

**REPORT OF THE
JOINT SUBCOMMITTEE STUDYING
PROPOSED MODIFICATIONS TO THE**

Uniform Commercial Code

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 44

**COMMONWEALTH OF VIRGINIA
RICHMOND
1993**

Members of the Joint Subcommittee

Delegate George H. Heilig, Jr

Senator Edward M. Holland

Delegate Clifton A. Woodrum

Senator Thomas K. Norment, Jr.

Delegate Willard R. Finney

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Acknowledgment

The Subcommittee expresses its appreciation to the Virginia Bar Association's UCC Study Committee, Chaired by David I. Greenberg, for its assistance in reviewing the issues presented by the HJR-147 study resolution.

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**Report of the Joint
Subcommittee Studying
proposed modifications to the
Uniform Commercial Code**

**To: The Honorable L. Douglas
Wilder, Governor of Virginia
and
The General Assembly of
Virginia**

Introduction

The 1992 General Assembly passed House Joint Resolution 147 (Appendix 1) establishing a joint subcommittee to examine proposed changes to the Uniform Commercial Code (UCC). The National Conference of Commissioners on Uniform State Laws (the Conference) periodically revises existing UCC articles, and it occasionally proposes new ones. During the past several years, legislative subcommittees -- usually assisted by the Conference's Virginia Commissioner and Bar committees -- have reviewed current Conference proposals to determine whether they should be incorporated into Virginia's UCC. The HJR-147 Subcommittee continues this tradition.

The following members were appointed to the joint subcommittee pursuant to the resolution: Delegates George H. Heilig, Jr., of Norfolk, Clifton A.

Woodrum of Roanoke, and Willard R. Finney of Rocky Mount; Senators: Edward M. Holland of Arlington and Thomas K. Norment, Jr. of Williamsburg. Delegate Heilig was elected Chairman.

Executive Summary

The Virginia General Assembly -- with the assistance of UCC study subcommittees -- generally responds promptly (and favorably) to Conference proposals. The past three General Assembly sessions are illustrative. New Article 2A governing commercial leases was adopted (1990); new Article 4A addressing electronic funds transfers between financial institutions was approved (1991); and significant revisions to Article 3A governing negotiable instruments were enacted (1992).

This year, the UCC subcommittee examined Article 6, the Bulk Transfers Act (Va. Code § 8.6-101, et.seq). The Conference's view is that the Article should be repealed, or at least significantly revised. The HJR-147 Subcommittee agreed and recommends its repeal to the Governor and the 1993 General Assembly.

The Bulk Transfers Act

The Bulk Transfers Act (the Act) is intended to protect

business creditors from the risk that a merchant will acquire stock in trade on credit, sell the entire inventory "in bulk" to an unsuspecting third party, and then flee with the proceeds (often across state lines), leaving creditors unpaid. Apparently this swindle was common around the turn of the century. The Act aims to prevent this fraud by (i) requiring notice to creditors before bulk sales are conducted, and (ii) empowering creditors to void sales that do not conform to the Act's requirements. Purchaser ignorance or innocence does not diminish this exceptional creditors' remedy.

The Act's critics say its provisions are unnecessary in the current business environment, and that it has generally fallen into disuse. Today, electronic credit services help businesses identify individuals or entities with checkered credit histories (or worse), thereby reducing the likelihood of inventory-sale fraud. Moreover, "long-arm statutes" have virtually eliminated what little protection state lines may once have afforded fast-moving, bulk-sales artists.

Additionally, inventory financing under UCC Article 9 (Secured Transactions) permits creditors to by-pass Article 6 in favor of Article 9 protections. These technological and legal advances, say critics, minimize bulk-sale fraud risk. Thus, some

contend, the Act's burden on bulk sellers and purchasers alike is disproportionate to the risk.

The Conference is on record favoring repeal. However, since repeal may not be acceptable to all state legislatures, it provided a Revised Article 6 as an alternative. Conference position papers discussing the repeal and revision options are annexed as Appendix 2. The revision's key features include the following:

The Act applies only when the buyer has notice that the seller will not continue to operate the same or similar kind of business after the sale.

When the seller is indebted to a large number of creditors, the buyer does not have to send individual notice to every person, but instead may give notice by filing.

A buyer who makes a good faith effort to comply with the requirements of Article 6 is not liable for noncompliance.

Action in Other States

The Conference reports that sixteen states have repealed Article 6 -- four states doing so in their 1992 Session. The repealing states are Arkansas, Colorado, Illinois, Kansas, Kentucky, Louisiana, Maine, Minnesota, Montana, Nebraska,

Nevada, New Mexico, Oregon,
Pennsylvania, and Wyoming.

The following five states have adopted the Article 6 revision: Arizona, California, Hawaii, Oklahoma and Utah. At last report, Wisconsin's legislature was considering a bill to repeal the Act.

Bar Committee Action

The Virginia State Bar Association and the Virginia State Bar were asked to review the Conference's Article 6 alternatives, and to furnish recommendations to this Subcommittee. The UCC study subcommittees solicit the Bar's participation because the UCC influences the conduct of business in the Commonwealth and elsewhere.

A UCC Study Committee, comprised of the Virginia Bar Association Business Law Section members, met in October to discuss the current Act's utility in Virginia practice, and to review the Conference's proposals. David Greenberg, the study committee's chairman, reported the committee's recommendation in a November 3 letter (copy attached as Appendix 3) to Delegate George Heilig: *repeal the current Act without replacement.*

The Case for Repeal

Explaining the study committee's position, Mr. Greenberg writes, "[T]he consensus of the committee was that fraudulent bulk sales do not occur frequently enough to justify regulation of *all* bulk sales, including the vast majority that are conducted in good faith. Therefore, *the committee recommends repeal of Article 6.*" [Mr. Greenberg's emphasis]

He also notes that Article 6's disuse is reflected in its widespread absence from law school curriculums. Moreover, he writes, "the committee noted that Article 6 is not invoked very much in practice," the expense and burden of compliance resulting in many parties agreeing to waive compliance. The study committee concluded the revision was no improvement over the current article and, in some respects, further burdened the parties to bulk sales.

Additional Comments Solicited and Received

The Subcommittee staff contacted representatives of the banking community, requesting their comments on the Conference's proposals. The Subcommittee received correspondence (copy attached as Appendix 4) from the Virginia League of Savings Institutions.

Writing for the League, S. Miles Dumville, Esq., noted the Act's infrequent use and that it has "little or no impact on the lending activities of member institutions of the Virginia League." The League, however, takes no position on the question of repeal or revision.

Subcommittee Action

House Joint Resolution 147 directed this Subcommittee to review the Conference's Article 6 recommendations, and to provide guidance to the Virginia General Assembly. The Subcommittee met on December 1 to hear from interested parties, and to consider three policy options: i) repeal existing Article 6, ii) enact revised Article 6, or iii) make no change in existing law, retaining the current article.

Carlyle Ring, Virginia's Conference representative, briefed the Subcommittee on the Conference's view of the Article 6 issue. In its view, he said, long-arm statutes, credit services, and protections in UCC Article 9 afford ample protection against the risk of bulk sale fraud. An outline of Mr. Ring's presentation to the Subcommittee is attached as Appendix 5.

Subcommittee members expressed some reservation about eliminating notice of an impending bulk sale to small business's unsecured creditors --

particularly where start-up capital was furnished without security, e.g., unsecured loans from family members to purchase business stock and inventory.

However, after weighing the current burden imposed by the act on bulk purchasers and sellers alike, and after reviewing the Conference's rationale for repeal, the subcommittee recommends that the Virginia Bulk Transfers Act be repealed. A copy of the proposed repealer bill is attached as Appendix 6.

Future Subcommittee Activity

The Subcommittee was also advised by Mr. Ring that additional UCC revisions may be ready for legislative review in 1993. These include: Article 5 (letters of Credit) and Article 8 (investment securities).

Mr. Ring also informed the Subcommittee that the Conference has also recently authorized revision projects addressing UCC Articles 2 (sales) and 9 (secured transactions). Additionally, a Conference study committee has been appointed to look at whether Article 2 should be further revised in order to cover computer services contracts



Appendices

Appendix 1 -- House Joint Resolution 147. **A-1.**

Appendix 2 -- National Conference of Commissioners on Uniform State Laws position papers: Article 6 revision or repeal. **A-2 through A-6.**

Appendix 3 -- November 3, 1992 correspondence from David I. Greenberg, Esq. to the HJR-147 Subcommittee. **A-7 through A-9.**

Appendix 4 -- November 12, 1992 Correspondence to the Subcommittee from S. Miles Dumville, Esq., on behalf of the Virginia League of Savings Institutions. **A-10.**

Appendix 5 -- Outline of 12/1/92 remarks to the HJR-147 Subcommittee by Carlyle C. Ring, Jr., Virginia's representative to the National Conference of Commissioners on Uniform State Laws. **A-11, A-12.**

Appendix 6 -- Proposed repealer legislation: Virginia's Bulk Transfer Act (Va. Code §§ 8.6-101 through 8.6-111). **A-13.**

Appendix 7 -- Current provisions of the Virginia Bulk Transfers Act (Va. Code §§ 8.6-101 through 8.6-111). **A-14 through A-19.**

Appendix 8 -- National Conference of Commissioners on Uniform State Laws publication incorporating both repeal and revision options suggested by the NCCUSL. **A-20 through A-59.**

GENERAL ASSEMBLY OF VIRGINIA--1992 SESSION
HOUSE JOINT RESOLUTION NO. 147

Requesting creation of a joint subcommittee to review modifications of the Uniform Commercial Code.

Agreed to by the House of Delegates, March 5, 1992
Agreed to by the Senate, March 3, 1992

WHEREAS, the Uniform Commercial Code has been adopted in 49 states, the District of Columbia and the Virgin Islands; and

WHEREAS, the National Conference of Commissioners on Uniform State Laws has adopted revisions to various articles of the U.C.C. and is considering additional revisions to update the U.C.C.; and

WHEREAS, the 1988, 1989 and 1990 Sessions of the General Assembly, pursuant to House Joint Resolutions 59, 248 and 15, established and continued, respectively, a joint subcommittee to review modifications of the U.C.C.; and

WHEREAS, that joint subcommittee recommended adoption of Articles 2A (Leases) and 4A (Wire Transfers); and

WHEREAS, the National Conference continues to revise the U.C.C., specifically Articles 8 and 9 (Secured Transactions) and Article 6 (Bulk Sales); and

WHEREAS, the need for continued uniformity in the area of commercial laws is great; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a six-member joint subcommittee be created to review the revisions to the U.C.C. considered and adopted by the National Conference and make recommendations to the General Assembly regarding enactment of the revisions in Virginia. The membership of the joint subcommittee shall be appointed as provided in House Joint Resolution No. 59 (1988). The Business Law Section of the Virginia State Bar and the Business Law Section of the Virginia Bar Association are requested to assist in the study.

The indirect costs of this study are estimated to be \$8,255; the direct costs of this study shall not exceed \$3,240.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

A Few Facts About
REVISED ARTICLE 6 OF THE UNIFORM COMMERCIAL CODE

PURPOSE: To provide states with the option of repealing or revising current Article 6 of the UCC.

ORIGIN: Completed by the Uniform Law Commissioners in 1989.

STATE ADOPTIONS
OF REVISED UCC6: California
Hawaii
Oklahoma
Utah

STATE REPEALS
OF UCC6: Arkansas Montana
Colorado Nebraska
Illinois Nevada
Kentucky * New Mexico *
Louisiana Oregon
Maine * West Virginia *
Minnesota Wyoming

INTRODUCTIONS
TO REPEAL UCC6: Kansas
Pennsylvania
Wisconsin

INTRODUCTIONS
TO REVISE UCC6: Arizona

For any further information regarding the revised Article 6 of the Uniform Commercial Code, please contact John McCabe or Katie Robinson at 312-915-0195.

* 1992 Adoption

(4/15/92)

UNIFORM COMMERCIAL CODE

REVISED ARTICLE 6 — BULK SALES

— A Summary —

Article 6 of the Uniform Commercial Code (UCC) provides a specific kind of protection for creditors of businesses that sell merchandise from stock. Creditors of these business are vulnerable to a "bulk sale", in which the business sells all or a large part of inventory to a single buyer outside the ordinary course of business, following which the proprietor absconds with the proceeds. Original Article 6 of the UCC requires "bulk sale" buyers to provide notice to the seller's creditors and to maintain a list of seller's creditors and a schedule of property obtained in a "bulk sale" for six months after the "bulk sale" takes place. Unless these procedures are followed, creditors may void the sale. Auctioneers, who handle merchandise in bulk, are given a similar burden to that of "bulk sale" buyers.

Article 6 replaced a variety of earlier bulk sales laws in the states. All were enacted in a climate of smaller businesses that were localized in scope. These laws protected local business creditors from liquidations that might take merchandise and proceeds beyond these creditors' ability to obtain a remedy. Article 6 introduced the salubrious quality of uniformity to these protections for creditors.

But the credit environment has changed, so that the risk of the absconding merchandiser is no longer very great. Business creditors can evaluate credit-worthiness far better than was the case when the UCC was first promulgated, and they can pursue absconding sellers with much less difficulty. Further, modern fraudulent transfer actions under the Uniform Fraudulent Transfer Act overlap Article 6 in a significant way. Sophisticated and widespread inventory financing under Article 9 of the UCC, which provides even more significant protections for creditors, simply by-passes Article 6 protections. In 1988, as revisions of Article 6 were being considered, a considerable body of opinion supported the notion of repeal for Article 6. That body of opinion perceived that the balance of equities had swung from

essential protection for creditors to unnecessary burden for "bulk sale" buyers.

It was not clear, however, that repeal was or is a uniform solution or a uniformly acceptable recommendation in every state and jurisdiction. So the Revised Article 6 of the UCC is provided in the alternative. Alternative A offers the states the option of repealing the whole of Article 6. Alternative B offers a revised and updated Article 6 to those states and jurisdictions that will evaluate the positions of creditors, sellers, and buyers, and then decide to retain a bulk sales law.

How is uniformity to be served and maintained when states are given these alternatives? The law of the seller's place of business controls the choice of law. If the seller in a bulk sale has his or her place of business in a state in which Article 6 has been repealed, then there is no bulk sales law applicable to the sale. If the state does have Revised Article 6, it applies. No conflict situation should arise.

Revised Article 6, if repeal is not chosen, remedies the problems of the original. It minimizes the burdens placed upon the bulk sale buyer. The object is to pinpoint the creditor's risk and to narrow the reach of the statute to cover that risk and no more. Much improvement accrues through the definitions of such terms as "assets", "bulk sale", "date of bulk sale", and the like, all of which increase the certainty of Revised Article 6. None of these terms are defined at all in the original Article 6. A "bulk transfer" under original Article 6 took place with the transfer "of a major part of the materials, supplies, merchandise or other inventory" outside the ordinary course of business. Revised Article 6 defines "assets" as "inventory that is subject of a bulk sale and any tangible and intangible personal property used or held for use primarily in, or arising from, the seller's business and sold in connection with that inventory. . . ." The reach of Article 6 is more clearly confined in Revised Article 6.

In Revised Article 6 a "bulk sale" takes place if there is a sale of "more than half the seller's inventory" outside the ordinary course of business and under conditions in which the "buyer has notice. . . that the seller will not continue to operate the same or a similar kind of business after the sale". Again the reach of Article 6 is limited and more clearly defined than under the original Article 6. The risk to creditors arises from the sale in which the seller goes out of business, so Revised Article 6 applies only to those situations.

The notion of limitations is carried forward in the extended exceptions provision in Revised Article 6. Certain kinds of transfers are excepted under original Article 6. Any transfer that secures an obligation or that is accomplished to satisfy an obligation is not subject to original Article 6. A sale or transfer of a business that preserves existing creditors' rights is not subject to original Article 6. Revised Article 6 improves upon the existing exceptions with some new notice requirements for buyers who will assume the seller's debts.

Revised Article 6, also, excepts for the first time any asset sales that fall below a net value of \$10,000.00 or that exceed a value of \$25,000,000.00. In neither case is there a perceived need to burden the buyer with the requirements of Article 6. The small amounts constitute a nuisance, and the very large "bulk sale" can hardly be done in a manner unknown to creditors and, indeed, to the world.

What a buyer in a bulk sale does under Revised Article 6 is primarily the same as what that buyer does under original Article 6. The buyer obtains a list of creditors ("claimants" under Revised Article 6) and provides them with notice of the "bulk sale". The notice requirements are different, however, under Revised Article 6. If the seller provides a list of 200 or more claimants, or provides a verified statement that there are more than 200, the buyer satisfies the notice requirement by filing a written notice of the "bulk sale" with the office of the Secretary of State (or other applicable official, as a state provides) rather than by giving written notice to all claimants. One of the great burdens to buyers under original Article 6 is individual notice to large numbers of creditors.

Revised Article 6 simplifies the process.

Revised Article 6, also, provides for a different array of information that is kept for creditors (or claimants). Under original Article 6, the buyer kept a schedule of property and a list of claimants for a six month period following the sale. These are not requirements of Revised Article 6. Instead, the seller and buyer must agree on the net contract price to be distributed, and then must set forth "a written schedule of distribution". The "schedule of distribution" may provide for any distribution that the seller and buyer agree to, "including distribution of the entire net contract price to the seller." The schedule of distribution accompanies any notice given to claimants, however given.

The last significant change from the original Article 6 in Revised Article 6 is the basic remedy available to creditors. In original Article 6, the creditor voids the sale. Revised Article 6 provides for money damages rather than for voiding the sale. The creditor is entitled to damages for noncompliance in an amount to equal his or her real losses. There are cumulative limits on the damages that may be assessed, and buyers are given the defense of "good faith" efforts to comply with Article 6.

Auctioneers and liquidators continue to be covered by Revised Article 6. Those who conduct auction sales and liquidation sales are treated as "bulk sale" buyers, and must provide notice to claimants as "bulk sale" buyers are required to do. The notice form is different and tailored to auction or liquidation sales.

Revised Article 6 extends the statute of limitations on creditor's actions from six months to one year. Original Article 6 provided for six months. The period runs from the date of the "bulk sale". Concealed sales toll the statute of limitations in Revised Article 6, as they do under original Article 6.

Repeal or revise are the options offered to the states in the Revised Article 6 of the UCC. Repeal is the preferred option, but the revisions in Alternative B eliminate the significant difficulties encountered under original Article 6, and make them an excellent alternative to repeal.

Why states should revise Article 6 of the Uniform Commercial Code

Bulk sales laws were originally drafted in response to a fraud perceived to be common around the turn of the century: a merchant would acquire his stock in trade on credit, then sell the entire inventory ("in bulk") and abscond with the profits, leaving creditors unpaid.

Article 6 was drafted as a response to this "bulk sale risk." It affords creditors a remedy against a good faith purchaser for full value without notice of any wrongdoing on the part of the seller. In the legal context in which Article 6 was drafted, the benefits to creditors appeared to justify the costs of interfering with good faith transactions.

Present Article 6 imposes several duties on the buyer in bulk. These duties include the duty to notify the creditors of the impending bulk transfer. This can be burdensome, particularly when the seller has a large number of creditors.

The Article requires compliance even when there is no reason to believe that the seller is conducting a fraudulent transfer, as when the seller is scaling down the business but remaining available to creditors. And it also imposes strict liability for noncompliance. Failure to comply with the provisions of the Article renders the transfer ineffective, even when the buyer has complied in good faith, and even when no creditor has been injured by the noncompliance.

The current revision of Article 6 is designed to reduce the burdens and risks imposed upon good-faith buyers of business assets while increasing the protection afforded to creditors.

Among the needed changes are:

- Article 6 applies only when the buyer has notice that the seller will not continue to operate the same or a similar kind of business after the sale;
- when the seller is indebted to a large number of creditors, the buyer does not have to send individual notice to every person, but instead may give notice by filing;
- a buyer who makes a good faith effort to comply with the requirements of Article 6 is not liable for noncompliance.

Present Article 6 has become inadequate to regulate modern bulk sales. The revised Article is designed to afford better protection to creditors while minimizing the impediments to good-faith transactions.

Why states should repeal Article 6 of the Uniform Commercial Code

Bulk sales laws were originally drafted in response to a fraud perceived to be common around the turn of the century: a merchant would acquire his stock in trade on credit, then sell his entire inventory ("in bulk") and abscond with the proceeds, leaving creditors unpaid.

Article 6 was drafted as a response to this "bulk sale risk." It imposes several duties on the buyer in bulk, including the duty to notify all creditors of the impending bulk transfer. It also requires compliance even when there is no reason to believe that the seller is conducting a fraudulent transfer. The Article imposes strict liability for noncompliance. Failure to comply with the provisions render the transfer ineffective, even when the buyer has complied in good faith.

But today, changes in the business and legal contexts in which sales are conducted have made regulation of bulk sales unnecessary. Creditors are better able to make informed decisions about whether to extend credit. Changes in technology have enabled credit reporting services to provide fast, accurate, and more complete credit histories at relatively small cost.

Creditors also have greater opportunity to collect their debts. The adoption of state long-arm statutes and rules have greatly improved the possibility of obtaining personal jurisdiction over a debtor who flees to another state.

And creditors no longer face the choice of extending unsecured credit or no credit at all. Retaining an interest in inventory to secure its price has become relatively simple and inexpensive under Article 9 of the UCC - adopted in 49 states. If a bulk sale is fraudulent and the buyer is a party to the fraud, creditors have remedies under the Uniform Fraudulent Transfer Act.

There is no evidence that in today's economy, fraudulent bulk sales are frequent enough, or engender credit losses significant enough, to require regulation of all bulk sales, including the vast majority that are conducted in good faith.

The Uniform Law Commissioners, therefore, encourage those states that have enacted Article 6 to repeal it.

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November 3, 1992

The Honorable George H. Heilig, Jr.
700 Newtown Road
Norfolk, Virginia 23502

Re: UCC Article 6 (Bulk Sales)

Dear Delegate Heilig:

I am writing to report on the recommendation of a committee of the Business Law Section of the Virginia Bar Association which I chair and which reviewed the proposals of the Commissioners on Uniform State Laws to repeal or revise Article 6 of the Uniform Commercial Code. Enclosed is a list of the members of my committee. Although Connie Ring was invited to attend our recent meeting, he was unable to attend, but Arlen Bolstad of the Division of Legislative Services was in attendance during our committee's discussions.

The consensus of the committee after discussing the proposed revisions to Article 6 was that Article 6 should be repealed. Although there was agreement that the requirement to give notice of a "bulk sale" was helpful to creditors, the committee felt that the benefits of the notice did not outweigh all of the other burdens imposed on the seller and the buyer by Article 6. It was felt that creditors have remedies under the law of fraudulent transfers if the bulk sale is fraudulent and the buyer is a party to the fraud or the seller engages in fraudulent transfers. A creditor can now obtain a lien on inventory to secure his claim under Article 9 of the Uniform Commercial Code which was not the case when the bulk sales law was originally enacted, and states have adopted long-arm statutes and rules which have improved the possibility of obtaining personal jurisdiction over a debtor who flees to another state. None of these remedies will guarantee collection from a debtor who has absconded, but there are clearly more legal tools available for interstate collection today than when the bulk sales law was originally enacted.

Although one committee member strongly favored adoption of the proposed revisions instead of repeal because he had had favorable experiences with having received bulk sale notices and getting payment of claims for his clients, the committee noted that Article 6 is not invoked very much in actual practice and in a majority of cases the parties agree to waive

CHRISTIAN, BARTON, EPPS, BRENT & CHAPPELL
Delegate George H. Heilig, Jr.
November 3, 1992
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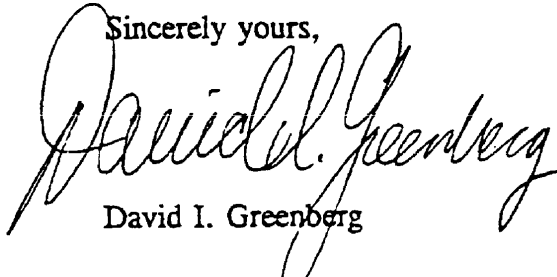
compliance because compliance is expensive and burdensome. Failure to comply with the provisions of existing Article 6 renders the transfer ineffective even when the buyer has complied in "good faith" and even when no creditor has been injured by noncompliance. It was also noted that Article 6 is not being taught in the law schools today because of its infrequent use.

One of the burdensome requirements that troubled the committee was the "schedule of distribution" required under revised Article 6. In other jurisdictions under the existing Article 6, there is an optional provision which Virginia did not adopt which imposes liability on the buyer to apply the proceeds in satisfaction of the debts of the seller. Virginia did not adopt this optional provision because it was "undesirable" according to the Code commentary. The schedule of distribution requirement is similar to this optional provision, but the schedule of distribution requirement under revised Article 6 is not offered as an optional provision. So, if we chose to adopt revised Article 6, the schedule of distribution requirement would have to be included to avoid a material deviation from the model Act.

The consensus of the committee was that fraudulent bulk sales do not occur frequently enough to justify regulation of all bulk sales, including the vast majority that are conducted in good faith. Therefore, the committee recommends repeal of Article 6.

I am sending a copy of this letter to Fred Palmore who is the former Chairman of the Business Law Section of the Virginia State Bar. I have spoken with Fred about this matter, and he has indicated that he will discuss the recommendation of my committee with his successor. I am sure that you will hear further from that section if they feel further comment is appropriate.

Sincerely yours,



David I. Greenberg

DIG/dd

cc: Carlyle C. Ring, Jr., Esquire
Ross Reeves, Esquire
Fred W. Palmore, III, Esquire
Arlen Bolstad, Esquire
Members of the Committee

**UCC STUDY COMMITTEE -
REVISION OR REPEAL OF
ARTICLE 6 (BULK SALES LAW)**

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November 12, 1992

Honorable George H. Heilig, Jr.
Member, Virginia House of Delegates
700 Newtown Road
Norfolk, VA 23502

Re: Uniform Commercial Code Subcommittee/
Bulk Sales Act

Dear George:

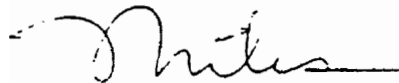
At your request, a representative of Legislative Services recently contacted me to ascertain whether the Virginia League of Savings Institutions has a position on whether the Bulk Sales Act should be retained as a part of Virginia's Uniform Commercial Code or repealed. I have discussed this with Mike Toalson, President of the Virginia League, and it appears that the Bulk Sales Act is utilized infrequently and has little or no impact on the lending activities of the member institutions of the Virginia League. Therefore, the Virginia League takes no position on whether repeal is desirable and will defer to the judgment of your subcommittee on this issue.

We appreciate the opportunity to provide comments on this proposed legislation.

With best personal regards, I remain

Very truly yours,

HAZEL & THOMAS, P.C.



S. Miles Dumville

SMD/cbs

cc: Mr. Michael L. Toalson

**Outline of Remarks before Joint Subcommittee
Reviewing Modifications of the Uniform Commercial Code**

December 1, 1992

A. Background of the Uniform Commercial Code

- In the 1940's and 50's the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) undertook as a joint project the drafting and promulgation of the Uniform Commercial Code (UCC)
- By the late 60's the UCC had been enacted in all fifty states, facilitating interstate and international trade and forestalling Federal preemption of commercial law.

B. Current Amendments to the Uniform Commercial Code

- Virginia has enacted all of the currently outstanding amendments to the UCC, including Article 2A (Personal Property Leasing); Revised Article 3 and related amendments to Article 4 (Negotiable Instruments and Checks); Article 4A (Funds Transfers); Article 8 (Securities); and Article 9 (Secured Transactions).
- These amendments and current projects have been necessitated by changes in business practices and the new technologies (use of computers) which affect substantially the risks and liabilities.

Current Enactments

	2A (1987)	3 & 4 (1990)	4A (1989)	8 (1977)	9 (1972)
Number of Enactments	30	19	44	48	49

C. Drafting Process for UCC Amendments

- Open meetings, circulated drafts, Advisors and Observers.
- Three to five year process
- Participation of all interested groups.

D. Current Projects

- Revised Article 5 (Letters of Credit) - expected to be completed in 1994 (or 1995)

- Revised Article 8 (Securities) - expected to be completed in 1993.
- Revised Article 2 (Sale of Good) - expected to be completed in the next four years.
- Revised Article (Secured Transactions) - expected to be completed in the next five years)

E. Repeal of Article 6 (Bulk Sales) or Amendment (1989)

HJR-147 UCC Study DRAFT

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A BILL to repeal Title 8.6 of the Code of Virginia, consisting of sections 8.6-101 through 8.6-111, relating to the Uniform Commercial Code; bulk transfers.

Be it enacted by the General Assembly of Virginia:

1. That Title 8.6 of the Code of Virginia, consisting of sections 8.6-101 through 8.6-111, is repealed.

#

*Virginia Bulk Transfers Act***Title 8.6.****Commercial Code-Bulk Transfers.****Sec.****8.6-101. Short title.****8.6-102. "Bulk transfer"; transfers of equipment; enterprises subject to this title; bulk transfers subject to this title.****8.6-103. Transfers excepted from this title.****8.6-104. Schedule of property; list of creditors.****8.6-105. Notice to creditors.****8.6-106. [Omitted.]****8.6-107. The notice.****8.6-108. Auction sales; "auctioneer."****8.6-109. What creditors protected.****8.6-110. Subsequent transfers.****8.6-111. Limitation of actions and levies.****§ 8.6-101. Short title.**

This title shall be known and may be cited as Uniform Commercial Code - Bulk Transfers.

(1964, c. 219.)

§ 8.6-102. "Bulk transfer"; transfers of equipment; enterprises subject to this**title; bulk transfers subject to this title.**

(1) A "bulk transfer" is any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory (§ 8.9-109) of an enterprise subject to this title.

(2) A transfer of a substantial part of the equipment (§ 8.9-109) of such an enterprise is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise.

(3) The enterprises subject to this title are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell.

(4) Except as limited by the following section [§ 8.6-103] all bulk transfers of goods located within this State are subject to this title.

(1964, c. 219.)

§ 8.6-103. Transfers excepted from this title.

The following transfers are not subject to this title:

(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 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.

(1964, c. 219.)

§ 8.6-104. Schedule of property; list of creditors.

(1) Except as provided with respect to auction sales (§ 8.6-108), a bulk transfer subject to this title is ineffective against any creditor of the transferor unless:

(a) The transferee requires the transferor to furnish a list of his existing creditors prepared as stated in this section; 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 the clerk's office where deeds are admitted to record of the county or city in which is located the principal place of business of the transferor, if an individual or partnership, or the registered office of the transferor, if a corporation.

(2) 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. If the transferor is the obligor of an outstanding issue of bonds, debentures or the like as to which there is an indenture trustee, the list of creditors need include only the name and address of the indenture trustee and the aggregate outstanding principal amount of the issue.

(3) 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.

(Code 1950, §§ 55-83, 55-84; 1964, c. 219.)

§ 8.6-105. Notice to creditors.

In addition to the requirements of the preceding section [§ 8.6-104], any bulk transfer subject to this title except one made by auction sale (§ 8.6-108) is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, the transferee gives notice of the transfer in the manner and to the persons hereafter provided (§ 8.6-107).

(Code 1950, § 55-83; 1964, c. 219.)

§ 8.6-106.

Omitted.

Editor's note. - The official text of the Uniform Commercial Code offers § 8.6-106 as an optional section as follows:

"§ 8.6-106. Application of the proceeds. In addition to the

requirements of the two preceding sections:

"(1) Upon every bulk transfer subject to this Article for which new consideration becomes payable except those made by sale at auction it is the duty of the transferee to assure that such consideration is applied so far as necessary to pay those debts of the transferor which are either shown on the list furnished by the transferor (§ 6-104) or filed in writing in the place stated in the notice (§ 6-107) 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.

"(2) If any of said debts are in dispute the necessary sum may be withheld from distribution until the dispute is settled or adjudicated.

"(3) If the consideration payable is not enough to pay all of the said debts in full distribution shall be made pro rata."

This optional section was omitted as being undesirable.

§ 8.6-107. The notice.

(1) The notice to creditors (§ 8.6-105) shall state:

(a) that a bulk transfer is about to be made; and

(b) the names and business addresses of the transferor and transferee, and all other business names and addresses used by the transferor within three years last past so far as known to the transferee; and

(c) whether or not all the debts of the transferor are to be paid in full as they fall due as a result of the transaction, and if so, the address to which creditors should send their bills.

(2) If 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 then the notice shall state further:

(a) the location and general description of the property to be transferred and the estimated total of the transferor's debts;

(b) the address where the schedule of property and list of creditors (§ 8.6-104) may be inspected;

(c) whether the transfer is to pay existing debts and if so the amount of such debts and to whom owing;

(d) whether the transfer is for new consideration and if so the amount of such consideration and the time and place of payment.

(3) The notice in any case shall be delivered personally or sent by registered or certified mail to all the persons shown

on the list of creditors furnished by the transferor (§ 8.6-104) and to all other persons who are known to the transferee to hold or assert claims against the transferor.

(Code 1950, § 55-83; 1964, c. 219.)

§ 8.6-108. Auction sales; "auctioneer."

(1) A bulk transfer is subject to this title even though it is by sale at auction, but only in the manner and with the results stated in this section.

(2) The transferor shall furnish a list of his creditors and assist in the preparation of a schedule of the property to be sold, both prepared as before stated (§ 8.6-104).

(3) The person or persons other than the transferor who direct, control or are responsible for the auction are collectively called the "auctioneer." The auctioneer shall:

(a) receive and retain the list of creditors and prepare and retain the schedule of property for the period stated in this title (§ 8.6-104);

(b) give notice of the auction personally or by registered or certified mail at least ten days before it occurs

to all persons shown on the list of creditors and to all other persons who are known to him to hold or assert claims against the transferor.

(4) Failure of the auctioneer to perform any of these duties does not affect the validity of the sale or the title of the purchasers, but 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 them from the transferor up to but not exceeding the net proceeds of the auction. If the auctioneer consists of several persons their liability is joint and several.

(1964, c. 219.)

§ 8.6-109. What creditors protected.

The creditors of the transferor mentioned in this title are those holding claims based on transactions or events occurring before the bulk transfer, but creditors who become such after notice to creditors is given (§§ 8.6-105 and 8.6-107) are not entitled to notice.

(Code 1950, § 55-83; 1964, c. 219.)

§ 8.6-110. Subsequent transfers.

When the title of a transferee to property is subject to a defect by reason of his noncompliance with the requirements of this title, then:

(1) a purchaser of any of such property from such transferee who pays no value or who takes with notice of such noncompliance takes subject to such defect, but

(2) a purchaser for value in good faith and without such notice takes free of such defect.

(Code 1950, § 55-83; 1964, c. 219.)

§ 8.6-111. Limitation of actions and levies.

No action under this title 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.

(Code 1950, §§ 55-85, 55-86; 1964, c. 219.)

UNIFORM COMMERCIAL CODE

The American Law Institute

National Conference of
Commissioners on Uniform State Laws

REPEALER OF ARTICLE 6 -
BULK TRANSFERS

and

[REVISED] ARTICLE 6 - BULK SALES

OFFICIAL TEXT — 1989

WITH COMMENTS

The Executive Office
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Approved by the American Bar Association
Los Angeles, California, February 13, 1990

REPEALER OF ARTICLE 6
BULK TRANSFERS
and
[REVISED] ARTICLE 6
BULK SALES
(States To Select One Alternative)

ALTERNATIVE A

Section

1. Repeal.
2. Amendment.
3. Amendment.
4. Savings Clause.

[END OF ALTERNATIVE A]

ALTERNATIVE B

- 6-101. Short Title.
- 6-102. Definitions and Index of Definitions.
- 6-103. Applicability of Article.
- 6-104. Obligations of Buyer.
- 6-105. Notice to Claimants.
- 6-106. Schedule of Distribution.
- 6-107. Liability for Noncompliance.
- 6-108. Bulk Sales by Auction; Bulk Sales Conducted by Liquidator.
- 6-109. What Constitutes Filing; Duties of Filing Officer; Information From Filing Officer.
- 6-110. Limitation of Actions.

[END OF ALTERNATIVE B]

**National Conference of Commissioners on Uniform State
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PREFATORY NOTE

Background. Bulk sale legislation originally was enacted in response to a fraud perceived to be common around the turn of the century: a merchant would acquire his stock in trade on credit, then sell his entire inventory ("in bulk") and abscond with the proceeds, leaving creditors unpaid. The creditors had a right to sue the merchant on the unpaid debts, but that right often was of little practical value. Even if the merchant-debtor was found, in personam jurisdiction over him might not have been readily available. Those creditors who succeeded in obtaining a judgment often were unable to satisfy it because the defrauding seller had spent or hidden the sale proceeds. Nor did the creditors ordinarily have recourse to the merchandise sold. The transfer of the inventory to an innocent buyer effectively immunized the goods from the reach of the seller's creditors. The creditors of a bulk seller thus might be left without a means to satisfy their claims.

To a limited extent, the law of fraudulent conveyances ameliorated the creditors' plight. When the buyer in bulk was in league with the seller or paid less than full value for the inventory, fraudulent conveyance law enabled the defrauded creditors to avoid the sale and apply the transferred inventory toward the satisfaction of their claims against the seller. But fraudulent conveyance law provided no remedy against persons who bought in good faith, without reason to know of the seller's intention to pocket the proceeds and disappear, and for adequate value. In those cases, the only remedy for the seller's creditors was to attempt to recover from the absconding seller.

State legislatures responded to this perceived "bulk sale risk" with a variety of legislative enactments. Common to these statutes was the imposition of a duty on the buyer in bulk to notify the seller's creditors of the impending sale. The buyer's failure to comply with these and any other statutory duties generally afforded the seller's creditors a remedy analogous to the remedy for fraudulent conveyances: the creditors acquired the right to set aside the sale and reach the transferred inventory in the hands of the buyer.

Like its predecessors, Article 6 (1987 Official Text) is remarkable in that it obligates buyers in bulk to incur costs to protect the interests of the seller's creditors, with whom they usually have no relationship. Even more striking is that Article 6 affords creditors a remedy against a good faith purchaser for full value without notice of any wrongdoing on the part of the seller. The Article thereby impedes normal business transactions, many of which can be expected to benefit the seller's creditors. For this reason, Article 6 has been subjected to serious criticism. See, e.g., Rapson, *U.C.C. Article 6: Should It Be Revised or "Deep-Sixed"?* 38 *Bus.Law.* 1753 (1983).

In the legal context in which Article 6 (1987 Official Text) and its nonuniform predecessors were enacted, the benefits to creditors appeared to justify the costs of interfering with good faith transactions. Today, however, creditors are better able than ever to make informed decisions about whether to extend credit. Changes in technology have enabled credit reporting services to provide fast, accurate, and more complete credit histories at relatively little cost. A search of the public real estate and personal property records will disclose most encumbrances on a debtor's property with little inconvenience.

In addition, changes in the law now afford creditors greater opportunities to collect their debts. The development of "minimum contacts" with the forum state as a basis for *in personam* jurisdiction and the universal promulgation of state long-arm statutes and rules have greatly improved the possibility of obtaining personal jurisdiction over a debtor who flees to another state. Widespread enactment of the Uniform Enforcement of Foreign Judgments Act has facilitated nationwide collection of judgments. And to the extent that a bulk sale is fraudulent and the buyer is a party to fraud, aggrieved creditors have a remedy under the Uniform Fraudulent Transfer Act. Moreover, creditors of a merchant no longer face the choice of extending unsecured credit or no credit at all. Retaining an interest in inventory to secure its price has become relatively simple and inexpensive under Article 9.

Finally, there is no evidence that, in today's economy, fraudulent bulk sales are frequent enough, or engender credit losses significant enough, to require regulation of all bulk sales, including the vast majority that are conducted in good faith. Indeed, the experience of the Canadian Province of British Columbia, which repealed its Sale of Goods in Bulk Act in 1985, and of the United Kingdom, which never has enacted bulk sales legislation, suggests that regulation of bulk sales no longer is necessary.

Recommendation. The National Conference of Commissioners on Uniform State Laws and the American Law Institute believe that changes in the business and legal contexts in which sales are conducted have made regulation of bulk sales unnecessary. The Conference and the Institute therefore withdraw their support for Article 6 of the Uniform Commercial Code and encourage those states that have enacted the Article to repeal it.

The Conference and the Institute recognize that bulk sales may present a particular problem in some states and that some legislatures may wish to continue to regulate bulk sales. They believe that existing Article 6 has become inadequate for that purpose. For those states that are disinclined to repeal Article 6, they have promulgated a revised version of Article 6. The revised Article is designed to afford better protection to creditors while minimizing the impediments to good-faith transactions.

Art. 6

BULK TRANSFERS; BULK SALES

The Official Comment to Section 6-101 explains the rationale underlying the revisions and highlights the major substantive changes reflected in them. Of particular interest is Section 6-103(1)(a), which limits the application of the revised Article to bulk sales by sellers whose principal business is the sale of inventory from stock. In approving this provision, the Conference and the Institute were mindful that some states have expanded the coverage of existing Article 6 to include bulk sales conducted by sellers whose principal business is the operation of a restaurant or tavern. Expansion of the scope of revised Article 6 is inconsistent with the recommendation that Article 6 be repealed. Nevertheless, the inclusion of restaurants and taverns within the scope of the revised Article as it is enacted in particular jurisdictions would not disturb the internal logic and structure of the revised Article.

ALTERNATIVE A

Section

1. Repeal.
2. Amendment.
3. Amendment.
4. Savings Clause.

[§ 1. Repeal.

Article 6 and Section 9-111 of the Uniform Commercial Code are hereby repealed, effective _____.

§ 2. Amendment.

Section 1-105(2) of the Uniform Commercial Code is hereby amended to read as follows:

(2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 2-402.

Applicability of the Article on Leases. Sections 2A-105 and 2A-106.

Applicability of the Article on Bank Deposits and Collections. Section 4-102.

~~Bulk transfers subject to the Article on Bulk Transfers. Section 6-102.~~

Applicability of the Article on Investment Securities. Section 8-106.

Perfection provisions of the Article on Secured Transactions. Section 9-103.

§ 3. Amendment.

Section 2-403(4) of the Uniform Commercial Code is hereby amended to read as follows:

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), ~~Bulk Transfers (Article 6)~~ and Documents of Title (Article 7).

§ 4. Savings Clause.

Rights and obligations that arose under Article 6 and Section 9-111 of the Uniform Commercial Code before their repeal remain valid and may be enforced as though those statutes had not been repealed.]

[END OF ALTERNATIVE A]

ALTERNATIVE B

Section

- 6-101. Short Title.
- 6-102. Definitions and Index of Definitions.
- 6-103. Applicability of Article.
- 6-104. Obligations of Buyer.
- 6-105. Notice to Claimants.
- 6-106. Schedule of Distribution.
- 6-107. Liability for Noncompliance.
- 6-108. Bulk Sales by Auction; Bulk Sales Conducted by Liquidator.
- 6-109. What Constitutes Filing; Duties of Filing Officer; Information From Filing Officer.
- 6-110. Limitation of Actions.

[§ 6-101. Short Title.

This Article shall be known and may be cited as Uniform Commercial Code—Bulk Sales.

Official Comment

Prior Uniform Statutory Provision: Section 6-101 (1987 Official Text).

Change: This Article applies only to sales, as defined in Section 2-103(1), and not to other transfers.

Purpose of Change: Transfers other than sales, *e.g.*, grants of security interests, do not present risks to creditors necessitating advance notice in accordance with the provisions of this Article. The Uniform Fraudulent

Transfer Act affords a remedy to creditors who are injured by donative transfers.

Rationale for Revision of the Article:

Article 6 (1987 Official Text) imposes upon transferees in bulk several duties toward creditors of the transferor. These duties include the duty to notify the creditors of the impending bulk transfer and, in those juris-

dictions that have adopted optional Section 6-106, the duty to assure that the new consideration for the transfer is applied to pay debts of the transferor.

Compliance with the provisions of Article 6 can be burdensome, particularly when the transferor has a large number of creditors. When the transferor is actively engaged in business at a number of locations, assembling a current list of creditors may not be possible. Mailing a notice to each creditor may prove costly. When the goods that are the subject of the transfer are located in several jurisdictions, the transferor may be obligated to comply with Article 6 as enacted in each jurisdiction. The widespread enactment of nonuniform amendments makes compliance with Article 6 in multiple-state transactions problematic. Moreover, the Article requires compliance even when there is no reason to believe that the transferor is conducting a fraudulent transfer, *e.g.*, when the transferor is scaling down the business but remaining available to creditors.

Article 6 imposes strict liability for noncompliance. Failure to comply with the provisions of the Article renders the transfer ineffective, even when the transferor has attempted compliance in good faith, and even when no creditor has been injured by the noncompliance. The potential liability for minor noncompliance may be high. If the transferor should enter bankruptcy before the expiration of the limitation period, Bankruptcy Code §§ 544(b), 550(a), 11 U.S.C. §§ 544(b), 550(a), may enable the transferor's bankruptcy trustee to set aside the entire transaction and recover from the noncomplying transferee all the goods transferred or their value. The trustee has this power even though the noncompliance was with respect to only a single creditor holding a small claim.

The benefits that compliance affords to creditors do not justify the substantial burdens and risks that the Article imposes upon good faith purchasers of business assets. The Article requires that notice be sent only ten days before the transferee takes possession of the goods or pays for them, whichever happens first. Given the delay between sending the notice and its receipt, creditors have scant opportunity to avail themselves of a judicial or nonjudicial remedy before the transfer has been consummated.

In some cases Article 6 may have the unintended effect of injuring, rather than aiding, creditors of the transferor. Those transferees who recognize the burdens and risks that Article 6 imposes upon them sometimes agree to purchase only at a reduced price. Others refuse to purchase at all, leaving the creditors to realize only the liquidation value, rather than the going concern value, of the business goods.

As a response to these inadequacies and others, the National Conference of Commissioners on Uniform State Laws has completely revised Article 6. This revision is designed to reduce the burdens and risks imposed upon good-faith buyers of business assets while increasing the protection afforded to creditors. Among the major changes it makes are the following:

—this Article applies only when the buyer has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale (Section 6-102(1)(c)).

—this Article does not apply to sales in which the value of the property otherwise available to creditors is less than \$10,000 or those in which the value of the property is greater than \$25,000,000 (Section 6-103(3)(f)).

—the choice-of-law provision (Sections 6-103(1)(b) and 6-103(2)) limits

the applicable law to that of one jurisdiction.

—when the seller is indebted to a large number of persons, the buyer need neither obtain a list of those persons nor send individual notices to each person but instead may give notice by filing (Sections 6-105(2) and 6-104(2)).

—the notice period is increased from 10 days to 45 days (Section 6-105(5)), and the statute of limitations is extended from six months to one year (Section 6-110).

—the notice must include a copy of a “schedule of distribution,” which sets forth how the net contract price is to be distributed (Sections 6-105(3) and 6-106(1)).

—a buyer who makes a good faith effort to comply with the require-

ments of this Article or to exclude the sale from the application of this Article, or who acts on the good faith belief that this Article does not apply to the sale, is not liable for noncompliance (Section 6-107(3)).

—a buyer’s noncompliance does not render the sale ineffective or otherwise affect the buyer’s title to the goods; rather, the liability of a non-complying buyer is for damages caused by the noncompliance (Sections 6-107(1) and 6-107(8)).

In addition to making these and other major substantive changes, revised Article 6 resolves the ambiguities that three decades of law practice, judicial construction, and scholarly inquiry have disclosed.

§ 6-102. Definitions and Index of Definitions.

(1) In this Article, unless the context otherwise requires:

- (a) “Assets” means the inventory that is the subject of a bulk sale and any tangible and intangible personal property used or held for use primarily in, or arising from, the seller’s business and sold in connection with that inventory, but the term does not include:
 - (i) fixtures (Section 9-313(1)(a)) other than readily removable factory and office machines;
 - (ii) the lessee’s interest in a lease of real property; or
 - (iii) property to the extent it is generally exempt from creditor process under nonbankruptcy law.
- (b) “Auctioneer” means a person whom the seller engages to direct, conduct, control, or be responsible for a sale by auction.
- (c) “Bulk sale” means:
 - (i) in the case of a sale by auction or a sale or series of sales conducted by a liquidator on the seller’s behalf, a sale or series of sales not in the ordinary course of the seller’s business of more than half of the seller’s inventory, as measured by value on the date of the bulk-sale agreement, if on that date the auctioneer or liquidator has notice, or after reasonable inquiry would have had notice, that the seller will not contin-

ue to operate the same or a similar kind of business after the sale or series of sales; and

- (ii) in all other cases, a sale not in the ordinary course of the seller's business of more than half the seller's inventory, as measured by value on the date of the bulk-sale agreement, if on that date the buyer has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale.
- (d) "Claim" means a right to payment from the seller, whether or not the right is reduced to judgment, liquidated, fixed, matured, disputed, secured, legal, or equitable. The term includes costs of collection and attorney's fees only to the extent that the laws of this state permit the holder of the claim to recover them in an action against the obligor.
- (e) "Claimant" means a person holding a claim incurred in the seller's business other than:
 - (i) an unsecured and unmatured claim for employment compensation and benefits, including commissions and vacation, severance, and sick-leave pay;
 - (ii) a claim for injury to an individual or to property, or for breach of warranty, unless:
 - (A) a right of action for the claim has accrued;
 - (B) the claim has been asserted against the seller; and
 - (C) the seller knows the identity of the person asserting the claim and the basis upon which the person has asserted it; and

(States To Select One Alternative)

ALTERNATIVE A

[(iii) a claim for taxes owing to a governmental unit.]

ALTERNATIVE B

[(iii) a claim for taxes owing to a governmental unit, if:

- (A) a statute governing the enforcement of the claim permits or requires notice of the bulk sale to be given to the governmental unit in a manner other than by compliance with the requirements of this Article; and
- (B) notice is given in accordance with the statute.]
- (f) "Creditor" means a claimant or other person holding a claim.
- (g) (i) "Date of the bulk sale" means:

- (A) if the sale is by auction or is conducted by a liquidator on the seller's behalf, the date on which more than ten percent of the net proceeds is paid to or for the benefit of the seller; and
- (B) in all other cases, the later of the date on which:
 - (I) more than ten percent of the net contract price is paid to or for the benefit of the seller; or
 - (II) more than ten percent of the assets, as measured by value, are transferred to the buyer.
- (ii) For purposes of this subsection:
 - (A) Delivery of a negotiable instrument (Section 3-104(1)) to or for the benefit of the seller in exchange for assets constitutes payment of the contract price pro tanto;
 - (B) To the extent that the contract price is deposited in an escrow, the contract price is paid to or for the benefit of the seller when the seller acquires the unconditional right to receive the deposit or when the deposit is delivered to the seller or for the benefit of the seller, whichever is earlier; and
 - (C) An asset is transferred when a person holding an unsecured claim can no longer obtain through judicial proceedings rights to the asset that are superior to those of the buyer arising as a result of the bulk sale. A person holding an unsecured claim can obtain those superior rights to a tangible asset at least until the buyer has an unconditional right, under the bulk-sale agreement, to possess the asset, and a person holding an unsecured claim can obtain those superior rights to an intangible asset at least until the buyer has an unconditional right, under the bulk-sale agreement, to use the asset.
- (h) "Date of the bulk-sale agreement" means:
 - (i) in the case of a sale by auction or conducted by a liquidator (subsection (c)(i)), the date on which the seller engages the auctioneer or liquidator; and
 - (ii) in all other cases, the date on which a bulk-sale agreement becomes enforceable between the buyer and the seller.
- (i) "Debt" means liability on a claim.
- (j) "Liquidator" means a person who is regularly engaged in the business of disposing of assets for businesses contemplating liquidation or dissolution.

- (k) "Net contract price" means the new consideration the buyer is obligated to pay for the assets less:
- (i) the amount of any proceeds of the sale of an asset, to the extent the proceeds are applied in partial or total satisfaction of a debt secured by the asset; and
 - (ii) the amount of any debt to the extent it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the new consideration for the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale.
- (l) "Net proceeds" means the new consideration received for assets sold at a sale by auction or a sale conducted by a liquidator on the seller's behalf less:
- (i) commissions and reasonable expenses of the sale;
 - (ii) the amount of any proceeds of the sale of an asset, to the extent the proceeds are applied in partial or total satisfaction of a debt secured by the asset; and
 - (iii) the amount of any debt to the extent it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the new consideration for the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale.
- (m) A sale is "in the ordinary course of the seller's business" if the sale comports with usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.
- (n) "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.
- (o) "Value" means fair market value.
- (p) "Verified" means signed and sworn to or affirmed.
- (2) The following definitions in other Articles apply to this Article:
- (a) "Buyer." Section 2-103(1)(a).

- (b) "Equipment." Section 9-109(2).
- (c) "Inventory." Section 9-109(4).
- (d) "Sale." Section 2-106(1).
- (e) "Seller." Section 2-103(1)(d).

(3) In addition, Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.

Official Comment

1. (a) "Assets". New. The term generally includes only "personal property." Whether particular property is "personal property" is to be determined by law outside this Article; however, for purposes of this Article, (i) the term includes "readily removable factory and office machines" (compare Section 9-313(4)(c)), even if they are covered by applicable real estate law and thus are "fixtures" as defined in Section 9-313(1)(a); (ii) the term does not include the lessee's interest in a lease of real property, even if that interest is considered to be personal property under other applicable law; and (iii) the term does not include property to the extent that it is "generally exempt from creditor process under nonbankruptcy law."

(b) "Auctioneer". Compare Section 6-108(3) (1987 Official Text).

(c) "Bulk Sale". Bulk sales are of two kinds. Subsection (1)(c)(i) describes bulk sales conducted by a professional intermediary (i.e., an auctioneer or liquidator), as to which sales Section 6-108 applies. If these indirect sales occur as a series of related sales, then the entire series is treated as a single "bulk sale" and the term applies to the sales in the aggregate. Sales made directly by the seller to the buyer, described in subsection (1)(c)(ii), include sales conducted by an auctioneer or liquidator for its own account.

The elements of both direct and indirect sales are the same. Some of these elements have been borrowed

from the 1987 Official Text of Article 6 and restated. For example, the term includes only sales that are not "in the ordinary course of the seller's business" (subsection (1)(m)). The sale must be of "more than half of the seller's inventory, as measured by value [subsection (1)(o)] on the date of the bulk-sale agreement [subsection (1)(h)]." All inventory owned by the seller should be included in the calculation, regardless of where it is located. Inventory that is encumbered by a security interest or lien should be counted at its gross value, although the fact that it is encumbered may affect the applicability of this Article to the sale.

The determination whether a sale is a "bulk sale" and thus subject to this Article is not affected by whether other types of property are sold in connection with inventory. However, other provisions of this Article take account of the fact that other property may be sold in connection with inventory. For example, the availability of the exclusion in Section 6-103(3)(l) turns on the value of all the "assets," not just the inventory. Similarly, the notice required by Section 6-105 must describe the "assets," not just the inventory. And Section 6-107(4) measures the buyer's maximum cumulative liability for noncompliance by the value of the inventory and equipment sold in the bulk sale.

In an effort to limit its coverage to sales posing the greatest risks to creditors, this Article adds an additional element to the definition of "bulk

sale." A sale is not a "bulk sale" unless the buyer, auctioneer, or liquidator has notice, or after a reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale. Whether a person has "notice" depends upon what the person knows and what the person would have known had the person conducted a reasonable inquiry. The issue of whether a transaction was a bulk sale is likely to be litigated only when the seller has absconded with the sale proceeds. This Article requires that the matters as to which the buyer, auctioneer, or liquidator had notice be determined only by reference to facts that the person knew or would have known at the date of the bulk-sale agreement. Reference to what actually occurred is inappropriate.

Whether an inquiry is "reasonable" depends on the facts and circumstances of each case. These facts and circumstances may include the identities of the buyer and seller and the type of assets being sold. In some cases, a reasonable inquiry may consist of no inquiry at all concerning the seller's future.

Not every change in business operations poses a substantial enough risk to creditors to justify the costs of compliance with this Article. Thus, in determining whether post-sale business is of a kind that is "the same" or "similar" to the business conducted before the sale, a court should consider whether, viewed from the perspective of the creditors of the seller, the change poses extraordinary risks or whether the change is a normal risk that creditors can be assumed to take. In particular, when the post-bulk sale business differs from the pre-bulk sale business only in the size of the business conducted, the seller should be considered to be continuing in the same or a similar kind of business and

the sale should not be considered a bulk sale.

The seller must "continue to operate" the same or a similar kind of business as owner. If the owner sells the business assets to a buyer and continues to manage the business as an employee of the buyer, the seller is not continuing to operate the business within the meaning of this Article.

(d) "Claim". New. The first sentence derives from Bankruptcy Code § 101(4), 11 U.S.C. § 101(4). Changes, including the deletion of Section 101(4)(B), were made for stylistic purposes only.

(e) "Claimant". New. This term defines the category of claim holders who are the primary beneficiaries of the duties that this Article imposes. Compare "Creditor" (subsection (1)(f)).

States that choose not to afford taxing authorities the benefits of this Article should adopt Alternative A. Adoption of Alternative B would afford the benefits of this Article to taxing authorities except with respect to those taxes as to which there has been compliance with another statute requiring that notice of the bulk sale be given to the taxing authority.

(f) "Creditor". New. The term includes all holders of claims against the seller, even holders of claims arising from consumer transactions. Compare "Claimant" (subsection (1)(e)).

(g) "Date of the bulk sale". New. The parties are able to control the date of the bulk sale in several ways. They can keep the proceeds of the sale in escrow, thereby delaying the date of payment, or they can specifically agree that the assets remain subject to the reach of the seller's creditors, thereby delaying the date that the assets are transferred. By adjusting the time that the buyer acquires an unconditional right to possess tangible assets and the time the buyer acquires

an unconditional right to use intangible assets, the parties may affect the substantive rights of creditors and thereby control the date the assets are transferred.

The connection between the time of transfer and the buyer's rights under the bulk-sale agreement appears only for purposes of sales to which this Article applies. Subsection (1)(g) does not purport to affect the rights of creditors of a seller of property for other purposes or under other circumstances.

(h) "Date of the bulk-sale agreement". New. Law outside this Article, including the provisions of Article 2, determines when an agreement for a bulk sale becomes enforceable between the buyer and the seller and when an auctioneer or liquidator is engaged.

(i) "Debt". New. This subsection is borrowed from Bankruptcy Code Section 101(11).

(j) "Liquidator". New. Although the definition of "liquidator" is quite broad, the term is used with respect to sales that are "conducted" by a liquidator on behalf of the seller. See subsection (1)(c)(i). Thus only those liquidators that "conduct" sales will be affected by this Article.

(k) "Net contract price". New. Consideration is not "new considera-

tion" to the extent that it consists of the partial or total satisfaction of an antecedent debt owed to the buyer by the seller. When the buyer buys assets along with property other than assets, the "net contract price" is that portion of the new consideration allocable to the assets.

(l) "Net proceeds". New. The term appears, without definition, in Section 6-108 (1987 Official Text).

(m) "In the ordinary course of the seller's business". New.

(n) "United States". New. This subsection derives from Section 9-103(3)(c).

(o) "Value". New. The definition in Section 1-201(44) is not appropriate in the context of this Article.

(p) "Verified". New.

2. "Good faith". This Article adopts the definition of "good faith" in Article 1 in all cases, even when the buyer is a merchant.

Cross-References:

Point 1(a): Section 9-313.

Point 1(c): Sections 1-201 and 6-103.

Point 1(g): Article 2 generally.

Point 1(h): Section 2-201 and Article 2 generally.

§ 6-103. Applicability of Article.

(1) Except as otherwise provided in subsection (3), this Article applies to a bulk sale if:

- (a) the seller's principal business is the sale of inventory from stock; and
- (b) on the date of the bulk-sale agreement the seller is located in this state or, if the seller is located in a jurisdiction that is not a part of the United States, the seller's major executive office in the United States is in this state.

(2) A seller is deemed to be located at his [or her] place of business. If a seller has more than one place of business, the seller is deemed located at his [or her] chief executive office.

- (3) This Article does not apply to:
- (a) a transfer made to secure payment or performance of an obligation;
 - (b) a transfer of collateral to a secured party pursuant to Section 9-503;
 - (c) a sale of collateral pursuant to Section 9-504;
 - (d) retention of collateral pursuant to Section 9-505;
 - (e) a sale of an asset encumbered by a security interest or lien if (i) all the proceeds of the sale are applied in partial or total satisfaction of the debt secured by the security interest or lien or (ii) the security interest or lien is enforceable against the asset after it has been sold to the buyer and the net contract price is zero;
 - (f) a general assignment for the benefit of creditors or to a subsequent transfer by the assignee;
 - (g) a sale by an executor, administrator, receiver, trustee in bankruptcy, or any public officer under judicial process;
 - (h) a sale made in the course of judicial or administrative proceedings for the dissolution or reorganization of an organization;
 - (i) a sale to a buyer whose principal place of business is in the United States and who:
 - (i) not earlier than 21 days before the date of the bulk sale, (A) obtains from the seller a verified and dated list of claimants of whom the seller has notice three days before the seller sends or delivers the list to the buyer or (B) conducts a reasonable inquiry to discover the claimants;
 - (ii) assumes in full the debts owed to claimants of whom the buyer has knowledge on the date the buyer receives the list of claimants from the seller or on the date the buyer completes the reasonable inquiry, as the case may be;
 - (iii) is not insolvent after the assumption; and
 - (iv) gives written notice of the assumption not later than 30 days after the date of the bulk sale by sending or delivering a notice to the claimants identified in subparagraph (ii) or by filing a notice in the office of the [Secretary of State];
 - (j) a sale to a buyer whose principal place of business is in the United States and who:
 - (i) assumes in full the debts that were incurred in the seller's business before the date of the bulk sale;
 - (ii) is not insolvent after the assumption; and

- (iii) gives written notice of the assumption not later than 30 days after the date of the bulk sale by sending or delivering a notice to each creditor whose debt is assumed or by filing a notice in the office of the [Secretary of State];
- (k) a sale to a new organization that is organized to take over and continue the business of the seller and that has its principal place of business in the United States if:
 - (i) the buyer assumes in full the debts that were incurred in the seller's business before the date of the bulk sale;
 - (ii) the seller receives nothing from the sale except an interest in the new organization that is subordinate to the claims against the organization arising from the assumption; and
 - (iii) the buyer gives written notice of the assumption not later than 30 days after the date of the bulk sale by sending or delivering a notice to each creditor whose debt is assumed or by filing a notice in the office of the [Secretary of State];
- (l) a sale of assets having:
 - (i) a value, net of liens and security interests, of less than \$10,000. If a debt is secured by assets and other property of the seller, the net value of the assets is determined by subtracting from their value an amount equal to the product of the debt multiplied by a fraction, the numerator of which is the value of the assets on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale; or
 - (ii) a value of more than \$25,000,000 on the date of the bulk-sale agreement; or
- (m) a sale required by, and made pursuant to, statute.

(4) The notice under subsection (3)(i)(iv) must state: (i) that a sale that may constitute a bulk sale has been or will be made; (ii) the date or prospective date of the bulk sale; (iii) the individual, partnership, or corporate names and the addresses of the seller and buyer; (iv) the address to which inquiries about the sale may be made, if different from the seller's address; and (v) that the buyer has assumed or will assume in full the debts owed to claimants of whom the buyer has knowledge on the date the buyer receives the list of claimants from the seller or completes a reasonable inquiry to discover the claimants.

(5) The notice under subsections (3)(j)(iii) and (3)(k)(iii) must state: (i) that a sale that may constitute a bulk sale has been or will be made; (ii) the date or prospective date of the bulk sale; (iii) the individual,

partnership, or corporate names and the addresses of the seller and buyer; (iv) the address to which inquiries about the sale may be made, if different from the seller's address; and (v) that the buyer has assumed or will assume the debts that were incurred in the seller's business before the date of the bulk sale.

(6) For purposes of subsection (3)(l), the value of assets is presumed to be equal to the price the buyer agrees to pay for the assets. However, in a sale by auction or a sale conducted by a liquidator on the seller's behalf, the value of assets is presumed to be the amount the auctioneer or liquidator reasonably estimates the assets will bring at auction or upon liquidation.

Official Comment

Prior Uniform Statutory Provision: Sections 6-102 and 6-103 (1987 Official Text).

Changes: New choice-of-law provision; exclusions from the Article clarified, revised, and expanded.

Purposes of Changes and New Matter:

1. Subsection (1)(a) follows Section 6-102(3) of the 1987 Official Text and makes Article 6 applicable only when the seller's principal business is the sale of inventory from stock. This Article does not apply to a sale by a seller whose principal business is the sale of goods other than inventory, e.g., a farmer, is the sale of inventory not from stock, e.g., a manufacturer who produces goods to order, or is the sale of services, e.g., a dry cleaner, barber, or operator of a hotel, tavern, or restaurant.

2. The choice-of-law rule in subsections (1)(b) and (2) derives from Section 9-103(3) and should be interpreted consistently with the Official Comment and case law construing that Section. Any agreement between the buyer and the seller with regard to the law governing a bulk sale does not affect the choice-of-law rule in this Article.

3. Some of the transactions excluded by subsection (3), e.g., those excluded by subsection (3)(a), may not be

bulk sales. This Article nevertheless specifically excludes them in order to allay any doubts about the Article's applicability. Certain transactions, e.g., the sale of fully encumbered inventory that remains subject to a security interest, may be excluded by more than one subsection.

4. Subsections (3)(a), (b), (c), (d), and (e) derive from subsections (1) and (3) of Section 6-103 (1987 Official Text).

5. Subsections (3)(f), (g), and (h) restate subsections (2), (4), and (5) of Section 6-103 with minor changes.

6. Subsections (3)(i), (j), and (k) relate to sales in which the buyer assumes specified debts of the seller. A bulk sale does not fall within any of these subsections unless the buyer's assumption of debts is binding and irrevocable.

Subsection (3)(j) derives from subsection (6) of Section 6-103 (1987 Official Text) and is available to buyers who are not insolvent (as defined in Section 1-201(23)), assume all the seller's business debts in full, and give notice of the assumption. Subsection (3)(k) derives from subsection (7) of Section 6-103 (1987 Official Text) and excludes transactions in which the risks to creditors are minimal. Like subsection (3)(j), this subsection applies only if the buyer assumes all the sell-

er's business debts in full and gives notice of the assumption. In addition, the buyer must be a new organization that is organized to take over and continue the seller's business, the seller must receive nothing from the sale other than an interest in the new organization, and the seller's interest must be subordinate to the claims arising from the assumption. Sales that may qualify for the exclusion include the incorporation of a partnership or sole proprietorship.

Buyers often are reluctant to assume debts of which they have no knowledge. Subsection (3)(i), which is new, permits a qualifying buyer to exclude a sale from this Article by assuming only those debts owed to claimants of whom the buyer has knowledge after the buyer either conducts a reasonable inquiry to discover claimants or obtains a list of claimants from the seller. A buyer who takes a verified list from the seller is held to have knowledge of the claimants on the list and is entitled to rely in good faith on the list without making further inquiry. The protection afforded by the assumption of these debts, while not perfect, is sufficiently great to eliminate the need for compliance with Article 6.

7. Subsection (3)(l) is new. Although the bulk sale of even a very small business may be of concern to some creditors, losses to creditors from sales of assets in which the seller's equity is less than \$10,000 are not likely to justify the costs of complying with this Article. Sales of assets having a value of more than \$25,000,000 have not presented serious risks to creditors. Publicity normally attends sales of that magnitude, and the sellers are unlikely to be able successfully to remove the proceeds from the reach of creditors. As used in this subsection, "price" includes all consideration for the assets, not only new consideration. Compare "Net contract price"

(Section 6-102(1)(k)). If the auctioneer or liquidator does not make an estimation, then no presumption arises.

8. Subsection (3)(m) is new. This Article assumes that creditors are aware of statutes that may require their debtors to conduct bulk sales under specified circumstances, *e.g.*, upon the termination of a franchise or of a contract between a dealer and supplier, and are able to take account of any risk that those sales may impose.

Cross-References:

Point 1: Section 9-109.

Point 2: Sections 1-105 and 9-103.

Point 3: Section 6-102.

Point 4: Sections 9-111, 9-503, 9-504, and 9-505.

Point 6: Sections 1-201 and 1-203.

Point 7: Section 6-102.

Definitional Cross-References:

"Asset". Section 6-102.

"Auctioneer". Section 6-102.

"Bulk sale". Section 6-102.

"Buyer". Section 2-103.

"Claimant". Section 6-102.

"Collateral". Section 9-105.

"Date of the bulk sale". Section 6-102.

"Date of the bulk-sale agreement". Section 6-102.

"Debt". Section 6-102.

"Insolvent". Section 1-201.

"Inventory". Section 9-109.

"Knowledge". Section 1-201.

"Liquidator". Section 6-102.

"Net contract price". Section 6-102.

"Notice". Section 1-201.

"Organization". Section 1-201.

"Presumed". Section 1-201.

"Proceeds". Section 9-306.

Art. 6 **BULK TRANSFERS; BULK SALES** **§ 6-104**

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| "Sale". Section 2-106. | "Send". Section 1-201. |
| "Secured party". Section 9-105. | "United States". Section 6-102. |
| "Security interest". Section 1-201. | "Value". Section 6-102. |
| "Seller". Section 2-103. | "Verified". Section 6-102. |

§ 6-104. Obligations of Buyer.

(1) In a bulk sale as defined in Section 6-102(1)(c)(ii) the buyer shall:

- (a) obtain from the seller a list of all business names and addresses used by the seller within three years before the date the list is sent or delivered to the buyer;
- (b) unless excused under subsection (2), obtain from the seller a verified and dated list of claimants of whom the seller has notice three days before the seller sends or delivers the list to the buyer and including, to the extent known by the seller, the address of and the amount claimed by each claimant;
- (c) obtain from the seller or prepare a schedule of distribution (Section 6-106(1));
- (d) give notice of the bulk sale in accordance with Section 6-105;
- (e) unless excused under Section 6-106(4), distribute the net contract price in accordance with the undertakings of the buyer in the schedule of distribution; and
- (f) unless excused under subsection (2), make available the list of claimants (subsection (1)(b)) by:
 - (i) promptly sending or delivering a copy of the list without charge to any claimant whose written request is received by the buyer no later than six months after the date of the bulk sale;
 - (ii) permitting any claimant to inspect and copy the list at any reasonable hour upon request received by the buyer no later than six months after the date of the bulk sale; or
 - (iii) filing a copy of the list in the office of the [Secretary of State] no later than the time for giving a notice of the bulk sale (Section 6-105(5)). A list filed in accordance with this subparagraph must state the individual, partnership, or corporate name and a mailing address of the seller.

(2) A buyer who gives notice in accordance with Section 6-105(2) is excused from complying with the requirements of subsections (1)(b) and (1)(f).

Official Comment

Prior Uniform Statutory Provision: Section 6-104 (1987 Official Text).

Changes: Revised and rewritten.

Purposes of Changes and New Matter:

1. Subsection (1) sets forth the buyer's duties in a bulk sale conducted by the seller. The buyer's failure to perform these duties may result in liability under Section 6-107. An auctioneer in a bulk sale by auction and a liquidator in a bulk sale that the liquidator conducts on the seller's behalf have similar duties but may face somewhat different liability. See Section 6-108(1). The buyer's duties are designed to afford the seller's claimants the opportunity to learn of the bulk sale before the seller has removed the assets from their reach and has received payment that is easily secreted.

2. Section 6-104(3) (1987 Official Text) provides that "[r]esponsibility 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." This sentence has been deleted as superfluous. Nothing in this Article suggests that the buyer is responsible for the completeness or accuracy of the list of claimants. The buyer's only obligations with respect to the list are to obtain it from the seller and to make it available. A buyer who sends or delivers notice of the bulk sale in accordance with Section 6-105(1) may rely in good faith on the list supplied by the seller unless, at the time the

notice is sent or delivered, the buyer has knowledge of a claimant not on the list. A buyer who knows of a claimant not on the list is obligated to send notice of the bulk sale to that claimant.

3. The buyer's only obligation with respect to the net contract price is to comply with the schedule of distribution. The schedule may provide for the buyer to pay the entire net contract price to the seller. If so, the buyer complies with the requirements of Section 6-104(1)(e) by paying the entire net contract price to the seller.

4. The purpose of the list of claimants is to enable the buyer to give claimants notice of the bulk sale. If the buyer gives notice by filing in a public office (Section 6-105(2)), then the buyer need not obtain or preserve a list of the seller's claimants.

Cross-References:

- Point 1: Sections 6-107 and 6-108.
- Point 2: Sections 6-105 and 1-203.
- Point 3: Section 6-106.
- Point 4: Section 6-105.

Definitional Cross-References:

- "Buyer". Section 2-103.
- "Bulk sale". Section 6-102.
- "Claimant". Section 6-102.
- "Date of the bulk sale". Section 6-102.
- "Net contract price". Section 6-102.
- "Notice". Section 1-201.
- "Seller". Section 2-103.
- "Verified". Section 6-102.

§ 6-105. Notice to Claimants.

(1) Except as otherwise provided in subsection (2), to comply with Section 6-104(1)(d), the buyer shall send or deliver a written notice of the bulk sale to each claimant on the list of claimants (Section 6-

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104(1)(b)) and to any other claimant of whom the buyer has knowledge at the time the notice of the bulk sale is sent or delivered.

(2) A buyer may comply with Section 6-104(1)(d) by filing a written notice of the bulk sale in the office of the [Secretary of State] if:

- (a) on the date of the bulk-sale agreement the seller has 200 or more claimants, exclusive of claimants holding secured or matured claims for employment compensation and benefits, including commissions and vacation, severance, and sick-leave pay; or
- (b) the buyer has received a verified statement from the seller stating that, as of the date of the bulk-sale agreement, the number of claimants, exclusive of claimants holding secured or matured claims for employment compensation and benefits, including commissions and vacation, severance, and sick-leave pay, is 200 or more.

(3) The written notice of the bulk sale must be accompanied by a copy of the schedule of distribution (Section 6-106(1)) and state at least:

- (a) that the seller and buyer have entered into an agreement for a sale that may constitute a bulk sale under the laws of the State of _____;
- (b) the date of the agreement;
- (c) the date on or after which more than ten percent of the assets were or will be transferred;
- (d) the date on or after which more than ten percent of the net contract price was or will be paid, if the date is not stated in the schedule of distribution;
- (e) the name and a mailing address of the seller;
- (f) any other business name and address listed by the seller pursuant to Section 6-104(1)(a);
- (g) the name of the buyer and an address of the buyer from which information concerning the sale can be obtained;
- (h) a statement indicating the type of assets or describing the assets item by item;
- (i) the manner in which the buyer will make available the list of claimants (Section 6-104(1)(f)), if applicable; and
- (j) if the sale is in total or partial satisfaction of an antecedent debt owed by the seller, the amount of the debt to be satisfied and the name of the person to whom it is owed.

(4) For purposes of subsections (3)(e) and (3)(g), the name of a person is the person's individual, partnership, or corporate name.

(5) The buyer shall give notice of the bulk sale not less than 45 days before the date of the bulk sale and, if the buyer gives notice in

accordance with subsection (1), not more than 30 days after obtaining the list of claimants.

(6) A written notice substantially complying with the requirements of subsection (3) is effective even though it contains minor errors that are not seriously misleading.

(7) A form substantially as follows is sufficient to comply with subsection (3):

Notice of Sale

(1) _____, whose address is _____, is described in this notice as the "seller."

(2) _____, whose address is _____, is described in this notice as the "buyer."

(3) The seller has disclosed to the buyer that within the past three years the seller has used other business names, operated at other addresses, or both, as follows: _____

(4) The seller and the buyer have entered into an agreement dated _____, for a sale that may constitute a bulk sale under the laws of the state of _____

(5) The date on or after which more than ten percent of the assets that are the subject of the sale were or will be transferred is _____, and [if not stated in the schedule of distribution] the date on or after which more than ten percent of the net contract price was or will be paid is _____

(6) The following assets are the subject of the sale: _____

(7) [If applicable] The buyer will make available to claimants of the seller a list of the seller's claimants in the following manner: _____

(8) [If applicable] The sale is to satisfy \$_____ of an antecedent debt owed by the seller to _____

(9) A copy of the schedule of distribution of the net contract price accompanies this notice.

[End of Notice]

Official Comment

Prior Uniform Statutory Provision: Sections 6-105 and 6-107 (1987 Official Text).

Changes: Revised, alternative method of giving notice added, and form of notice added.

Purposes of Changes and New Matter:

1. Subsection (1) sets forth the method by which the buyer may discharge the duty to notify the seller's claimants of the impending sale. The buyer "has knowledge" of a claimant only if the buyer has actual knowledge sufficient to enable the buyer to send a notice to the claimant. A buy-

er who knows only that the seller has other, unidentified claimants complies with this subsection by giving notice to the claimants on the seller's list.

2. Subsection (2) is new. It affords the buyer the opportunity to publish notice in cases in which the number of claimants—and thus the costs of compliance and risk of inadvertent non-compliance—are large. Although a filed notice will not inform every claimant of the impending sale, a filed notice is expected to inform a sufficient number of claimants (perhaps through credit reporting services) to enable them to stop an unfair or fraudulent transaction before it occurs.

The buyer may give notice by filing if the seller actually has 200 or more claimants or if the buyer receives a verified statement that the seller has 200 or more claimants. Claimants who hold secured or matured claims for employment compensation and benefits are not counted in determining the number of claimants for this purpose; however, they are entitled to receive notice of the bulk sale.

The duty to give notice must be performed in good faith. A buyer who receives a verified statement from the seller but knows the statement to be false does not act in good faith and thus does not comply with subsection (2)(b).

3. Subsection (3) prescribes the contents of the notice. The contents are the same regardless of whether notice is sent to each claimant or filed, except that the information in subsection (3)(i) is required only when notice is sent. The requirements of subsection (3) are the minimum; a notice that includes additional information is effective. The requirement in subsection (3)(h) for the description of assets is modeled on Section 9-402(1). Neither the identification of

assets by serial number nor an item-by-item list of assets is required.

Subsection (3)(j) applies when the sale satisfies a debt owed by the seller to the buyer or to a third party. Section 6-103(3) excludes certain sales of this kind from the application of this Article.

4. Subsection (4) requires that a notice give the proper name of the seller and the buyer. A trade name is insufficient. See Official Comment 7 to UCC § 9-402. However, subsection (3)(f) requires that trade names be added when the seller has provided them to the buyer. The list need not include trade names or other names that the seller has used but not listed, even if the buyer knows of the names.

5. Subsection (5) requires that notice be given not less than 45 days before the date of the bulk sale. The period was extended from the 10 days afforded by the 1987 Official Text to provide ample time for claimants to receive or discover the notice and to take any action that the law permits to collect their claims from the seller. For example, depending upon the facts of each case and upon applicable law, claimants might seek to enjoin the sale, acquire a judicial lien on the assets or the proceeds, threaten to refuse to deal with the buyer unless the seller's debt is paid, or file an involuntary bankruptcy petition against the seller. The "date of the bulk sale" is defined in such a way as to permit the seller to transfer the assets to the buyer or the buyer to pay the price to the seller (but not both) before or during the 45 days.

6. Subsection (6) derives from Section 9-402(8). The purpose of filing is to give notice to claimants. Whether an error in the seller's name is seriously misleading should depend upon whether a claimant searching under the seller's correct name could have found the filing. Whether an error

other than in the seller's name is seriously misleading should depend upon whether the error prejudiced the ability of claimants to assert their rights.

Cross-References:

Point 1: Sections 1-201 and 6-104.

Point 2: Sections 1-203 and 6-104.

Point 3: Sections 6-102, 6-104, and 9-402.

Point 4: Sections 6-104 and 9-402.

Point 5: Sections 6-102.

Point 6: Sections 6-107 and 9-402.

Definitional Cross-References:

"Asset". Section 6-102.

"Bulk sale". Section 6-102.

"Buyer". Section 2-103.

"Claim". Section 6-102.

"Claimant". Section 6-102.

"Date of the bulk sale". Section 6-102.

"Date of the bulk-sale agreement". Section 6-102.

"Debt". Section 6-102.

"Knowledge". Section 1-201.

"Net contract price". Section 6-102.

"Seller". Section 2-103.

"Send". Section 1-201.

"Verified". Section 6-102.

"Written". Section 1-201.

§ 6-106. Schedule of Distribution.

(1) The seller and buyer shall agree on how the net contract price is to be distributed and set forth their agreement in a written schedule of distribution.

(2) The schedule of distribution may provide for distribution to any person at any time, including distribution of the entire net contract price to the seller.

(3) The buyer's undertakings in the schedule of distribution run only to the seller. However, a buyer who fails to distribute the net contract price in accordance with the buyer's undertakings in the schedule of distribution is liable to a creditor only as provided in Section 6-107(1).

(4) If the buyer undertakes in the schedule of distribution to distribute any part of the net contract price to a person other than the seller, and, after the buyer has given notice in accordance with Section 6-105, some or all of the anticipated net contract price is or becomes unavailable for distribution as a consequence of the buyer's or seller's having complied with an order of court, legal process, statute, or rule of law, the buyer is excused from any obligation arising under this Article or under any contract with the seller to distribute the net contract price in accordance with the buyer's undertakings in the schedule if the buyer:

- (a) distributes the net contract price remaining available in accordance with any priorities for payment stated in the schedule of distribution and, to the extent that the price is insufficient to pay all the debts having a given priority, distributes the price

pro rata among those debts shown in the schedule as having the same priority;

- (b) distributes the net contract price remaining available in accordance with an order of court;
- (c) commences a proceeding for interpleader in a court of competent jurisdiction and is discharged from the proceeding; or
- (d) reaches a new agreement with the seller for the distribution of the net contract price remaining available, sets forth the new agreement in an amended schedule of distribution, gives notice of the amended schedule, and distributes the net contract price remaining available in accordance with the buyer's undertakings in the amended schedule.

(5) The notice under subsection (4)(d) must identify the buyer and the seller, state the filing number, if any, of the original notice, set forth the amended schedule, and be given in accordance with subsection (1) or (2) of Section 6-105, whichever is applicable, at least 14 days before the buyer distributes any part of the net contract price remaining available.

(6) If the seller undertakes in the schedule of distribution to distribute any part of the net contract price, and, after the buyer has given notice in accordance with Section 6-105, some or all of the anticipated net contract price is or becomes unavailable for distribution as a consequence of the buyer's or seller's having complied with an order of court, legal process, statute, or rule of law, the seller and any person in control of the seller are excused from any obligation arising under this Article or under any agreement with the buyer to distribute the net contract price in accordance with the seller's undertakings in the schedule if the seller:

- (a) distributes the net contract price remaining available in accordance with any priorities for payment stated in the schedule of distribution and, to the extent that the price is insufficient to pay all the debts having a given priority, distributes the price pro rata among those debts shown in the schedule as having the same priority;
- (b) distributes the net contract price remaining available in accordance with an order of court;
- (c) commences a proceeding for interpleader in a court of competent jurisdiction and is discharged from the proceeding; or
- (d) prepares a written amended schedule of distribution of the net contract price remaining available for distribution, gives notice of the amended schedule, and distributes the net contract price remaining available in accordance with the amended schedule.

(7) The notice under subsection (6)(d) must identify the buyer and the seller, state the filing number, if any, of the original notice, set

forth the amended schedule, and be given in accordance with subsection (1) or (2) of Section 6-105, whichever is applicable, at least 14 days before the seller distributes any part of the net contract price remaining available.

Official Comment

Prior Uniform Statutory Provision:
None.

Purposes:

1. A principal purpose of bulk sales legislation has been to impair the ability of a seller to liquidate inventory and abscond with the proceeds, leaving creditors unpaid. Toward this end, a significant minority of jurisdictions adopted optional Section 6-106 (1987 Official Text), which imposes upon a transferee in bulk the duty to apply the new consideration for the transfer to the debts of the transferor pro rata. When one or more of these debts is unliquidated, disputed, or allegedly secured, making a pro rata distribution may prove quite difficult and distribution of the consideration may be delayed considerably. In addition, since preferences generally are permitted under state law, the appropriateness of mandating a pro rata distribution is questionable. Accordingly, this Article does not require the buyer to apply the consideration to payment of the seller's debts.

This Article recognizes, however, that the seller's claimants have an interest in learning what will happen to the net contract price. If the contemplated distribution is objectionable, claimants should be able to avail themselves of whatever remedies state law or federal law allows to prevent the sale or tie up the price. On the other hand, if the price is to be distributed in a manner that is favorable to creditors, then advance knowledge of that fact will facilitate the sale by obviating any need for claimants to interfere with it.

To afford advance notice of the intended distribution of the contract price, Section 6-105(3) requires the buyer to include with the notice of the sale a copy of the "schedule of distribution"—i.e., of the agreement between the buyer and the seller on how the net contract price is to be distributed.

2. This Article does not require the net contract price to be applied in any particular fashion. Rather, the buyer and the seller may agree to whatever they wish. They must, however, disclose their agreement in ample time before the date of the bulk sale. See Section 6-105(5). The terms of the schedule of distribution in any given sale will be a function of the negotiations between buyer and seller as affected by any applicable non-Code law (e.g., corporate dissolution statutes) imposing distribution requirements in sales of the kind conducted.

In formulating the schedule, the parties may be well advised to consider the likely reaction of claimants to the schedule. For example, a schedule that contemplates the distribution of the entire net contract price to the seller or to a single creditor may prompt the filing of an involuntary bankruptcy petition. A schedule that contemplates paying the net contract price into an escrow established for the benefit of the seller's claimants may be more favorably received.

The seller may incur additional debt between the time the schedule is published and the time the net contract price is paid. The schedule may provide for payment of those debts from the net contract price.

3. Unless otherwise agreed, the buyer's only liability to creditors for failure to comply with his undertakings in the schedule of distribution is set forth in Section 6-107(1). A creditor named in the schedule may not rely on the creation or publication of the schedule as the basis for imposing liability against the buyer on any other theory, including that of estoppel or third-party beneficiary.

The seller may wish to undertake to pay some of the price to creditors. The seller may, but need not, include this undertaking in the schedule of distribution. The buyer is not responsible for performance of the seller's undertakings. Thus, if the seller makes an undertaking with respect to payment of the net contract price and fails to perform in accordance with it, the buyer faces no liability. However, certain persons in control of the seller may be liable under those circumstances. See Section 6-107(11).

4. In some cases, the precise amount of the net contract price may be unknown at the time that the schedule of distribution is formulated and notice of the bulk sale is given. In other cases, the net contract price may prove to be less than originally anticipated. Parties who fail to provide for these contingencies in the schedule of distribution and are unable to abide by the original schedule may be required to give a new notice with a new schedule.

The inability to abide by the schedule may be due to an external legal event, e.g., the suffering of a garnishment lien on the net contract price, the filing of a bankruptcy petition, or compliance with a corporate dissolution statute. If so, subsection (4), which applies to the extent that the net contract price is within the control of the buyer, may afford relief to the buyer, and subsection (6), which applies to the extent the net contract

price is within the control of the seller, may afford relief to a person in control of the seller. Although this Article imposes no obligation on sellers with respect to distribution of the net contract price (or otherwise), a seller may incur an obligation of this kind by agreement with the buyer. Accordingly, subsection (6) provides the means by which the seller as well as a person in control of the seller may be excused from any such obligation.

Subsections (4)(a) and (6)(a) permit the buyer or seller respectively to distribute the net contract price remaining available in accordance with any priorities for payment. A schedule need not afford priority to particular debts. If the schedule contains no priorities, then the debts are treated as if they are all of the same priority, and the buyer or seller, as the case may be, may distribute the price pro rata in partial satisfaction of the debts set forth in the schedule. Law other than this Article determines whether a court order or a proceeding for interpleader is available for purposes of subsections (4)(b), (4)(c), (6)(b), and (6)(c).

Cross-References:

Point 1: Sections 6-104 and 6-105.

Point 2: Sections 6-105.

Point 3: Sections 1-102 and 6-107.

Definitional Cross-References:

"Buyer". Section 2-103.

"Contract". Section 1-201.

"Creditor". Section 1-201.

"Debt". Section 6-102.

"Net contract price". Section 6-102.

"Person". Section 1-201.

"Seller". Section 2-103.

"Written". Section 1-201.

§ 6-107. Liability for Noncompliance.

(1) Except as provided in subsection (3), and subject to the limitation in subsection (4):

- (a) a buyer who fails to comply with the requirements of Section 6-104(1)(e) with respect to a creditor is liable to the creditor for damages in the amount of the claim, reduced by any amount that the creditor would not have realized if the buyer had complied; and
- (b) a buyer who fails to comply with the requirements of any other subsection of Section 6-104 with respect to a claimant is liable to the claimant for damages in the amount of the claim, reduced by any amount that the claimant would not have realized if the buyer had complied.

(2) In an action under subsection (1), the creditor has the burden of establishing the validity and amount of the claim, and the buyer has the burden of establishing the amount that the creditor would not have realized if the buyer had complied.

(3) A buyer who:

- (a) made a good faith and commercially reasonable effort to comply with the requirements of Section 6-104(1) or to exclude the sale from the application of this Article under Section 6-103(3); or
- (b) on or after the date of the bulk-sale agreement, but before the date of the bulk sale, held a good faith and commercially reasonable belief that this Article does not apply to the particular sale is not liable to creditors for failure to comply with the requirements of Section 6-104. The buyer has the burden of establishing the good faith and commercial reasonableness of the effort or belief.

(4) In a single bulk sale the cumulative liability of the buyer for failure to comply with the requirements of Section 6-104(1) may not exceed an amount equal to:

- (a) if the assets consist only of inventory and equipment, twice the net contract price, less the amount of any part of the net contract price paid to or applied for the benefit of the seller or a creditor; or
- (b) if the assets include property other than inventory and equipment, twice the net value of the inventory and equipment less the amount of the portion of any part of the net contract price paid to or applied for the benefit of the seller or a creditor which is allocable to the inventory and equipment.

(5) For the purposes of subsection (4)(b), the "net value" of an asset is the value of the asset less (i) the amount of any proceeds of the sale of an asset, to the extent the proceeds are applied in partial or total

satisfaction of a debt secured by the asset and (ii) the amount of any debt to the extent it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale. The portion of a part of the net contract price paid to or applied for the benefit of the seller or a creditor that is "allocable to the inventory and equipment" is the portion that bears the same ratio to that part of the net contract price as the net value of the inventory and equipment bears to the net value of all of the assets.

(6) A payment made by the buyer to a person to whom the buyer is, or believes he [or she] is, liable under subsection (1) reduces pro tanto the buyer's cumulative liability under subsection (4).

(7) No action may be brought under subsection (1)(b) by or on behalf of a claimant whose claim is unliquidated or contingent.

(8) A buyer's failure to comply with the requirements of Section 6-104(1) does not (i) impair the buyer's rights in or title to the assets, (ii) render the sale ineffective, void, or voidable, (iii) entitle a creditor to more than a single satisfaction of his [or her] claim, or (iv) create liability other than as provided in this Article.

(9) Payment of the buyer's liability under subsection (1) discharges pro tanto the seller's debt to the creditor.

(10) Unless otherwise agreed, a buyer has an immediate right of reimbursement from the seller for any amount paid to a creditor in partial or total satisfaction of the buyer's liability under subsection (1).

(11) If the seller is an organization, a person who is in direct or indirect control of the seller, and who knowingly, intentionally, and without legal justification fails, or causes the seller to fail, to distribute the net contract price in accordance with the schedule of distribution is liable to any creditor to whom the seller undertook to make payment under the schedule for damages caused by the failure.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. This section sets forth the consequences of noncompliance with the requirements of Section 6-104. Although other legal consequences may result from a bulk sale—e.g., the buy-

er may be liable to the seller under Article 2 or to the seller's creditors under the Uniform Fraudulent Transfer Act—no other consequences may be imposed by reason of the buyer's failure to comply with the requirements of this Article.

The two subsections of Section 6-107(1) reflect the duties set forth in Section 6-104. The duties generally run only to claimants, but the duty to distribute the net contract price in accordance with the schedule of distribution (Section 6-104(1)(e)) may run also to certain creditors.

2. Article 6 (1987 Official Text), like many of its nonuniform predecessors, makes a noncomplying transfer ineffective against aggrieved creditors. In contrast, noncompliance with this Article neither renders the sale ineffective nor otherwise affects the buyer's rights in or title to the assets.

Liability under this Article is for breach of a statutory duty. The buyer's only liability is personal (*in personam*) liability. Aggrieved creditors may only recover money damages. *In rem* remedies, which are available upon noncompliance with Article 6 (1987 Official Text), are not available under this Article. Thus, aggrieved creditors no longer may treat the sale as if it had not occurred and use the judicial process to apply assets purchased by the buyer toward the satisfaction of their claims against the seller.

The change in the theory of liability and in the available remedy should be of particular significance if the seller enters bankruptcy after the sale is consummated. When an aggrieved creditor of the transferor has a nonbankruptcy right to avoid a transfer in whole or in part, as may be the case under Article 6 (1987 Official Text), the transferor's bankruptcy trustee may avoid the entire transfer. See Bankruptcy Code § 544(b), 11 U.S.C. § 544(b). Under this Article, a person who is aggrieved by the buyer's noncompliance may not avoid the sale. Rather, the person is entitled only to recover damages as provided in this section. Because no creditor has the right to avoid the transaction or to assert a remedy that is the functional

equivalent of avoidance, the seller's bankruptcy trustee likewise should be unable to do.

3. This Article makes explicit what is implicit in Article 6 (1987 Official Text): only those persons as to whom there has been noncompliance are entitled to a remedy. For example, if notices are sent to each claimant other than claimant A, claimant B cannot recover. Similarly, a creditor who acquires a claim after notice is given has no remedy unless the buyer undertakes in the schedule of distribution to pay that creditor and the buyer fails to meet the obligation.

4. Unlike Article 6 (1987 Official Text), which imposes strict liability upon a noncomplying transferee, this Article imposes liability for noncompliance only when the failure to comply actually has injured a creditor and only to the extent of the injury. Each creditor's damages are measured by the injury that the particular creditor sustained as a consequence of the buyer's failure to comply. This measure is stated as the amount of the debt reduced by any amount that the person would not have realized if the buyer had complied. Compare Section 4-103(5).

5. A buyer is liable only for the buyer's own noncompliance with the requirements of Section 6-104. Under that section, the only step the buyer must take to discover the identity of the seller's claimants is to obtain a list of claimants from the seller. If the seller's list is incomplete and the buyer lacks knowledge of claimant C, then claimant C has no remedy under subsection (1)(b) of this section.

6. The creditor has the burden of establishing the validity and amount of the debt owed by the seller as well as the fact of the buyer's noncompliance. In contesting the allegation of noncompliance, the buyer may intro-

duce evidence tending to show either that the sale was not a bulk sale or that the sale was a bulk sale to which this Article does not apply. In contesting the validity and amount of the debt, the buyer may introduce evidence tending to show that the seller had a defense to the debt. The buyer has the burden of establishing the amount that the creditor would not have realized even if the buyer had complied. Implicit in subsection (2) is that certain failures to comply with the requirements of this Article will cause no injury and thus result in no liability.

The following examples illustrate the operation of subsection (2):

Example 1: The buyer fails to give notice of the bulk sale. Claimant D, who appears on seller's list of claimants, admits to having had actual knowledge of the impending sale two months before it occurred. The buyer is likely to be able to meet the burden of establishing that even had the buyer given notice of the sale, claimant D would not have recovered any more than the claimant actually recovered.

Example 2: The buyer failed to obtain a list of seller's business names (Section 6-104(1)(a)) or to make available the list of claimants (Section 6-104(1)(f)). In many cases, the buyer may be able to meet the burden of establishing that compliance with those subsections would not have enabled claimants to recover any more than they actually recovered.

7. Subsection (3) may afford a complete defense to a noncomplying buyer. This defense is available to buyers who establish that they made a good faith effort to comply with the requirements of this Article or made a good faith effort to exclude the sale from the application of this Article (e.g., by assuming debts and attempt-

ing to comply with the notice requirements of Section 6-103(3)(i), (j), or (k)). When a buyer makes a good faith effort to comply with this Article or to exclude the transaction from its coverage, the injury caused by noncompliance is likely to be *de minimis*. In any event, the primary responsibility for satisfying claims rests with the creditors, and this Article imposes no greater duty upon buyers who attempt to comply with this Article or to exclude a sale from its application than to make a good faith effort to do so.

The defense of subsection (3) also is available to buyers who act on the good faith belief that this Article does not apply to the sale (e.g., because the sale is not a bulk sale or is excluded under Section 6-103). The good-faith-belief defense is an acknowledgement that reasonable people may disagree over whether a given transaction is or is not a bulk sale and over whether Section 6-103 excludes a particular transaction. A buyer acting in good faith should be protected from the liability that this Article otherwise would impose on buyers who may be completely innocent of wrongdoing. A buyer who is unaware of the requirements of this Article holds no belief concerning the applicability of the Article and so may not use the defense.

8. Even a buyer who completely fails to comply with this Article may not be liable in an amount equal to sum of the seller's debts. Subsection (4) limits the aggregate recovery for "any one bulk sale," which term includes a series of sales by a liquidator. The maximum cumulative liability for noncompliance with this Article parallels the maximum recovery generally available to creditors under the 1987 Official Text of Article 6. Under that Article, the noncomplying transferee may have to "pay twice" for the goods. First, the transferee may pay the purchase price to the transferor;

then, the transferee may lose the goods to aggrieved creditors.

Under this Article, the maximum cumulative liability is an amount equal to twice the net contract price of the inventory and equipment (i.e., twice the amount that would be available to unsecured creditors from the inventory and equipment), less the amount of any portion of that net contract price paid to or applied for the benefit of the seller or a creditor of the seller. Unless the buyer receives credit for amounts paid to the seller (which amounts the creditors have a right to apply to payment of their claims), the buyer might wind up paying an amount equal to the net contract price three times (once to the seller and twice to aggrieved creditors). The grant of credit for amounts paid to the seller's creditors recognizes that ordinarily the seller has no obligation to pay creditors pro rata.

When the assets sold consist of only inventory and equipment, calculation of the maximum cumulative liability is relatively simple. But when the assets sold include property in addition to inventory and equipment, the calculation becomes more difficult. When inventory or equipment secures a debt that also is secured by other collateral and the aggregate value of the collateral exceeds the secured debt, a determination of the amount in clause (ii) of subsection (5) may require an allocation of the collateral to the debt in accordance with the statutory formula. In addition, one may need to determine which portion of payments of the net contract price is allocable to inventory and equipment. Subsection (5) directs that this allocation be made by multiplying the part of the net contract price paid to or applied for the benefit of the seller or a creditor by a fraction whose nominator is the net value of the inventory and equipment and whose de-

nominator is the net value of all the assets.

Sometimes the seller may receive the net contract price and pay some or all of it to one or more creditors. In determining whether a payment to a creditor was made from the net contract price or from another source, courts are free to employ tracing rules. Amounts paid to secured parties usually are taken into account in determining the net contract price; if so, the buyer should not receive credit for them.

9. The buyer need not wait for judgment to be entered before paying a person believed to be a creditor of the seller. Indeed, the buyer is entitled to credit for amounts paid to persons who in fact may not be creditors of the seller, as long as the buyer acts with the belief that the seller is so indebted. As is the case with respect to all obligations under the Code, the buyer's belief must be held in good faith.

10. Any amounts paid by the buyer in satisfaction of the liability created by Section 6-107(1) reduce the seller's liability to the recipient pro tanto. Consequently, the buyer is entitled to immediate reimbursement of those amounts from the seller. The right of reimbursement is available only for amounts paid to actual creditors. Amounts paid to those whom the buyer incorrectly believes to be creditors ordinarily are not recoverable from the seller, although the buyer is entitled to credit for those amounts against the aggregate liability in subsection (4). Of course, the buyer and seller may vary the seller's reimbursement obligation by agreement.

11. Because of the difficulty in valuing claims that are unliquidated or contingent, persons holding claims of that kind may not bring an action under subsection (1)(b). If the claim remains unliquidated or contingent

throughout the limitation period in Section 6-110, then these creditors have no remedy for noncompliance under that subsection. They may, however, be entitled to a remedy under subsection (1)(a) of (11) for failure to distribute the net contract price in accordance with the schedule of distribution.

12. In certain circumstances, subsection (11) imposes liability on a person in direct or indirect control of a seller that is an organization. Excuse under Section 6-106(6) is a "legal justification" that prevents liability from attaching under subsection (11). No special provision applies to the seller who fails to comply with the schedule. The seller already owes the debt to the creditor, and other law governs the consequences of a debtor who fails to pay a debt when promised.

Cross-References:

- Point 1: Section 6-104.
- Point 4: Section 4-103.
- Point 5: Sections 6-104 and 6-105.
- Point 6: Sections 1-201, 6-102, 6-103, and 6-104.
- Point 7: Sections 1-102, 1-201, 6-102 and 6-103.
- Point 8: Section 6-102.

Point 9: Section 1-203.

Point 10: Section 1-102.

Point 11: Sections 6-102 and 6-110.

Point 12: Section 6-106.

Definitional Cross-References:

- "Assets". Section 6-102.
- "Bulk sale". Section 6-102.
- "Burden of establishing". Section 1-201.
- "Buyer". Section 2-103.
- "Claim". Section 6-102.
- "Claimant". Section 6-102.
- "Creditor". Section 6-102.
- "Date of the bulk sale". Section 6-102.
- "Equipment". Section 6-102.
- "Good faith". Section 6-102.
- "Inventory". Section 9-109.
- "Net contract price". Section 6-102.
- "Organization". Section 1-201.
- "Person". Section 1-201.
- "Proceeds". Section 9-306.
- "Security interest". Section 1-201.
- "Seller". Section 2-103.
- "Written". Section 1-201.

§ 6-108. Bulk Sales by Auction; Bulk Sales Conducted by Liquidator.

(1) Sections 6-104, 6-105, 6-106, and 6-107 apply to a bulk sale by auction and a bulk sale conducted by a liquidator on the seller's behalf with the following modifications:

- (a) "buyer" refers to auctioneer or liquidator, as the case may be;
- (b) "net contract price" refers to net proceeds of the auction or net proceeds of the sale, as the case may be;
- (c) the written notice required under Section 6-105(3) must be accompanied by a copy of the schedule of distribution (Section 6-106(1)) and state at least:
 - (i) that the seller and the auctioneer or liquidator have entered into an agreement for auction or liquidation

services that may constitute an agreement to make a bulk sale under the laws of the State of _____;

- (ii) the date of the agreement;
 - (iii) the date on or after which the auction began or will begin or the date on or after which the liquidator began or will begin to sell assets on the seller's behalf;
 - (iv) the date on or after which more than ten percent of the net proceeds of the sale were or will be paid, if the date is not stated in the schedule of distribution;
 - (v) the name and a mailing address of the seller;
 - (vi) any other business name and address listed by the seller pursuant to Section 6-104(1)(a);
 - (vii) the name of the auctioneer or liquidator and an address of the auctioneer or liquidator from which information concerning the sale can be obtained;
 - (viii) a statement indicating the type of assets or describing the assets item by item;
 - (ix) the manner in which the auctioneer or liquidator will make available the list of claimants (Section 6-104(1)(f)), if applicable; and
 - (x) if the sale is in total or partial satisfaction of an antecedent debt owed by the seller, the amount of the debt to be satisfied and the name of the person to whom it is owed; and
- (d) in a single bulk sale the cumulative liability of the auctioneer or liquidator for failure to comply with the requirements of this section may not exceed the amount of the net proceeds of the sale allocable to inventory and equipment sold less the amount of the portion of any part of the net proceeds paid to or applied for the benefit of a creditor which is allocable to the inventory and equipment.

(2) A payment made by the auctioneer or liquidator to a person to whom the auctioneer or liquidator is, or believes he [or she] is, liable under this section reduces pro tanto the auctioneer's or liquidator's cumulative liability under subsection (1)(d).

(3) A form substantially as follows is sufficient to comply with subsection (1)(c):

Notice of Sale

(1) _____, whose address is _____, is described in this notice as the "seller."

(2) _____, whose address is _____, is described in this notice as the "auctioneer" or "liquidator."

(3) The seller has disclosed to the auctioneer or liquidator that within the past three years the seller has used other business names, operated at other addresses, or both, as follows: _____.

(4) The seller and the auctioneer or liquidator have entered into an agreement dated _____ for auction or liquidation services that may constitute an agreement to make a bulk sale under the laws of the State of _____.

(5) The date on or after which the auctioneer will begin or the date on or after which the liquidator or assignee will begin to sell assets on the seller's behalf is _____, and [insert in the schedule of distribution] the date on or after which more than ten percent of the net proceeds of the sale will or will be paid is _____.

(6) The following assets are the subject of the sale: _____.

(7) [If applicable] The auctioneer or liquidator will make available to claimants of the seller a list of the seller's claimants in the following manner: _____.

(8) [If applicable] The sale is to satisfy \$_____ of an antecedent debt owed by the seller to _____.

(9) A copy of the schedule of distribution of the net proceeds accompanies this notice.

[End of Notice]

(4) A person who buys at a bulk sale by auction or conducted by a liquidator need not comply with the requirements of Section 6-104(1) and is not liable for the failure of an auctioneer or liquidator to comply with the requirements of this section.

Official Comment

Prior Uniform Statutory Provision: Section 6-108.

Changes: Revised, expanded to include sales conducted by a liquidator on the seller's behalf, and form of notice added.

Purposes of Changes and New Matter:

1. This section applies only to bulk sales by auction or conducted by a liquidator on the seller's behalf, as defined in Section 6-102(1)(c). Bulk sales conducted by an auctioneer or liquidator on its own behalf are treated as ordinary bulk sales and are not subject to this section.

2. Regardless of whether the assets are sold directly from the seller to the

buyer, are sold to a variety of buyers at auction, or are sold on the seller's behalf by a liquidator to one or more buyers, a going-out-of-business sale of inventory presents similar risks to claimants. Auctioneers and liquidators are likely to be in a better position to ascertain whether the sale they are conducting is, or is part of, a bulk sale than are their customers. Accordingly, buyers at auctions and from liquidators selling assets of others need not be concerned with complying with this Article. Instead, this section imposes upon auctioneers and liquidators duties and liabilities that are similar, but not always identical, to those of a buyer under Sections 6-104(1) and 6-107. Except to

the extent that this section treats bulk sales by auctioneers and liquidators differently from those conducted by the seller on its own behalf, the Official Comments to Sections 6-104(1) and 6-107, as well as the Comments to Sections 6-105 and 6-106, which those sections incorporate by reference, are applicable to sales to which this section applies.

3. Subsection (1)(d) sets forth the maximum cumulative liability for auctioneers and liquidators "in any one bulk sale," which term includes a series of sales by a liquidator. This liability is to be calculated in a manner similar to that set forth in Sections 6-107(4) and 6-107(5). The term "net proceeds of the auction or sale allocable to inventory and equipment" is analogous to the term "net value of the inventory and equipment"; however, the former takes into account the reasonable expenses of the auction or sale whereas the latter does not. Also, the latter is doubled whereas the former is not. The "amount of the portion of any part of the net proceeds paid to or applied for the benefit of a creditor which is allocable to inventory and equipment" is determined by multiplying the part of the net proceeds paid to or applied for the benefit of a creditor by a fraction whose numerator is the net proceeds of the sale allocable to inventory and equipment and whose denominator is the total net proceeds of the auction or sale. Because the amount of the net proceeds allocable to inventory and

equipment is not doubled, the auctioneer or liquidator is not entitled to credit for payments made to the seller.

4. Section 6-107(3) applies to all bulk sales. Accordingly, an auctioneer or liquidator who makes a good faith effort to comply with the requirements of this Article or to exclude the sale from this Article or who acts under a good faith belief that this Article does not apply to the sale faces no liability whatsoever.

Cross-References:

Point 1: Section 6-102.

Point 2: Sections 6-102, 6-104, 6-105, 6-106, and 6-107.

Point 3: Sections 6-102 and 6-107.

Point 4: Section 6-107.

Definitional Cross-References:

"Assets". Section 6-102.

"Auctioneer". Section 6-102.

"Bulk sale". Section 6-102.

"Claimants". Section 6-102.

"Creditor". Section 6-102.

"Debt". Section 6-102.

"Equipment". Section 9-109.

"Inventory". Section 9-109.

"Liquidator". Section 6-102.

"Net proceeds". Section 6-102.

"Person". Section 1-201.

"Seller". Section 2-103.

"Written". Section 1-201.

§ 6-109. What Constitutes Filing; Duties of Filing Officer; Information from Filing Officer.

(1) Presentation of a notice or list of claimants for filing and tender of the filing fee or acceptance of the notice or list by the filing officer constitutes filing under this Article.

(2) The filing officer shall:

- (a) mark each notice or list with a file number and with the date and hour of filing;

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- (b) hold the notice or list or a copy for public inspection;
- (c) index the notice or list according to each name given for the seller and for the buyer; and
- (d) note in the index the file number and the addresses of the seller and buyer given in the notice or list.

(3) If the person filing a notice or list furnishes the filing officer with a copy, the filing officer upon request shall note upon the copy the file number and date and hour of the filing of the original and send or deliver the copy to the person.

(4) The fee for filing and indexing and for stamping a copy furnished by the person filing to show the date and place of filing is \$_____ for the first page and \$_____ for each additional page. The fee for indexing each name more than two is \$_____.

(5) Upon request of any person, the filing officer shall issue a certificate showing whether any notice or list with respect to a particular seller or buyer is on file on the date and hour stated in the certificate. If a notice or list is on file, the certificate must give the date and hour of filing of each notice or list and the name and address of each seller, buyer, auctioneer, or liquidator. The fee for the certificate is \$_____ if the request for the certificate is in the standard form prescribed by the [Secretary of State] and otherwise is \$_____. Upon request of any person, the filing officer shall furnish a copy of any filed notice or list for a fee of \$_____.

(6) The filing officer shall keep each notice or list for two years after it is filed.

Official Comment

Prior Uniform Statutory Provision:
None

or liquidator's) individual, partnership, or corporate name.

Purposes of New Matter:

Cross-References:

This Article contemplates public filing of bulk sale notices and lists of claimants in a single filing office in each state. This section, which derives substantially from Sections 9-403 and 9-407, governs filing. The filing system is designed to enable one seeking information about a sale to discover any filed notices or lists by searching under either the seller's or the buyer's (but not the auctioneer's

Sections 6-103, 6-105, 9-403, and 9-407.

Definitional Cross-References:

"Auctioneer". Section 6-102.

"Buyer". Section 2-103.

"Liquidator". Section 6-102.

"Person". Section 1-201.

"Seller". Section 2-103.

"Send". Section 1-201.

§ 6-110. **Limitation of Actions.**

(1) Except as provided in subsection (2), an action under this Article against a buyer, auctioneer, or liquidator must be commenced within one year after the date of the bulk sale.

(2) If the buyer, auctioneer, or liquidator conceals the fact that the sale has occurred, the limitation is tolled and an action under this Article may be commenced within the earlier of (i) one year after the person bringing the action discovers that the sale has occurred or (ii) one year after the person bringing the action should have discovered that the sale has occurred, but no later than two years after the date of the bulk sale. Complete noncompliance with the requirements of this Article does not of itself constitute concealment.

(3) An action under Section 6-107(11) must be commenced within one year after the alleged violation occurs.]

Official Comment

Prior Uniform Statutory Provision: Section 6-111 (1987 Official Text).

Changes: Statute of limitations extended and clarified.

Purposes of Changes and New Matter:

1. This Article imposes liability upon only those who do not make a good faith and commercially reasonable effort to comply with the requirements of the Article or to exclude the sale from the application of the Article and who do not hold a good faith and commercially reasonable belief that the Article is inapplicable to the sale. Consequently, it extends the six-month limitation period of the 1987 Official Text, which applies to good faith transferees as well as those not in good faith, to one year. The period commences with the date of the bulk sale.

2. Cases decided under the 1987 Official Text of Article 6 disagree over whether the complete failure to comply with the requirements of that Ar-

ticle constitutes a concealment that tolls the limitation. This Article adopts the view that noncompliance does not of itself constitute concealment.

3. This Article does not contemplate tolling the limitation for actions against a person in control of the seller who fails to distribute the net contract price in accordance with the schedule of distribution. Those actions must be commenced within one year after the alleged violation occurs.

Cross-References:

Point 1: Sections 1-201, 6-102, 6-107 and 6-108.

Point 3: Section 6-107.

Definitional Cross-References:

"Action". Section 1-201.

"Auctioneer". Section 6-102.

"Buyer". Section 2-103.

"Date of the bulk sale". Section 6-102.

"Liquidator". Section 6-102.

[End of Alternative B]

CONFORMING AMENDMENT TO SECTION 1-105

States adopting Alternative B should amend Section 1-105(2) of the Uniform Commercial Code to read as follows:

(2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 2-402.

Applicability of the Article on Leases. Sections 2A-105 and 2A-106.

Applicability of the Article on Bank Deposits and Collections. Section 4-102.

Bulk ~~transfers~~ sales subject to the Article on Bulk ~~Transfers~~ Sales. Section ~~6-102~~ 6-103.

Applicability of the Article on Investment Securities. Section 8-106.

Perfection provisions of the Article on Secured Transactions. Section 9-103.

CONFORMING AMENDMENT TO SECTION 2-403

States adopting Alternative B should amend Section 2-403(4) of the Uniform Commercial Code to read as follows:

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk ~~Transfers~~ Sales (Article 6) and Documents of Title (Article 7).