be in the ordinary course of business. The court appeared to rely upon the common practice among automobile dealers of trading between themselves. Thereafter, the same court applied the Georgia Act to a sale by a dealer involving twenty-three automobiles out of a total stock of between twenty-five and thirty cars. This sale was held to be outside the ordinary course of business seemingly because it involved substantially all of the seller's stock.

There is every reason to expect that, under Article 6, courts will continue to face difficulty in deciding whether a particular transfer has been made in the "ordinary course of the transferor's business." The pre-Code cases, however, do suggest one crucial factor: whether the transferee is within the class of customers with whom the transferor usually deals on a volume basis. Thus, in Pastimes Publishing Co. v. Advertising Displays, the court properly held the sale of an entire inventory of books by one publisher to another to be outside "the ordinary course of the transferor's business" and ineffective for non-compliance with Article 6.

Exceptions

The Code, in section 6–103, excepts eight types of bulk transfers from its coverage, thereby eliminating the requirement of compliance with Article 6. Subsections 6–103(1) through (5) and subsection

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74. Id.
76. Id. at 145.
77. See Note, Transactions Within the Bulk Transfer Acts and Creditors Protected Thereby, 43 IOWA L. REV. 572, 576 (1958). See also Miller, supra note 69, at 302. Professor Miller suggests additional factors to be considered: state of mind of the seller, solvency of the seller, and the seller's ability to continue in business after the transfer.
78. 6 Ill. App. 3d 414, 286 N.E.2d 19 (1972).
79. Id. at 416, 286 N.E.2d at 21.
80. UNIFORM COMMERCIAL CODE § 6-103 reads:

The following transfers are not subject to this Article:
(1) Those made to give security for the performance of an obligation;
(2) General assignments for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder;
(3) Transfers in settlement or realization of a lien or other security interest;
(4) Sales by executors, administrators, receivers, trustees in bankruptcy, or any public officer under judicial process;
(5) Sales made in the course of judicial or administrative proceedings for the dissolution or reorganization of a corporation and of which notice is sent
6-103(8), codify, without material change, the pre-Code law of most
states.81 But, subsections 6-103(6) and (7) represent major and
desirable changes in the law of bulk transfers.

Subsection 6-103(6) offers an alternative to compliance with
the formalities of Article 6 where there is a need for an expeditious
transfer. To come within this exception, a bulk transfer must comply
with four stated conditions: (1) the transferee maintains a known
place of business in the state, (2) the transferee becomes bound to
pay the debts of the transferor in full, (3) the transferee gives public
notice of that fact,82 and (4) the transferee is solvent after becoming
to the creditors of the corporation pursuant to order of the court or administrative
agency;

(6) Transfers to a person maintaining a known place of business in this
State who becomes bound to pay the debts of the transferor in full and gives public
notice of that fact, and who is solvent after becoming so bound;

(7) A transfer to a new business enterprise organized to take over and
continue the business, if public notice of the transaction is given and the new
enterprise assumes the debts of the transferor and he receives nothing from
the transaction except an interest in the new enterprise junior to the claims
of creditors;

(8) Transfers of property which is exempt from execution.

Public notice under subsection (6) or subsection (7) may be given by
publishing once a week for two consecutive weeks in a newspaper of general
circulation where the transferor had its principal place of business in this state an
advertisement including the names and addresses of the transferor and transferee and
the effective date of the transfer.

81. See Hawkland, supra note 11, at 843. Under the various bulk sales statutes,
the law was not uniform in deciding whether “bulk mortgages” should be subject
to the bulk sales provisions. In the absence of a bulk mortgage act, courts usually
exclude mortgages from the bulk sales law by reasoning that, when a mortgage is
executed, the transferor’s interest in the mortgaged property is not terminated and
further that the purpose of the mortgage is to continue, rather than end, the operation
of the business. E.g., Farrow v. Farrow, 136 Ark. 140, 206 S.W. 134 (1918);
Appel Mercantile Co. v. Kirtland, 105 Neb. 494, 181 N.W. 151 (1920). Some courts,
however, held to the contrary. E.g., Citizens State Bank v. Rogers, 155 Kan. 478,
126 P.2d 214 (1942). Uniform Commercial Code § 6-103(1) expressly excludes
any transfer “made to give security for the performance of an obligation” because
security interests in all kinds of personal property are regulated by Article 9 of the
Code. California, in adopting Article 6, departed from the proposed text by providing
that the grant of a security interest in bulk, except purchase money security interests
both in inventory of durable goods having a unit value of at least $500 and in
inventory of a wholesale merchant, constitute a “transfer” governed by the bulk

82. Uniform Commercial Code § 6-103 requires that such notice must be
published once a week for two consecutive weeks “in a newspaper of general circulation
where the transferor had its principal place of business.” The advertisement must
include the names and address of the transferor and transferee and the effective
date of the transfer. If there is no qualifying newspaper where the transferor
has his place of business, then the newspaper to be used is determined by provisions
contained in Article 1 as well as any other applicable state statute. Prior to 1962,
the Code did not define what was meant by public notice. This omission was noted
so bound. Obviously, if these four conditions are met, the transferor's creditors are not and can not be injured by noncompliance with the requirements of Article 6. The creditors should not complain; they have a direct action against a known solvent party as well as their original claim against the transferor whose debts are not discharged by his transfer in bulk. There is, therefore, no justifiable reason to subject the bulk transfer to the "delay and red tape" imposed by Article 6.

Despite the draftsmen's attempt to achieve clarity by stating four specific requirements for compliance with subsection 6-103(6), two ambiguities persist. The failure of Article 6 to delineate those debts that the transferee must assume or to state how long the transferee must remain solvent following the transfer may produce litigation over the applicability of this exception to a particular bulk transfer. Neither of these questions has yet been judicially answered.

Subsection 6-103(7) is concerned with bulk transfers that are made in connection with formal changes in the business organization of an enterprise. Such a change might occur, for example, either by incorporation of a business previously conducted as a sole proprietorship or partnership or by change in the composition of a partnership.

Under the various pre-Code laws, there was a diversity of judicial opinion as to whether such bulk transfers had to comply with the Bulk Sales Acts. A majority of courts held that a transfer of a partnership interest to an existing partner was not within the bulk sales law because such a transfer did not involve a direct exchange of any tangible assets but merely the reapportionment of an intangible right to share in the proceeds of the firm after payment of the partnership

in the New York study of the Code. See Leg. Doc. No. 65(G) at 1743-44. The Permanent Editorial Board then recommended adoption of a provision for public notice. Report No. 1, PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 29 (1962). A 1962 amendment to section 6-103, which now constitutes the last full sentence of this section, cured the omission. For a criticism of the earlier omission see Steingold, Bulk Sales and the Uniform Commercial Code, 59 Com. L.J. 92, 96 (1954). Although section 6-103 does not state when the public notice should be given, it is submitted that such notice should be made upon the occurrence of the transfer. One commentator has suggested that the publication of such notice "should take place a reasonable time after the transfer." Weintraub & Levin in COOGAN, HOGAN & VAGTS, supra note 9, § 22.08[4]. No Code decisions have been found in which the validity of the public notice was challenged.

83. See HAWKLAND, supra note 11, at 843.
84. See id. Forgey, Bulk Transfers, 29 Mo. L. Rev. 449, 453 (1964) [hereinafter cited as Forgey].
85. UNIFORM COMMERCIAL CODE § 6-103, Comment 4.
86. See DUESENBERG & KING, supra note 11, § 15.03[5].
87. UNIFORM COMMERCIAL CODE § 6-103, Comment 5.
debts. However, many courts distinguished the case of a sale by a partner to an outsider, who thereby became a partner in the existing firm. This latter transfer was generally considered within the purview of the bulk sales laws. Additionally, the process of incorporation was usually held to be a transfer subject to bulk sales laws, even though creditors could proceed against the corporate stock owned by the transferor.

The Code declares that bulk transfers made in connection with formal changes in business organizations must comply with Article 6. Subsection 6–103(7), however, provides a mechanism for excepting such bulk transfers if: (1) the new enterprise is organized to take over and continue the business, (2) public notice of the transaction is given, (3) the new enterprise assumes the debts of the transferor, and (4) the transferee receives nothing from the transaction except an interest, junior to the claims of creditors, in the new enterprise. Here again, if these four conditions are met, the exception from Article 6 is justified because the transferor's creditors neither are, nor can be injured, by noncompliance with the requirements of Article 6.

The eight exceptions provided in section 6–103 are exclusive; any bulk transfer not within one of these exceptions must comply with

91. Some jurisdictions held that incorporation did not amount to a bulk transfer because the creditors could reach the processes of the corporate stock. Maskell v. Spokane Cycle & Auto Supply Co., 100 Wash. 16, 170 P. 350 (1918); McLean v. Miller Robinson Co., 55 F.2d 232 (E.D. Pa. 1931).
92. See UNIFORM COMMERCIAL CODE § 6-102(1).
93. See note 82 supra.
94. Here again, the failure of Article 6 to define "debts" may present the same problem discussed in the text accompanying note 86 supra. No Code decisions have been found in which this particular exclusion has been challenged.
95. UNIFORM COMMERCIAL CODE § 6–103, Comment 5. The Louisiana Bulk Sales Act expressly recognized this exception. LA. REV. STAT. § 9–2965 (1930). When the Bulk Sales Act was silent, the pre-Code decisions were in conflict as to whether the statute applied to a transfer to a new business entity. Compare Maskell v. Spokane Cycle & Auto Supply Co., 100 Wash. 16, 170 P. 350 (1918) (transfer not covered by Act), with Sakelos & Co. v. Hutchinson Bros., 129 Md. 300, 99 A. 357 (1916) (transfer covered by Act). See generally Billig & Smith, Bulk Sales Laws: Transactions Covered by These Statutes, 39 W. Va. L.Q. 323 (1933).
Article 6. Further, when a bulk transfer is challenged for noncompliance with Article 6, although the Code is silent, two courts have held that the burden is on the defendant (transferor, transferee or both) to plead as an affirmative defense that compliance is not necessary because the bulk transfer falls within a specified exception.96

**COMPLIANCE WITH ARTICLE 6**

The Code prescribes, in detail, the duties of the transferor and transferee in a bulk transfer.97 Primarily, Article 6 requires, for the bulk transfer to be effective, that the transferee give notice of the impending transfer to the creditors of the transferor.98 To further effectuate the purpose of Article 6, prevention of commercial fraud, subsection 6-104(1) stipulates that a bulk transfer99 will not be effective against any of the transferor's creditors unless:

(a) The transferee requires the transferor to furnish a list of his existing creditors . . . ; and

(b) The parties prepare a schedule of the property transferred sufficient to identify it; and

(c) The transferee preserves the list and schedule for six months next following the transfer and permits inspection of either or both and copying therefrom at all reasonable hours by any creditor of the transferor, or files the list and schedule in [a designated public office].100


97. The Bulk Transfers Article will be applied to a transfer according to the law of the state where the goods are located irrespective of the residence or principal place of business of the transferor or the transferee. UNIFORM COMMERCIAL CODE § 6-102(4). The parties can not change this conflict of laws rule. UNIFORM COMMERCIAL CODE § 1-105(2). The rationale for this restriction has been explained as follows: "[A]lthough as between themselves the parties to an agreement for sale of property may lawfully agree as to governing law, nevertheless where the rights of third party creditors are involved the law of the situs of the property is controlling." Weintraub & Levin in COOGAN, HOGAN & VAGTS, supra note 9, § 22.05[1][a].

98. UNIFORM COMMERCIAL CODE § 6-105.

99. Auction sales, which are dealt with in section 6-108, are excepted from the provisions of section 6-104. See notes 176-192 infra and accompanying text.

100. The designated office in Maryland is "the office of the clerk of the circuit court in the county, or of Superior Court of Baltimore City, in which the property was located at the time of transfer." Md. ANN. Code art. 95B, § 6-104(1)(c) (1964 Repl. Vol.).
The List of Creditors and the Schedule of Property

Although Article 6 does not expressly state when the list of creditors must be prepared, section 6-105, pertaining to notice, indicates that this list should be compiled at least ten days before the transferee either takes possession of or pays for the goods. The list of creditors must be signed and sworn to or affirmed by the transferor or his agent. It must contain the names and business addresses of all creditors of the transferor, with the amounts when known, and also the names of all persons who are known to the transferor to assert claims against him even though such claims are disputed.

Subsection 1-201(12) delineates the general scope of the word “creditor”:

“Creditor” includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

This delineation is restricted by subsection 6-109(1) to those creditors “holding claims based on transactions or events occurring before the bulk transfer . . . .” Thus, the creditors who must be enu-
merated in the list of creditors include literally all creditors, whether merchandise creditors, personal creditors or otherwise, who have liquidated or unliquidated claims against the transferor, whether secured or unsecured, fixed or contingent, matured or unmatured. This broad definition of creditor has been criticized by several commentators, and at least one leading writer has urged that Article 6 be amended to limit "creditors" to "business creditors only."

The requirement of subsection 6-104(2) that the transferor swear to the accuracy of the list of creditors invokes the criminal sanctions for false swearing. The same criminal sanctions existed under a number of Bulk Sales Acts which declared a falsely sworn statement, knowingly made in connection with the preparation of a list of creditors, to constitute perjury.

The Code substantially adopts the earlier law as to the legal effect of an incomplete or inaccurate list of creditors upon the validity of a bulk transfer. Under the Bulk Sales Acts, the courts generally held


The list of creditors must also include any federal, state or local government claims for taxes. One writer has suggested that taxing agencies are the creditors most frequently omitted from the list. Note, Bulk Transfers — An Analysis of the Changes in New York Law, 11 N.Y.L.F. 112, 119 (1965). On this subject, Professor Lamey further states:

Now in view of the many, many various types of tax today imposed upon business, it would seem to follow that every buyer should appreciate the possibility that one government or the other — federal, state or even local — is possibly a creditor, at least a contingent creditor, of the seller; and consequently, if the sworn list of creditors does not refer to this tax problem, it seems to me that a well-advised buyer would nonetheless see to it that the appropriate taxing authorities were notified of the prospective transfer, because in [United States v. Goldblatt, 128 F.2d 576 (7th Cir. 1942)] the Circuit Court of Appeals held that today each businessman is in fact put on constructive notice of the possibility of such tax delinquency and consequently may well find himself charged with a failure to comply with the notice requirement in the statute.

Lamey, supra note 12, at 71.


109. See Montgomery, supra note 2, at 46 (citing nineteen states including criminal penalties in their bulk sales statutes for a seller who knowingly and willfully makes a false statement).
where the transferor accidentally or intentionally failed to list any of his creditors, the sale could not be set aside as fraudulent if the transferee acted in good faith and complied with the Act by notifying all creditors included in the list provided by the transferor. One court explained this rule as follows: "[I]f the vendor furnishes a false list, he goes to prison, but the vendee, acting in good faith, and with reasonable diligence is not to be mulcted because he has been deceived." Subsection 6–104(3), in following this pre-Code law, provides: "Responsibility for the completeness and accuracy of the list of creditors rests on the transferor, and the transfer is not rendered ineffective by errors or omissions therein unless the transferee is shown to have had knowledge.

What constitutes the transferee's "knowledge" that the list of creditors contains "errors or omissions"? The general definition section of the Code provides that "a person 'knows' or has 'knowledge' of a fact when he has actual knowledge of it." This narrow definition of "knowledge" would seem to indicate that subsection 6–104(3) does not impose upon the transferee a duty to inquire as to the accuracy of the list of creditors. In Adrian Tabin Corp. v. Climax Boutique, Inc., a New York appellate court, in a 3–2 decision, agreed with this assumption. A creditor of the transferor alleged that the bulk sale was ineffective because the transferee, who had received an affidavit of "no creditors" from the transferor and had no actual knowledge of the creditors, failed to inquire as to the possible existence of any creditors. The trial court, noting "that the purchasers had not requested an examination of the seller's books and had not questioned the source of the garments involved in the sale," held that, by failing to make a careful inquiry of the seller as to existing creditors, the purchasers had acted at their own peril. The lower court, therefore, set aside the sale. The appellate court reversed, finding that the New York pre-Code decisions, imposing a duty to inquire upon the purchaser, were not applicable under Article 6. The court based its decision on the lan-

110. See generally, Annot., 83 A.L.R. 1140 (1933).
112. UNIFORM COMMERCIAL CODE § 1–201(25).
114. Id. at 148, 338 N.Y.S.2d at 61.
115. Id. The dissent, relying in part upon the prior New York case law, argued: [A] purchaser or transferee of the entire stock of a going business knows the seller more than likely has some creditors. He should at least inquire into the sources of the inventory. Otherwise, the opportunity for fraud upon creditors is too great.

Id. at 150, 338 N.Y.S.2d at 63.
guage of subsection 6-104(3), expressly providing that a transfer is not rendered ineffective by errors or omissions in the list of creditors unless the transferee is shown to have had knowledge. The court stated:

As the purchasers concededly had no actual knowledge of the plaintiff, the possibility of whose existence as a creditor was denied by the seller in an affidavit (the purchasers having no reason to disbelieve the truthfulness of the affidavit), the bulk sale may not be set aside as to the plaintiff.\(^{118}\)

Nevertheless, the prudent attorney would be well advised to file a "request for information"\(^{117}\) with the Secretary of State and with the appropriate county office to verify that all persons claiming security interests in the transferor's property have been included in the list of creditors.

With respect to the schedule of property\(^ {118}\) involved in a bulk transfer, subsection 6-104(1)(b) requires that "[t]he parties prepare a schedule of the property transferred sufficient to identify it."\(^ {119}\) This rule represents an improvement over some Bulk Sales Acts which required the seller to make a detailed inventory showing the cost of each article included in the sale.\(^ {120}\) This burdensome task, compelling the seller to disclose the cost price of each article to the buyer, is abolished by the Code. No longer will "every paper of pins or fine tooth comb . . . have to be inventoried . . . \(^ {121}\)

Compliance with the Code formalities for the schedule of property transferred is not difficult. The responsibility for the accuracy and completeness of the schedule of property, unlike the list of creditors,

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117. Request for information or copies — Form U.C.C.-11.

118. See Hart & Willier, supra note 101, at 6-143 for a form 6-6 for the schedule of property.

119. Although not required to be a "serial number" list, the schedule should contain more than a general description of the transferred property. A description that reasonably identifies or makes identification possible should be sufficient. See Duesenberg & King, supra note 11, § 15.04[2]. Article 6 does not require that the schedule of property be sworn to or signed.

120. See, e.g., Mich. Comp. Laws § 442.1 (1948) (repealed 1964) ("[T]he seller . . . and purchaser . . . shall . . . make a full detailed inventory, showing the quantity and, so far as possible with the exercise of reasonable diligence, the cost price to the seller . . . of each article to be included in the sale.").

lies with both the transferor and the transferee.\textsuperscript{122} In practice, the transferee is not prejudiced by this sharing of responsibility. If the transferee is aware of what he is purchasing, he may easily compare this with the schedule of property and, thereby, verify the correctness of the schedule. Additionally, the schedule of property must be prepared in time to be available for examination by the creditors entitled to notice of the transfer — a minimum of ten days before the transfer.\textsuperscript{123} This schedule does not have to be sent to each creditor; the Code permits the transferee to send a "general description of the property to be transferred"\textsuperscript{124} to each creditor rather than a detailed listing.

Once the list of creditors has been furnished to the transferee and the necessary schedule of property has been prepared by the parties, the Code requires that the transferee must either: (1) preserve the list and schedule for six months following the transfer and permit inspection and copying therefrom at all reasonable hours by any creditor of the transferor or (2) file the list and schedule in a designated public office.\textsuperscript{125} Although the six month preservation requirement is phrased in terms of the transfer date, the Code does not define this date. A reasonable interpretation would be that the transfer occurs on the date that title to the property is conveyed to the transferee.\textsuperscript{126}

**Notice to Creditors**

The heart of Article 6 is the requirement that the transferee give due notice of the bulk transfer, except one made at an auction sale,\textsuperscript{127} in the manner and to the persons specified in section 6-107 at least ten days before he pays for or takes possession of the goods, whichever occurs first.\textsuperscript{128} Section 6-107 stipulates that in specified cases

\begin{itemize}
  \item \textsuperscript{122}See Anderson, supra note 31, \S 6-104:5, at 460; Lamey, supra note 12, at 71. The transferee is primarily responsible for the accuracy of the schedule of property. If the schedule of property contains inaccuracies or omits property in fact transferred, the transferee cannot assert lack of knowledge as a defense. No Code decisions have been found in which a bulk transfer was challenged on the ground that a schedule of property was legally defective.
  \item \textsuperscript{123}See Hogan, supra note 65, at 38.
  \item \textsuperscript{124}Uniform Commercial Code \S 6-197(2) (a).
  \item \textsuperscript{125}Uniform Commercial Code \S 6-104(1) (c). Arkansas, California and Colorado have eliminated the option of filing in a designated public office. See 2 Uniform Laws Annotated 464-66 (1968). Colorado requires that the list and schedule be filed with the Secretary of State if the address where the documents are to be preserved is not within the state. Colo. Rev. Stat. Ann. \S 155-6-104(1) (c) (1963).
  \item \textsuperscript{126}See Hawkland, supra note 11, at 849.
  \item \textsuperscript{127}See notes 176-192 infra and accompanying text.
  \item \textsuperscript{128}Uniform Commercial Code \S 6-105, Comment 1. By comparison, the amount of notice required under the various bulk sales statutes ranged from as
either a short or long form of statutory notice of the bulk transfer shall be given by the transferee "to all the persons shown on the list of creditors furnished by the transferor . . . and to all other persons who are known to the transferee to hold or assert claims against the transferor." Failure to comply with this notice provision renders the bulk transfer "ineffective against any creditor of the transferor," thereby, subjecting the goods in the possession of the transferee to the claims of the unpaid creditors of the transferor.

The transferee shall provide the statutory notice in accordance with the short form only when "all debts of the transferor are to be paid in full as they fall due as a result of the transaction." The short-form notice must state: (1) that the bulk transfer is about to be made, (2) the names and business addresses of the parties involved and all other business names and addresses known by the transferee to have been used by the transferor within the past three years, and (3) that the debts of the transferor will be paid in full as they fall due and the address to which creditors should send their bills for payment.

Although attractive because of its simplicity, the short form of notice generally will not furnish the transferee with a practical mechanism for compliance with the notice requirement of the Bulk Transfers Article. The statement in the short form that "all the debts of the transferor are to be paid in full as they fall due as a result of the transaction," may, in fact, amount to a representation or warranty by the transferee. Such representation is hazardous because the transferee

little as none (Montana, Washington) to fourteen days (Connecticut). Typically, these statutes required five days notice. See Montgomery, supra note 2, at 16. Wyoming, the only state to vary the Code provision for ten days notice, presently requires five days notice. Wyo. Stat. Ann. § 6-105 (Supp. 1971).

129. Uniform Commercial Code § 6-107(3).
130. Uniform Commercial Code § 6-105.

131. In the event of noncompliance, the transferor's creditors may enforce their claims against the property transferred as though it belonged to the transferor. See notes 193-228 infra and accompanying text.


134. Uniform Commercial Code § 6-107(1) (b). One commentator has criticized this requirement, imposing upon the transferee a duty to have the notice contain the prior business names and address of the transferor and has suggested that "[a] more practical requirement would seem to be that the transferor give such information in conjunction with the list of creditors and schedule of property so that the transferee could make use of it in the notice" (footnotes omitted). Forgey, supra note 84, at 457.


136. See Hawkland, supra note 11, at 852; Rapson, supra note 107, at 228.
has no effective means of insuring that the transferor will apply the proceeds to the payment of his creditors. Indeed, if the transferee is willing to guarantee this payment, he could, by expressly assuming the debts, qualify the bulk transfer under the exception granted by subsection 6-103(6) and, thereby, avoid the "red tape" of Article 6.137

Caution, therefore, dictates that the transferee use the long form rather than the short form of statutory notice. Subsection 6-107(2) requires that the notice to creditors be in long form "'[i]f the debts of the transferor are not to be paid in full as they fall due or if the transferee is in doubt on that point . . . ."138 In addition to the statements contained in the short form, the long form of notice must include the following statements: (1) the location and general description of the property being transferred,139 (2) the estimated total, obtainable from the list of creditors, of the transferor's debts,140 (3) the address where the schedule of property and list of creditors is available for inspection,141 (4) whether the transfer is for the purpose of paying existing debts and, if so, the amount of such debts and to whom owed,142 (5) whether the transfer involves new consideration and, if so, the amount of such consideration together with the time and place for payment thereof.143 Furthermore, if the transfer is for new consideration and the state is one of the eighteen states to have adopted section 6-106,144 imposing a duty upon the transferee to assure that the transferor's creditors are paid, the long form of notice must also state "the time and place where the transferor's creditors are to file their claims" against the proceeds of the transfer.145

Having prepared the notice, whether in short or long form, the transferee must then either deliver the notice personally or have it sent by registered or certified mail to "all the persons shown on the list of creditors furnished by the transferor . . . and to all other persons who are known to the transferee to hold or assert claims against the transferor."146 The transferee should also give notice of the proposed

137. Rapson, supra note 107, at 228.
138. See Hart & Willier, supra note 101, at 6-261 for a long form for notice to creditors.
139. Uniform Commercial Code § 6-107(2) (a).
140. Uniform Commercial Code § 6-107(2) (a).
141. Uniform Commercial Code § 6-107(2) (b).
142. Uniform Commercial Code § 6-107(2) (c).
143. Uniform Commercial Code § 6-107(2) (d).
144. See notes 160-175 infra and accompanying text.
145. Uniform Commercial Code § 6-107(2) (e).
BULK TRANSFERS

bulk transfer to the local office of the Internal Revenue Service and the appropriate state and county tax offices. Notification of the taxing authorities is necessary because, even if there are no past due taxes, liability for taxes continually accrues in the ordinary course of business.\(^{147}\) The importance of giving notice to all creditors of the transferor, including taxing authorities, is underscored by the language of section 6–105 which provides that the bulk transfer "is ineffective against any creditor of the transferor" when such notice is not given.\(^{148}\)

The notice provisions of Article 6 impose one further obligation upon the transferee: he must give notice of the proposed bulk transfer "at least ten days before he takes possession of the goods or pays for them, whichever happens first . . . ."\(^{149}\) In *Starman v. John Wolfe, Inc.*,\(^{150}\) the transferee, attempting to comply with this ten day notice requirement, mailed the notice to creditors on May 19, informing them that a bulk transfer would take place on May 29 at an address in Missouri. The closing, however, was held in Illinois on, according to the transferee, June 4. A creditor, having unsuccessfully gone to the Missouri address on May 29, challenged the bulk transfer for failure to comply with the notice requirements of Article 6. The court held the transfer "ineffective"\(^{151}\) and stated:

In order to satisfy [section 6–105] the transferee should give notice to creditors so that they receive the notice at least ten days prior to taking possession of the goods or prior to paying for them. The fact that a closing takes place at a time later than ten days and at some different place than that specified in the notice is not a compliance with [section 6–105].\(^{152}\)

The case may be criticized with respect to the court's holding that the creditor must "receive" at least ten days notice since the Code requirement is that the transferee "gives notice." The Code elsewhere defines "gives" as "taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it."\(^ {153}\) But, the court correctly held the notice defective for specifying the wrong address where the transfer


\(^{148}\) There have been no reported Code decisions declaring a bulk transfer ineffective for failure to give notice to all creditors.

\(^{149}\) *Uniform Commercial Code* § 6–105.

\(^{150}\) 490 S.W.2d 377 (Mo. App. 1973).

\(^{151}\) Id. at 385.

\(^{152}\) Id. at 384–85 (emphasis added).

\(^{153}\) *Uniform Commercial Code* § 1–201(26).
was to take place. In so holding, the court was undoubtedly influenced by the creditor's attempt to be present at the transfer.

Several commentators have criticized the minimum ten day notice requirement as being inadequate to protect the creditors. One commentary asserts that, considering normal mail delivery and intervening weekends, the effective notice period may be as little as five days.

Moreover, others have questioned the wisdom of the language "at least ten days before he takes possession of the goods or pays for them, whichever happens first" by arguing that the payment of any amount, including a small down payment, must be preceded by notice to creditors. This interpretation may place the transferee in the awkward position of having to give notice before completion of the negotiations for the transfer. A better reading of this notice language would be that the necessary notice be given prior to the final payment, completing the transaction. Two commentators, after a more complete analysis of this problem, have concluded:

[Section 6-105] would seem to mean that the payment contemplated is the final payment for the goods or the act of possessing the goods, since this section appears to talk in terms of consummation of the deal rather than the prior process of negotiations. Clearer language could have been used to prevent this ambiguity.

Wisconsin has attempted to avoid this linguistic uncertainty by amending section 6-105 to define "payment" as "the major part of the purchase price." The Connecticut Commercial Code offers a more precise solution. Under this latter approach, section 6-105 does not become operative when there is a deposit of ten percent or less of the purchase price or when the purchase price, in whole or in part, is placed in escrow with someone other than the transferor or his agent.

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155. Weintraub & Levin, supra note 7, at 433.
156. Hogan, supra note 65, at 38 ("Great care should be taken to avoid part payment prior to compliance with the statute"); see Hawkland, supra note 11, at 851; Rapson, supra note 107, at 228; Commentary, supra note 11, at 299.
158. Wis. Stat. Ann. § 406-105 (1964). Interestingly, the Permanent Editorial Board commented that this change was not necessary "to make it clear that the ordinary earnest money payment does not bring the section into operation." Permanent Editorial Bd. for the Uniform Commercial Code, Rep. No. 2 at 112 (1965).
Application of Proceeds to the Payment of Creditors

The various Bulk Sales Acts were in sharp conflict as to whether the transferee had the personal duty to apply any new consideration exchanged in the bulk sale to the debts of the transferor. The New York and Pennsylvania Acts represented the two divergent approaches. The New York Bulk Sales Act, followed in forty other jurisdictions,\(^{160}\) did not impose such a personal duty upon the transferee.\(^{161}\) However, eleven jurisdictions had provisions in their Bulk Sales Acts, patterned after Pennsylvania’s Act, requiring the purchaser to assure that the purchase price was applied to the payment of the seller’s debts.\(^{162}\)

The variation between the New York and Pennsylvania approaches may be explained by a differing philosophy as to the scope of statutory protection to be afforded the seller’s creditors. Those acts patterned after New York’s were designed simply to give notice to the seller’s creditors. Underlying these acts was the presumption that the seller’s creditors, once notified of the proposed bulk sale, could adequately protect their interests.\(^{163}\) In contrast, the Pennsylvania Act and its progeny, long favored by credit men, reflect an assumption that the creditors’ interests could be effectively protected only by imposing upon the transferee the personal duty to apply the new consideration from the bulk sale to the payment of the seller’s debts.\(^{164}\)

The draftsmen of Article 6, cognizant of the divergence of authority as to whether the transferee should be personally responsible for applying any new consideration to the payment of the transferor’s debts, drafted an optional provision, section 6-106, articulating the Pennsylvania rule. No opinion has been expressed by the draftsmen

\(^{160}\) Weintraub & Levin in COOGAN, HOGAN & VAGTS, supra note 9, § 22.04[3][a] n.20; Weintraub & Levin, supra note 7, at 420 n.7 (listing thirty-eight states having no provision for the disposition of proceeds from a bulk sale).

\(^{161}\) HAWKLAND, supra note 11, at 853; Commentary, supra note 11, at 286.

\(^{162}\) Weintraub & Levin in COOGAN, HOGAN & VAGTS, supra note 9, § 22.04[3][b] n.22.

\(^{163}\) See UNIFORM COMMERCIAL CODE § 6-101, Comment 4:

Advance notice to the seller’s creditors of the impending sale is an important protection against [fraud], since with notice the creditors can take steps to impound the proceeds if they think it necessary. In many states, typified for instance by New York, such notice is substantially the only protection which bulk sales statutes give.

Professor Lamey further notes:

The only thing that the notice gives him [the creditor], it seems to me, is an alarm. It alerts him to what is going on. It permits him, therefore, to move in and to watch his debtor in respect to the proceeds which will be forthcoming from this sale.

Lamey, supra note 12, at 72.

\(^{164}\) Larson, supra note 154, at 111.
as to the wisdom of imposing such a duty upon the transferee. Rather, an explanatory note to section 6-106 states "that this is a point on which State enactments may differ without serious damage to the principle of uniformity." 165

Thirty-one states and the District of Columbia have omitted section 6-106 and all optional subsections related to that section. 166 The two reasons generally advanced in support of this omission are the additional burden placed upon the transferee and the personal liability imposed upon the transferee for failure to comply with section 6-106. 167

Nineteen states, including Maryland, and the Virgin Islands, have enacted section 6-106. 168 In these jurisdictions, the transferee to a bulk transfer in which new consideration becomes payable, except those made by sale at auction, 169 is personally obliged

165. **Uniform Commercial Code** § 6-106, Note to section.
166. The subsections related to section 6-106 are **Uniform Commercial Code** §§ 6-107(2) (e), 6-108(3) (c), and 6-109(2).
167. See, e.g., 11 N.Y.L.F. 112, 117 (1965). One leading commentator has stated that this section can be justified only if the buyer, now saddled with this additional duty [under section 6-106], is enabled to perform his duty in a prompt, effective and certain manner. This is not possible under Article 6 because of the numerous unanswered problems. Thus, an unreasonable, oppressive, and wholly impractical burden has been placed upon buyers of businesses in States adopting Section 6-106.

Rapson, *supra* note 107, at 228. Another commentary asks whether section 6-106 "has not annihilated the usefulness of the Article by imposing an intolerable burden upon the transferee." Weintraub & Levin in Coogan, Hogan & Vagts, *supra* note 9, § 22.11[4].


Some commentators have approved and endorsed the adoption of section 6-106. Professor Larson has concluded that this section is a progressive step for the states adopting it. If bulk transfers legislation is worth passing, it is worth the inclusion of the safeguard that any new consideration should be distributed among the transferor's creditors. To omit section 6-106 is to relegate the creditors to the uncertain and possibly illusory precautions of inquiry and negotiation, followed by hasty resort to the courthouse. *Id.* at 118. See also Barkin & Gilbert, *supra* note 106, at 166-67 (approving section 6-106). Dean Hawkland notes that "[m]ost writers concerned with bulk sales legislation have endorsed section 6-106 . . . ." Hawkland, *supra* note 11, at 854. The fact, however, remains that thirty-one of the forty-nine states adopting the Uniform Commercial Code have elected not to enact section 6-106.

169. Section 6-108(3)(c) imposes the duties of section 6-106 upon the auctioneer in auction bulk sales.
list furnished by the transferor ... or filed in writing in the place stated in the notice ... within thirty days after the mailing of such notice. This duty of the transferee runs to all the holders of such debts, and may be enforced by any of them for the benefit of all.\textsuperscript{170}

Thus, section 6–106 requires the transferee to make certain that the purchase price is applied to all creditors, either listed or filing claims, before any money may be paid to the transferor. If, however, any of the debts are disputed, the transferee may retain an appropriate sum pending resolution of the dispute.\textsuperscript{171} Additionally, in the event the new consideration is insufficient to pay the creditors in full, the transferee shall make a pro rata distribution.\textsuperscript{172}

The transferee may perform his duty under section 6–106 in any suitable manner; the section does not prescribe a procedure for compliance. The parties may, for example, mutually agree that the transferee retain a portion of the purchase price until the debts are ascertained, deposit the consideration in an account subject to checks bearing the transferee’s counter-signature, or place the consideration in an escrow account.\textsuperscript{173} But, if the transferee determines that procedures such as those outlined above are impractical, he may deposit all or part of the purchase price with an appropriate court and interplead the transferor’s creditors.\textsuperscript{174} For those states enacting section 6–106 and not generally permitting statutory interpleader, the draftsmen provided optional subsection (4).\textsuperscript{175} Under this subsection, the

\textsuperscript{170} \textit{Uniform Commercial Code} § 6–106(1).
\textsuperscript{171} \textit{Uniform Commercial Code} § 6–106(2).
\textsuperscript{172} \textit{Uniform Commercial Code} § 6–106(3).
\textsuperscript{173} \textit{Uniform Commercial Code} § 6–106, Comment 3. For an interesting discussion of the use of an escrow fund, see Bjork v. United States, 486 F.2d 934 (7th Cir. 1973).
\textsuperscript{174} \textit{Uniform Commercial Code} § 6–106, Comment 3.
\textsuperscript{175} \textit{Uniform Commercial Code} § 6–106(4); see Note to subsection. Ten states and the Virgin Islands have adopted this provision: Florida, Kansas, Maryland, Montana, New Jersey, Pennsylvania, Tennessee, Utah and West Virginia. See \textit{Anderson}, supra note 31, at 470. Maryland has modified subsection (4) to read:

(4) The transferee may within ten days after he takes possession of the goods file a petition in the circuit court for the county in which the place of business of the transferor is situated or in the circuit court or Circuit Court No. 2 of Baltimore City in case the place of business of the transferor is situated in Baltimore City and pay the consideration into such court asking that a receiver or receivers be appointed by said court to take charge of the distribution of the agreed purchase price and the transferee may discharge his duty under this section by giving notice by registered or certified mail to all the persons to whom the duty runs that the consideration has been paid into that court and that they should file their claims there. If said receivership is granted then said receiver or receivers, upon qualification by filing an approved bond in the
transferee may discharge his duty to the creditors of the transferor by paying the proceeds of the transfer into the designated court within ten days after taking possession of the goods and by giving notice to all creditors that such payment has been made and that they should file their claims with the court.

Auction Sales

The vast majority of Bulk Sales Acts did not expressly encompass sales at public auction. Absent express inclusion, the courts generally held that an auction sale need not comply with the Bulk Sales Acts. Typically, the rationale for this exclusion was expressed as follows:

[I]t is difficult to comprehend how a purchaser at such [auction] sale can comply with the terms of the statute which require that a buyer shall make inquiry of the vendor and demand an inventory of him of his creditors and to send to each a ten days' notice of the buyer's intended purchase and the amount of consideration to be paid and the place where it is to be paid. It needs no further discussion to demonstrate how absurd it would be to attempt to fit these requirements of the statute to a purchase made at a public auction.

Although the transferee-bidder at an auction sale may not reasonably be expected to perform the duties placed upon the transferee who deals directly with the transferor, the unfettered freedom of a debtor to effect a bulk transfer by public auction could work a severe hardship upon his creditors. The draftsmen of the Code, recognizing

amount fixed by the court, shall be entitled to the custody and distribution of the agreed purchase price under orders of the court as in other receiverships. Md. Ann. Code art. 95B, § 6-106(4) (1964).

176. See generally, Duesenberg & King, supra note 11, § 15.05[1]. Only Kentucky, California and Illinois specifically included bulk sales by auction in their bulk sales statutes. Note, Transactions Within the Bulk Transfers Act and Creditors Protected Thereby, 43 Iowa L. Rev. 572, 586 n.80 (1958).

177. See note 178 infra.


179. See Uniform Commercial Code § 6-108, Comment 1. Although the New York legislature recognized the possibility of evasion of the Bulk Sales Act by auction sale, no corrective legislation was passed. See Sixth Annual Report and Studies of Judicial Council of the State of New York 374 et seq. (1940) (discussing an amendment that would have made the New York Act applicable to arrangements between a seller and auctioneer).
these competing interests, offered section 6-108 as an accommodation. This section imposes upon the auctioneer essentially the same obligations required of the transferee when the bulk transfer is not made by auction sale. Thus, the auctioneer must receive the list of creditors from the transferor and retain it for six months after the sale; help prepare the schedule of property and retain it for six months after the sale; and give notice of the auction, personally or by registered or certified mail, at least ten days before the auction sale to all persons shown on the list of creditors and to all other parties known to him to hold or assert claims against the transferor. And, in the nineteen states that have enacted section 6-106, the auctioneer must assure all creditors that the net proceeds of the auction will be distributed in accordance with the provisions of that section.

Two practical questions posed by auction sales are answered by section 6-108. First, if the auctioneer fails to perform any of his enumerated duties, the auction sale is still valid, and the purchaser acquires good title. However, "if the auctioneer knows that the auction constitutes a bulk transfer such failure renders the auctioneer liable to the creditors of the transferor as a class for the sums owing to

181. The term "auctioneer" is defined by the Code to include "[t]he person or persons other than the transferor who direct, control or are responsible for the auction . . . ." *Uniform Commercial Code* § 6-108(3). Additionally, section 6-108(4) stipulates that "[i]f the auctioneer consists of several persons their liability is joint and several."
182. Compare *Uniform Commercial Code* § 6-104(1) with § 6-108(3).
183. *Uniform Commercial Code* § 6-108(3)(a). The list of creditors, in compliance with section 6-104(2) must be signed or sworn to by the transferor or his agent.
184. *Uniform Commercial Code* § 6-108(3)(a). As required by section 6-104(1)(b), the schedule of property must be sufficient to identify the transferred property. Although section 6-108 does not expressly require that the auctioneer permit the creditors of the transferor to inspect and copy the list of creditors and schedule of property, such a duty may be inferred from the section. Unless inspection and copying were permitted, there would be no reason for requiring the auctioneer to retain the list and schedule. *Duesenberg & King*, supra note 11, § 15.05[2].
185. See *Uniform Commercial Code* § 6-108(3)(b) and notes 101–117 *supra* and accompanying text.
186. *Uniform Commercial Code* § 6-108(3)(b). The notice given by the auctioneer is required only to state that the auction will take place. While the date, time and place of such auction is not expressly required to be given in such notice, prudence dictates that such details be given to avoid a challenge to the effectiveness of the auction sale. See Forgey, *supra* note 84, at 458–59. No Code decisions have been found in which the effectiveness of an auction sale has been challenged.
them from the transferor up to but not exceeding the net proceeds of the auction." 189 The sanction thus imposed upon the auctioneer is severe. 190 Second, if the auctioneer does not know that the sale constitutes a bulk transfer, he is not liable. No doubt in some instances, as when the goods are simply received on consignment for sale, the auctioneer may be unaware of the nature of the transfer. 191 Typically, however, an auctioneer who accepts all or substantially all of a transferor's inventory for sale at auction will have knowledge that the auction sale constitutes a transfer in bulk. The Code's coverage of auction sales is a substantial contribution to the law of bulk transfers. 192

CREDITORS' RIGHTS AND REMEDIES

Noncompliance with Article 6

Any bulk transfer subject to Article 6, unless made by auction sale, in which the transferee fails to comply with the provisions of that Article is declared to be "ineffective against any creditor of the transferor," 193 regardless of the good faith of the transferee. The word "ineffective," undefined in the Code, appears to mean "voidable." 194 The Bulk Sales Acts, by comparison, variously characterized a non-complying bulk sale as "void," 195 "fraudulent and void," 196 "presumed


190. One commentator, comparing the liability of the auctioneer with that of the transferee, has written: "Unlike the situation involving the private [bulk] sale, however, the Code places a direct, personal liability on the auctioneer up to the aggregate auction price obtained in the event of non-compliance . . . ." Lamey, supra note 12, at 74; see Rapson, An Introduction to Articles 2 (Sales) and 6 (Bulk Transfers) of the Uniform Commercial Code: Guidelines and Warnings for the Practitioner, 35 N.Y.S.B.I. 417, 425 (1963).

191. See note 112 supra and accompanying text.

192. While the coverage of auction sales has been well received by commentators, professional auctioneers criticized the inclusion of auction sales within the Bulk Transfers Article. See N.Y. Law Rev. Comm's Hearings on the Uniform Commercial Code 648 et seq. (1954). The absence of any reported Code decisions involving auctioneer liability suggests that the fears of auctioneers were more fanciful than real.


194. See In re Dee's Inc., 311 F.2d 619 (3d Cir. 1962); cf., McKissick v. Foremost-McKesson, Inc., 441 F.2d 811, 815 (5th Cir. 1971) (transfer in violation of article 6 fraudulent and void as to creditor). The commentators generally agree that the draftsmen intended no difference in result by the use of the term "ineffective" instead of "voidable." See Duesenberg & King, supra note 11, § 15.08. See also Hawkland, supra note 11, at 858; Barkin & Gilbert, supra note 106, at 168; Commentary, supra note 11, at 287.

195. Montgomery, supra note 2, at 38 (citing the statutes of eighteen states).

196. Id. (citing the statutes of seventeen states and the District of Columbia).
to be fraudulent and void,"\textsuperscript{197} or " prima facie evidence of fraud and void."\textsuperscript{198}

While terming a non-complying bulk sale void or fraudulent, the Bulk Sales Acts generally did not provide statutory remedies to the aggrieved creditors. Rather, the creditors were left to pursue their remedies under local and federal rules of civil procedure.\textsuperscript{199} Thus, depending upon the jurisdiction, the aggrieved creditors could proceed by the following remedies: (1) an action against the transferee for the proceeds of the transfer,\textsuperscript{200} (2) execution levied directly against the property in the possession of the transferee as if no sale had ever taken place,\textsuperscript{201} (3) garnishment of the proceeds in the possession of the transferee,\textsuperscript{202} (4) attachment of the property in the possession of the transferee,\textsuperscript{203} (5) an injunction to prevent the proposed transfer\textsuperscript{204} or (6) a petition for the appointment of a receiver for the transferred property or an accounting of the proceeds.\textsuperscript{205} Regardless of which remedy the creditors pursued, they were not required to first have the non-complying bulk sale judicially set aside.\textsuperscript{206}

The Code follows the practice of the bulk sales statutes and does not expressly grant any statutory remedies to the injured creditors. Except in the section dealing with auctioneers, Article 6 contains no provisions defining the nature and scope of the remedies of a creditor of the transferor for noncompliance. Indeed, an Official Comment states:

\begin{quote}
[T]he sanction for non-compliance . . . is that the transfer is ineffective against creditors of the transferor . . . . Any such creditor or creditors may therefore disregard the transfer and consider the transfer as if it had never been made.\textsuperscript{207}
\end{quote}

\textsuperscript{197} Id. (citing the statutes of eight states).
\textsuperscript{198} Id. (citing the statute of one state).
\textsuperscript{199} See Hawkland, supra note 11, at 858-59.
\textsuperscript{201} Gallup v. Rhodes, 207 Mo. App. 692, 230 S.W. 664 (1921); J. C. Smith & Wallace Co. v. Goldner, 92 N.J Eq. 504, 113 A. 487 (1921).
\textsuperscript{203} Courts often held that, unless the transaction was fraudulent, mere non-compliance with the Bulk Sales Act did not give the creditors the right to attach the sold property. See, e.g., C.M. Miller Co. v. Lunceford, 54 Ga. App. 21, 186 S.E. 766 (1936); Ainsworth v. Roubal, 74 Neb. 723, 105 N.W. 248 (1905); J. H. Mohlman Co. v. Landwehr, 87 App. Div. 83, 83 N.Y.S. 1073 (1903).
\textsuperscript{204} See, e.g., Landers Frary & Clark v. Vischer Prods. Co., 201 F.2d 319 (7th Cir. 1953) (federal court, applying Illinois Bulk Sales Act, granted injunction to creditor whose claim not then matured).
\textsuperscript{205} Caro v. Brachfeld, 163 N.Y.S. 511 (Sup. Ct. 1917); Semmes v. Ruediger, 195 Mo. App. 621, 187 S.W. 604 (1916).
levy on the goods as still belonging to the transferor, or a receiver representing them can take them by whatever procedure the local law provides.207

The objecting creditor, therefore, will have to pursue the various remedies provided under local and federal rules of civil procedure.208 As noted by one writer, the remedy that the creditor elects will depend on several factors: where the goods and the parties are located, who has the proceeds of the transfer, whether the transferee intends to satisfy the creditor's claim, the number of other creditors of the transferee, and whether the creditor is a judgment creditor.209

The question then arises whether the creditors may successfully proceed against the transferee on the rationale that a transferee is personally liable if he participates in a non-complying bulk transfer. Under the various Bulk Sales Acts, the courts generally held that the purchaser was not personally liable for failure to comply with the particular act.210 Rather, the purchaser's liability was limited to the value of any property that he resold, or otherwise disposed of, or so commingled with his own goods that the purchased goods could not be identified.211 The decisions under Article 6 have followed the pre-Code law.212 Thus, where the purchase of a business did not comply with Article 6 and the transferee had so commingled the merchandise that it could not be segregated, a court imposed personal liability upon the transferee for the creditors’ claims.213 The measure of the creditors’ recovery was held to be the fair market value of the merchandise.214

The commentators are in disagreement as to the effect of section 6-106,215 adopted in only nineteen states, upon the personal liability

207. UNIFORM COMMERCIAL CODE § 6-104, Comment 2.
209. Bennett, supra note 23, at 728.
210. See HAWKLAND, supra note 11, at 860; MONTGOMERY, supra note 2, at 42.
211. See MONTGOMERY, supra note 2, at 42.
212. In B & H Auto Supply, Inc. v. Andrews, 417 S.W.2d 341, 346 (Tex. Civ. App. 1967), the court, interpreting Article 6, explained: "The transferee has no personal liability at all unless he converts the property to his own use or otherwise defaults in his responsibility as receiver so as to place the property beyond the reach of the creditors."
214. Id. at 385.
215. See notes 160–175 supra and accompanying text.
of the transferee. Some writers have reasoned that failure to comply with subsection 6-106(1), requiring the transferee to assure that any new consideration is applied to the transferor's debts, merely renders the transfer "ineffective." The creditors are, under this construction of subsection 6-106(1), left to proceed in the usual manner against the ineffectively conveyed goods. On the other hand, several commentators have asserted that section 6-106, by imposing a duty upon the transferee, grants creditors the right to hold the transferee personally liable. In one of the few reported cases where the creditor sought to hold the transferee personally liable for noncompliance with Article 6, the creditor was aided in his argument by the language of section 6-106. The transferee relied on pre-Code decisions providing that creditors could not hold the transferee personally liable for noncompliance with that state's bulk sales statute. The court, noting that section 6-106 changed this prior law, held the transferee personally liable for the value of the property transferred or the amount paid therefor.

The further question arises as to the effect of a non-complying bulk transfer upon the creditors' rights against subsequent purchasers of any such property. Courts, interpreting the bulk sales statutes, generally held the creditors could not pursue the property once in the possession of subsequent good faith purchasers. This rule of law has been codified in section 6-110; when the transferee's title is subject to a defect because of noncompliance with Article 6, "a purchaser for value in good faith and without such notice takes free of such defect." This protective rule is extended to good faith purchasers for value at an auction. But, a subsequent purchaser who pays no value or who has notice of noncompliance takes the property

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216. Hawkland, supra note 11, at 860; Barkin & Gilbert, supra note 106, at 168.


219. Id. at 919.

220. See Montgomery, supra note 2, at 48.

221. Uniform Commercial Code § 6-110(2).


223. "Value" is broadly defined by the Code. Uniform Commercial Code § 1-201(44).

224. The word "notice" is defined by the Code in subjective and objective terms. Uniform Commercial Code § 1-201(25). One commentary, however, suggests that if a purchaser of property involved in a prior bulk transfer has no specific knowledge of noncompliance, such person is not required to ascertain whether the parties fully complied with Article 6. See generally, Duesenberg & King, supra.
subject to this defect. Of course, creditors, although unable to pursue property in the possession of a subsequent good faith purchaser, retain their remedies against the transferor and transferee where there has been noncompliance with Article 6.

Finally, the question arises whether the transferor or transferee may successfully assert noncompliance with the due notice to creditors requirement as a basis for setting aside the bulk transfer. This question was answered in Macy v. Oswald\(^{225}\) where the transferee sought to set aside a bulk transfer on the theory that creditors had not been notified of the transfer. The court held the transferee could not succeed because the notice provisions of Article 6 were solely for the benefit of the transferor's creditors, stating: "[a] sale of goods in bulk may be valid as between the parties although there has been no compliance with the act."\(^{226}\) The court did note, however, that if the contract had contained an express condition that the sale must comply with the provisions of Article 6, noncompliance would enable the aggrieved party to avoid the transfer.\(^{227}\)

**Compliance with Article 6**

Compliance with the formalities of Article 6 does not necessarily insulate a bulk transfer from attack by the creditors of the transferor. A conforming transfer may, nevertheless, be challenged under the general provisions of the law of fraudulent conveyances if the transferor's intent in disposing of his inventory was to hinder, delay, or defraud creditors.\(^{228}\)

Further, regardless of the agreement between the parties to the bulk transfer, the transferor's liability to his creditors is not discharged by compliance with Article 6. In McClain v. Laurens Glass Co.,\(^{229}\) a Georgia court emphasized this continuing liability of the transferor. Despite the parties' compliance with the Georgia bulk transfer law and the transferee's express assumption of the debts of the transferor, the court permitted the creditors to proceed against

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note 11, § 15.06. No Code decisions have been found where the title of a subsequent purchaser for value has been challenged.

226. Id. at 439, 182 A.2d at 96.
227. Id. In the case, however, the contract contained no express condition that the parties' failure to comply with Article 6 entitled the innocent party to rescind. A prudent attorney for the transferee should insist on such an express condition.
228. See note 7, supra.
the transferor. In response to the transferor's defense of compliance and discharge, the court stated:

[Article 6] has no language which compels the creditor of a debtor who thereafter sells to another in bulk to look to the latter for payment, whether or not as between the debtor and his transferee there is an agreement that the latter will pay the debt, where the original seller has not agreed to substitute the transferee in the place of the purchaser and is a stranger to the contract between the latter. Its purpose is not to eliminate a remedy of the original seller, but rather to protect him on a contractual indebtedness assumed to have been made at least partly on the implication of solvency of the purchaser arising from his ownership of the inventory of a going business. . . . But the act does not inhibit these creditors, where the statute has been complied with, from obtaining a judgment against the original purchaser who received the goods and contracted with the supplier to pay for them; compliance with its provisions merely prevents the creditors, after judgment, from levying on property title to which has passed out of the hands of the judgment debtor.230

Statute of Limitations

The several Bulk Sales Acts contained different statutes of limitations, ranging from ninety days to twelve months.231 Because “Article [6] imposes unusual obligations on buyers of property,” the draftsmen favored a short statute of limitations.232 Section 6-111, thus, provides:

No action under this Article shall be brought nor levy made more than six months after the date on which the transferee took possession of the goods unless the transfer has been concealed. If the transfer has been concealed, actions may be brought or levies made within six months after its discovery.233

This section includes levies because of the breadth of sections 6-104 and 6-105, making a non-complying transfer “ineffective against any creditor of the transferor.” The foregoing language permits a creditor who obtains a judgment against the transferor prior to the defective transfer to levy upon the transferred property without instituting a second “action.” Pursuant to section 6-111, any such levy must be

230. Id. at 317, 193 S.E.2d at 195.

231. See Montgomery, supra note 2, at 50. Many Bulk Sales Acts contained no provision for tolling the statute of limitations when there had been concealment of the bulk sale. See Raff, supra note 31, at 113.


233. Uniform Commercial Code § 6-111. California, Florida and Georgia amended Article 6 to increase the statute of limitation period from six months to one year. Arkansas omitted section 6-111 entirely. Anderson, supra note 31, at 496.
within six months "after the date on which the transferee took possession of the goods." 234

Under the provision tolling the statute of limitations when "the transfer has been concealed," 235 the question arises as to what constitutes concealment. One court found no concealment where the transferee, seeking to comply with the exemption provided in subsection 6-103(6), had agreed to become bound to pay the debts of the transferor in full but had failed to give the requisite "public notice." 236 The court was of the opinion that the exception to the six month statute of limitations for concealment "refers to affirmative concealment, not to mere non-disclosure or failure to give 'public notice.'" 237 In contrast, a New York court has accorded a more expansive definition to concealment. 238 That court held: "the transferee's complete failure to comply with the notice provisions of Article 6 was tantamount to a concealment of a transfer of assets within the meaning of section 6-111 ... ." 239 Consequently, the court denied the transferee's motion for summary judgment, finding a question of fact as to when the creditor discovered the concealment. 240 The breadth of this New York interpretation appears to emasculate needlessly the normal six month statute of limitations.

Two reasons may be advanced in support of the propriety of a six month statute of limitations. A creditor who delays more than six months after the bulk transfer is not likely to have relied upon the goods transferred in extending credit to the transferor. Moreover, a short statute of limitations will not unduly prejudice the rights of the transferee since his title will be perfected within a reasonable time.

**Summary**

The foregoing analysis of the Bulk Sales Acts discloses the widely different conceptual approach, terminology and applicability of such legislation as well as the conflicting judicial decisions inevitably spawned by the diversity of these statutes. This history amply supports the conclusion of the draftsmen of Article 6 that there was a manifest

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234. See Uniform Commercial Code § 6-111, Comment 2. See also Duesenberg & King, supra note 11, § 15.08.
237. Id. at 358.
239. Id. at 317.
240. Id.
need to simplify and make uniform the bulk transfer law. To this end, Article 6 represents a giant step forward in the treatment of bulk transfers. An examination of the reported Code decisions, relatively few in number, suggests that the paucity of legal challenges to the validity of bulk transfers is due to the fact that the parties involved in the transfer have been able to satisfy the claims of the transferor's creditors by careful compliance with the explicit requirements of Article 6 and by judicious use of the traditional escrow arrangement.

The Code's contribution to the reduction of litigation in the area of bulk transfers may, in part, be attributed to the following: (1) the clarification of the types of businesses and transfers that are subject to Article 6, (2) the simplification of the information that must be compiled and kept available for creditors, (3) the extension of the advance notice required in a bulk transfer to ten days, (4) the clarification of the contents of the notice and the manner in which it is to be given, (5) the express application of Article 6 to auction sales, (6) the explicit identification of creditors having rights under the various provisions of Article 6, (7) the definition and clarification of the rights of subsequent purchasers who acquire property from a transferee whose title is subject to a defect because of noncompliance with Article 6, and (8) the establishment of a six month statute of limitations with an exception for a concealed bulk transfer.

Although Article 6 represents a substantial contribution to the improvement of the legal and business environment in which bulk transfers take place, the codification contains certain ambiguities and weaknesses. The principal shortcoming of Article 6 lies in the draftsmen's use of certain terms without definition. For example, no where does the Code delineate what constitutes "a major part" of the inventory, when an enterprise's "principal business" is the sale of merchandise from stock, or when the transferee "pays for" the transferred goods. Yet, the definition of each of these terms is essential to the proper functioning of Article 6. Furthermore, Article 6 has unnecessarily broadened the definition of "creditors" to include those who hold unliquidated claims and those who are not business creditors of the transferor.

While commentators have correctly suggested that all is not perfect with Article 6 and that individual statutory variations have eroded the principle of uniformity, the indisputable fact is that Article 6 works well and is a valuable and important handmaiden to the business community.