The Uniform Commercial Code Article 6: New Bulk Sales Legislation for Ohio

Stevenson, Charles E.

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THE UNIFORM COMMERCIAL CODE ARTICLE 6:
NEW BULK SALES LEGISLATION FOR OHIO

CHARLES E. STEVENSON*

Following the example of Louisiana in 1894, each of the states of the United States enacted some form of bulk sales legislation. The legislation enacted varied from state to state, and the courts of each state were kept busy interpreting the statutes enacted there. The lack of uniformity of legislation was matched by the lack of uniformity of interpretation, even when the statutes were substantially similar. It was impossible for one state to revise its legislation on bulk sales and obtain uniformity with the other states for no uniformity existed. The absence of a uniform act or a model act on bulk sales increased the difficulty of national uniformity. It was not until the American Law Institute combined with the National Conference on Uniform State Laws to produce the Uniform Commercial Code that prospects for uniformity in the bulk sales area brightened. Article 6 of the Uniform Commercial Code deals with Bulk Transfers. The objective of article 6 is to attempt "to simplify and make uniform the bulk sales laws of the states that adopt this act." The purpose of bulk sales legislation has been stated briefly as follows:

Many states have enacted bulk sales laws, of varying types and coverage. Their central purpose is to deal with two common types of commercial fraud, namely: (a) The merchant, owing debts, who

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* Professor of Law, University of Cincinnati.


2 Uniform Commercial Code § 6-101, Comment 1. That both simplification and uniformity are needed and desirable has been demonstrated by two men who have in the past made intensive studies of bulk sales legislation and decisions on a national basis. In the late twenties Professor Thomas C. Billig began a series of publications on bulk sales and a generation later Professor Frank W. Miller, who had served as research assistant for the Reporter on Article 6 of the Uniform Commercial Code, again surveyed the entire field of legislation and court decision, now in the light of the additional work and thought that had gone into drafting article 6. For any student of bulk sales laws and any lawyer with a bulk sales problem the following articles will provide an invaluable reference source: Billig, "Bulk Sales Laws: A Study in Economic Adjustment," 77 U. Pa. L. Rev. 72 (1928); Billig and Smith, "Bulk Sales Laws: A Study in Statutory Construction," 38 W. Va. L. Rev. 309 (1932); Billig and Smith, "Bulk Sales Laws: Transactions Covered by These Statutes," 39 W. Va. L. Rev. 323 (1933); Billig and Branch, "The Problem of Transfers Under Bulk Sales Laws: A Study of Absolute Transfers and Liquidating Trusts," 35 Mich. L. Rev. 732 (1937); Miller, "Bulk Sales Laws: Businesses Included," 1954 Wash. U.L.Q. 1; Miller, "Bulk Sales Laws: Property Included," 1954 Wash. U.L.Q. 132; Miller, "Bulk Sales Laws: Meaning to be Attached to the Quantitative and Qualitative Requirements Phases of the Statutes," 1954 Wash. U.L.Q. 283.
sells out his stock in trade to a friend for less than it is worth, pays his creditors less than he owes them, and hopes to come back into the business through the back door some time in the future. (b) The merchant, owing debts, who sells out his stock in trade to any one for any price, pockets the proceeds, and disappears leaving his creditors unpaid.\(^3\)

The objective of this article is to study some of the areas in which change in the bulk sales law of Ohio has been made or may be anticipated by enactment of Article 6 of the Uniform Commercial Code.

The present Ohio law on bulk sales is found in Revised Code sections 1313.53 to 1313.55. These sections or their predecessors have been in effect in Ohio now for about a half century.\(^4\) In spite of a substantial number of interpretations by the courts, the act has been successful in Ohio. Certainly no one has seriously suggested its repeal. The passage of time, however, has indicated some areas in which changes are desirable both to provide more national uniformity and to adjust to the needs of a changing commercial environment.

The Uniform Commercial Code Article on Bulk Transfers is comprised of eleven sections, sections 6-101 through 6-111. The first of these sections merely states the short title to the act and was not enacted in Ohio. Section 6-106 is an optional section providing for the application of the proceeds of a bulk sale to the payment of debts of the transferor. It was not enacted in Ohio. Aside from these two sections the Article on Bulk Transfers was enacted in its entirety in Ohio, with one addition which will be discussed later in this article.\(^5\) The new Ohio law on bulk transfers will be Revised Code sections 1306.01 through 1306.09, effective July 1, 1962. For convenience in this article the present statutory provisions in Ohio on bulk sales will be referred to as they appear in the Revised Code and the provisions of article 6 will be referred to as they appear in the Uniform Commercial Code.

**Businesses and Property Covered by the Act**

Section 6-102 of the Uniform Commercial Code sets out the types of transactions, the types of property, and the types of enterprises covered by the article. It reads as follows:

(1) A “bulk transfer” is any transfer in bulk and not made in the ordinary course of the transferor's business of a major part of the

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\(^3\) UCC § 6-101, Comment 2.


\(^5\) The additional provision requires a certificate from the county treasurer showing all taxes are paid.
materials, supplies, merchandise or other inventory (Section 9-109) of an enterprise subject to this Article.

(2) A transfer of a substantial part of the equipment (Section 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 Article 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 all bulk transfers of goods located within this state are subject to this Article.

We must note particularly several provisions in this section. In order for the bulk transfers article to apply to a sale of goods the sale must be “in bulk.” Also, the sale must not be “in the ordinary course of the transferor’s business.” The sale must be of a “major part” of the “materials, supplies or other inventory” of the business. Sales of “equipment” unaccompanied by sales of inventory are not covered by the article. Some sales are excepted from operation of the article. Some of the provisions in this section are new to Ohio. Few if any are new to bulk sales legislation on a national basis. Let us look to the meaning of these terms and see how, if at all, they change the law of Ohio.

“In Bulk”

Since the beginning of bulk sales legislation in 1894, the term “sale in bulk” has been used in by far the majority of the statutes enacted on the subject. A few statutes have omitted the phrase without apparent change in the results in that state. None of the statutes has adequately defined the term and most of the statutes have not attempted to define it at all. Much as been written about the meaning of the term. Some authors have felt that it is a qualitative term, referring to the type of the transaction. Others have felt that

6 The provision of the Ohio statutes comparable to the section of the Uniform Commercial Code listed above appears in the first part of Ohio Rev. Code § 1313.54:

The sale, transfer, or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of the business, or the sale, transfer, or assignment in bulk of the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, transferor, or assignor is void as against creditors of the seller, . . . .


8 For example, no definition appears in Ohio Rev. Code §§ 1313.53-1313.55.

9 Miller, “Bulk Sales Laws: Meaning to be Attached to the Quantitative and Qualitative Requirements Phases of the Statutes,” 1954 Wash. U.L.Q. 283, 284. The problem then arises, as Professor Miller points out, how does it differ from the term “ordinary course of business?”
it is a quantitative term, dealing with the size of the sale.\textsuperscript{10} In some respects the word seems to have a sort of chameleon nature, varying from case to case depending on the facts of the case. In the past neither the cases nor the writings seem to have worried about the meaning of the term “in bulk” as used in the Ohio code. It is not likely that its meaning will be debated extensively in the future. Little change in its meaning was intended by the enactment of the Uniform Commercial Code. It has been suggested that in the future under the Uniform Commercial Code the term “in bulk” may well be “utilized to include a series of transactions which, when viewed collectively, constitute a major part of the included property . . . .”\textsuperscript{11} Inasmuch as prior Ohio bulk sales legislation covered a sale in bulk of “any” part of a stock of merchandise, such an interpretation was there unnecessary. In a proper situation, the suggested interpretation may well be used.

\textbf{“ORDINARY COURSE OF THE TRANSFEROR’S BUSINESS”}

The Uniform Commercial Code covers transfers in bulk “and not in the ordinary course of the transferor’s business.” When this is compared with the language of Revised Code section 1313.54, “otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller,”\textsuperscript{12} the similarity is apparent. In spite of the differences which appear in the language used, it seems clear that both enactments are speaking of the usual conduct of the business of this particular transferor and not some objective standard based on the usage of trade in this type of business, even though at times this may be considered. This interpretation is in accord with the great weight of authority in the United States interpreting comparable language.\textsuperscript{13}

In spite of the similarity of the language of the Uniform Commercial Code to the prior statute law of Ohio, a subtle change in meaning of the phrase “in the ordinary course of trade and in the regular and usual prosecution of the business” may well have taken place. In the past in Ohio this phrase may well have had quantitative overtones that are no longer present. The present bulk sales legislation applies to sales of “any part” of the merchandise.\textsuperscript{14} Thus, if

\textsuperscript{10} Billig and Branch, supra note 7. The problem then is, how does it differ from the other quantitative requirements in the acts?

\textsuperscript{11} Miller, supra note 9, at 323. This particular problem is closely involved with the term “major part,” discussed later.

\textsuperscript{12} Ohio Rev. Code § 1313.54, supra note 6.

\textsuperscript{13} Miller, supra note 9, at 304.

\textsuperscript{14} Ohio Rev. Code § 1313.54, supra note 6.
the usual conduct of the business involved sales of relatively small quantities of merchandise, a sale of a larger quantity might well be held to be not in the ordinary course of trade and in the regular and usual prosecution of the business. With the addition in the Uniform Commercial Code of the requirement that the sale be of a "major part" of the inventory before the statute applies, the inference to be drawn from the phrase "in the ordinary course of the transferor's business" seems to have changed. Now the wording seems to be directed more to the nature of the transfer than to the quantity of goods sold. The test most likely to be applied to determine if a particular transfer is in the ordinary course of trade under the Uniform Commercial Code will be whether the transferor has in this instance dealt with a customer of the class with whom he ordinarily deals, or perhaps, if it is a new class of customers for the transferor, whether sales to customers of this class are usual within the trade. If so, then the sale likely will be held to be in the ordinary course of the transferor's business. Even if a change in meaning of this term has been effected, it is not likely to produce much litigation.

"MAJOR PART"

A feature new to the law of Ohio is the requirement of the Uniform Commercial Code that the transfer be of a "major part" of the inventory of the transferor before the transaction will be governed by the requirements of the article on bulk transfers. This new provision presents several interesting questions. What does it mean? Why was the law changed? How does the change affect the operation of the prior bulk sales legislation?

Although this provision for a "major part" is new to the law of Ohio, it or somewhat similar provisions have been enacted in other states for a considerable time. The statutes of five states have set out the quantitative requirement that the transfer be of a "major part" of the goods. Another group of states have a requirement that a "large part" of the goods of the transferor must be involved. Still other states provided that the bulk sales legislation was to apply

\[18\] Sternberg v. Rubinstein, 305 N.Y. 235, 112 N.E.2d 210 (1953) involved interpretation of a statute similar to the present Ohio statute. The case involved a sale of off season stock at wholesale by a retail merchant. In holding that the sale was in the ordinary course of business the court seemingly gave considerable weight to the practice of businesses of this type. Enactment of the "major part" provision of the Uniform Commercial Code will substantially reduce the probability that cases of this type will arise.


only if all or substantially all of the goods were sold. The bulk sales provision in Ohio—"any part or the whole"—is typical of the law of the balance of the states. The choice of the term "major part" in the Uniform Commercial Code may well have been intended as a compromise between the policies of those states such as Ohio which had provided a maximum security to creditors and those where protection was provided only in cases of transfers of all or substantially all of the inventory of the seller. In addition, if a seller in fact plans to defraud his creditors by selling out his stock in trade and pocketing the proceeds, he probably will desire to sell at least a major part of the stock. In spite of this we still have problems. We need to know what is meant by the term "major part," what opportunities are open to a "bad man" attempting to defraud his creditors by a bulk transfer, and what dangers are faced by a "good man" desiring to purchase a supply of goods if he does not follow the formalities of the bulk transfer legislation.

The words "major part" have been construed to mean more than fifty percent of the property involved. In addition, there is evidence indicating that more than one-half was the meaning intended by the draftsmen of the Uniform Commercial Code. In spite of this, though, the argument may well be made by any creditor-oriented lawyer that the term "major part" should be interpreted to mean "substantial part" and not more than one-half. If more than one-half were meant, it would be simple enough to say it. All in all, however, it seems likely that the term "major part" will be interpreted to mean more than fifty percent by value of the inventory. If it is held to mean anything other than the fifty percent division, it will continue the lack of uniformity among the states that has so long existed.

Even if it is assumed that the court will interpret the meaning of

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19 Ohio Rev. Code § 1313.54, supra note 6.
21 Official comments on the meaning of "major part" are practically non-existent. Uniform Commercial Code comment 4 § 6-102, indicates that the kind of transfers covered in this section are the ones felt to be those that carry the major bulk sales risks, but it does not aid in defining the term "major part." In Miller, "The Effect of the Bulk Sales Article on Existing Commercial Practices," 16 Law & Contemp. Prob. 267, 269 (1951), referring to "major part," it is stated: "The term means simply more than one-half of the total stock." In view of Professor Miller's position as research assistant to the Reporter on article 6, this statement may well be conclusive of the intent of the draftsmen.
22 See 30 Ill. B.J. 298 (1942) for a comment urging this type approach to the interpretation of "major part."
“major part” so as to give a maximum of certainty to businessmen, equating it to more than one-half, some touchy problems may still arise. For example, the businessman may sell all or substantially all of the inventory of some part of his business. Even though the value of what was sold was less than one-half the value of his entire stock, the question may well be raised whether the fact that the sale involved more than one-half of the inventory of this particular item will bring it under the bulk transfers legislation. Then again, the businessman may transfer less than one-half of his inventory each time but by a series of transfers over a period of time, to the same person or to different persons, may succeed in selling substantially all his inventory. Will such a series of transfers fall under the bulk transfers legislation? Finally, a businessman desiring to dispose of his inventory may sell on the same day or over a short period of time, to a number of different persons in a number of unrelated sales so far as the purchasers are concerned, what will amount to substantially all his inventory even though each purchaser has bought less than one-half of it. Will such a series of transfers come under the bulk transfers legislation? We can at least see the result reached in situations of this type under prior legislation of sister states which contained a “major part” clause. In the absence of interpretations under the Uniform Commercial Code these decisions from sister states may well be of considerable importance.

If the businessman transfers all his inventory covering one phase of his business to a purchaser, and this amounts to less than one-half of the value of all his inventory, it is probable that the transaction will not be classed as a bulk transfer for purposes of the Uniform Commercial Code.23 A similar situation, with like result, may arise when a business with a number of outlets disposes of one of these outlets and all the stock therein. Again, such a transfer should not be held to be a transfer of a major part of the inventory merely because all of a part was sold.24 The procedure best adapted to the determination of one-half under the Uniform Commercial Code seems to be to take as the numerator of the fraction the value of the goods transferred and as the denominator the total value of the goods of the particular business at the time of the transfer.

If the businessman sells to one man his inventory in a series of transactions over a fairly short period of time in such quantities that

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23 Blanchard Co. v. Ward, 124 Wash. 204, 213 Pac. 929 (1923) (sale of sheet music by a piano store and music house, not a bulk sale).
24 Keller v. Fowler Bros. & Cox, 148 Tenn. 571, 256 S.W. 879 (1923) (sale of part of a business held not in the ordinary course of trade, thus violating a bulk sales law covering a sale in bulk of “any part”).
no one sale violates the bulk transfers article, but the quantity of the entire group of transfers is more than one-half of the inventory, it seems fairly clear that the entire group of transfers should be grouped and held as one transaction, ineffective as to creditors of the transferor. Evasion of the act would be too simple and easy if this result did not obtain. Even though there is a policy of protecting bona fide purchasers, it is hard to find a policy of protecting the purchaser in such a situation as this. In connection with this situation, the suggestion has been made that the term "in bulk" could be used to cover a series of transactions. Further, if the sales were to different persons acting in concert, or who were aware that the other sales were taking place or had taken place, the same result should follow. There is no policy of aiding one who attempts to make a profit after he has notice that another may well be attempting to defraud his creditors.

If the businessman transfers his inventory to various parties in a series of transactions over a fairly short period of time, so that no one of the transfers violates the major part provision of the Bulk Transfers Article, but the entire group of transfers does violate it, a choice again must be made between protection of creditors and protection of bona fide purchasers. In cases such as this it seems indeed harsh to hold that the group of transfers shall be considered as one to determine if there has been a transfer of a major part of the inventory so as to bring the group of transactions under article 6, if none of the purchasers had knowledge or notice of the other transfers. In cases such as this, once the "major part" policy has been adopted by the state, the need for protection of purchasers seems to outweigh the need for protection of creditors. The risk to creditors in cases of this type seems to be inherent in the establishment of a definite quantitative standard. The result suggested would follow only if the particular purchaser involved had bought less than one-half the inventory in the hands of the businessman at the time of his purchase. Even though this may seem self evident, it does raise the problem of the time when the quantity or value of inventory is to be measured. If what is purchased by a bona fide purchaser, without notice of other transactions, amounts to less than one-half of what

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26 See text at note 11 infra.

27 Hughes-Curry Packing Company v. Sprague, 200 Ind. 540, 165 N.E. 318 (1929). See also comment, 3 Ind. L.J. 565 (1928), approving a contra result at the appellate court level.
the transferor owns at the time of the sale, the purchaser should not be subject to the bulk transfers provisions. On the other hand, the purchaser may at times purchase what amounts to less than one-half of the inventory formerly owned but now depleted due to prior sales. At this point the purchaser may desire to define the total inventory of the transferor in terms of the sum of both what had been sold earlier and what remained, so that it will appear that the purchaser has bought less than one-half the inventory. A purchaser who has reached this point has indeed a narrow line to tread between Scylla and Charybdis. On the one hand, he desires to "tack on" the prior sales of inventory for the purpose of showing that his purchase was less than one-half; on the other, he wants to avoid "tacking on" the prior sales to his own purchase if it will end up showing that the sum of the two sales amounted to more than one-half of the entire inventory, and this result would seem likely. A logical solution to situations of this type seems to be to hold that in the absence of knowledge by the purchaser of the prior sales there can be no "tacking on" of the prior sales for any purpose and in the event of such knowledge the value of the prior sales shall be used both for the purpose of determining total inventory and the total amount sold in bulk.

The introduction of the new term "major part" into the bulk transfers legislation in Ohio has brought about a major change in the law. It may well produce a rash of litigation for a time until the businessmen and lawyers in Ohio manage to establish more clearly the meanings of the term. In spite of the significant changes, it may well be a better provision than was the old one, and even if it is not as good, the fact we are now on our way toward national uniformity in this field may well make it worth while.

"INVENTORY," "ENTERPRISE," "EQUIPMENT"

Very closely related are the types of businesses covered by bulk transfers legislation and the types of goods subject to the legislation. Often the provisions for both the businesses and the goods appear in the same clauses. The reference to the goods covered by the legislation on bulk sales in the present Ohio legislation is in terms of a "stock of merchandise or merchandise and the fixtures pertaining to

28 See three cases from Illinois on this general problem: Larson v. Judd, 200 Ill. App. 420 (1916) (permitted the second purchaser to increase the quantity of "inventory" by adding to that on hand at the time of his purchase some that had been previously sold, thus avoiding the bulk sales laws); Main v. Hall, 41 F.2d 715 (7th Cir. 1930) (refused to permit the quantity of inventory to be thus increased); Corrigan v. Miller, 338 Ill. App. 212, 86 N.E.2d 853 (1949) (added the prior sale both to the remaining property and to the second sale).
the conducting of said business, or . . . the fixtures pertaining to the conducting of said business. . . . Only to a minor extent is this language reflected in the Uniform Commercial Code, which speaks in terms of "materials, supplies, merchandise, or other inventory of an enterprise" in one part and of "equipment" in another. In the present Ohio legislation the principal if not the only indication of the particular types of businesses subject to the bulk sales legislation is found in the statement that "the sale, transfer, or assignment, in bulk, of any part or the whole of a stock of merchandise. . . ." is covered by the legislation, and the inference to be drawn therefrom is that unless the business is selling merchandise it is not covered by the act. The Uniform Commercial Code states that the enterprises subject to this article are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell.

With regard to the types of businesses subject to bulk transfers legislation, it is probable that the Uniform Commercial Code has made few changes in the present Ohio law. The courts in Ohio in attempting to determine by a process of inclusion and exclusion what businesses are covered have concluded that they are not covered if they are in the business of providing services rather than selling goods. Thus hotels and restaurants are not covered. In the comments to the Uniform Commercial Code it is pointed out that the businesses covered "do not include farming nor contracting nor professional services, nor such things as cleaning shops, barber shops, pool halls, hotels, restaurants, and the like whose principal business is the sale not of merchandise but of services." To the extent the present Ohio legislation has been interpreted it seems to be closely in agreement with the Uniform Commercial Code in regard to the businesses covered. However, one change does seem to have been made as to the type of business covered. In the past it has been held that even though the principal business of a restaurant was the sale of services, if it maintained a cigar, cigarette, and chewing gum counter it was engaged in the sale of merchandise and subject to bulk sales legislation. Under the test of the Uniform Commercial Code

29 Ohio Rev. Code § 1313.54, supra note 6.
30 UCC § 6-102(1).
31 UCC § 6-102(2).
32 Ohio Rev. Code § 1313.54, supra note 6.
33 UCC § 6-102(3).
36 30 UCC § 6-102, Comment 2.
37 Block v. New Era Cafe Inc., supra note 35.
it would appear that the principal business in such a case was not the
sale of merchandise from stock, but rather of services, and the busi-
ness would not be covered. Another change may have been made by
the inclusion of those who manufacture what they sell within the
terms of article 6. Under present legislation we have no decisions on
this point, and the cases from other jurisdictions are in conflict.
Whether or not this clause represents a change, all can agree that it is
well to have the point settled.

Although the changes made by the Uniform Commercial Code in
the types of businesses covered by the bulk transfers article are
minor, some substantial changes have been made with regard to the
types of property subject to the new legislation. Whereas the present
legislation speaks of merchandise, merchandise and fixtures, or the
fixtures of the business, the new legislation has changed both the
terminology and the coverage. The term "fixtures" is not used in
article 6 and in its place we find the term "equipment."

Equipment then is defined as follows:

Goods are "equipment" if they are bought for use primarily in
business (including farming or a profession) or by a debtor who is
a non-profit organization or a governmental subdivision or agency
or if the goods are not included in the definition of inventory, farm
products or consumer goods.

This is closely tied in with the definition of "inventory" in the Code,
where it is stated:

Goods are inventory if they are held by a person who holds them for
sale or lease or to be furnished under contracts of service or if he
has so furnished them, or if they are raw materials, work in process
or materials used or consumed in a business. Inventory of a person
is not to be classified as his equipment.

The terms "materials, supplies, merchandise" used in the Code are
not defined, but they seem to fall within the general definition of
inventory.

The change in the language from "fixtures pertaining to the con-
ducting of the said business" to "equipment" seems to be both de-
sirable and not too great. First of all, it eliminates from the statute
the term "fixtures" with its technical overtones from property law
of being attached to and pertaining to the realty as well as any
specialized concept of trade fixtures that may have arisen. Finally,
the definition of "equipment" in the Code seems to be generally in

38 UCC § 6-102(2).
39 UCC § 9-109(2).
40 UCC § 9-109(4).
line with that adopted by the courts on a national basis when the term "fixtures" has been used in bulk sales legislation. From the comments to the Code it appears that trucks, rolling stock, tools and machinery are typical of equipment. Further, even if the machinery is routinely sold off as it becomes obsolete, it is equipment. Generally, if goods are considered as fixed assets or have as identifiable units a relatively long period of use, they are equipment.\(^{41}\) The major change in the law of bulk sales relating to equipment lies in the provision which excludes it from the operation of the Bulk Transfers Article unless it is accompanied by a bulk transfer of inventory.\(^{42}\) At the present time a bulk transfer of fixtures alone is included within the requirements of the statute, although it is not entirely clear whether the transfer must be of all or substantially all the fixtures or whether it will be included if it is of a part only of them.\(^{43}\) While the wisdom of excluding equipment when transferred alone may be debated, it presumably was felt that unsecured creditors did not usually rely on this type of asset for protection.\(^{44}\) In addition, it may well serve on a national basis as a compromise between those states which had not included equipment in bulk sales legislation and those which had included it. If uniformity is to be achieved, there must be some give and take.

The change in language from "merchandise" in the present statute to "inventory" in article 6 also has produced some changes. Seemingly inventory includes all the items formerly included in the concept of merchandise and some new ones also. The principal test for determining the existence of inventory under the new act is whether the goods are held for immediate or ultimate sale in the ordinary course of business. To this extent it seems identical with the term "merchandise" of the prior acts. An additional facet of "inventory," however, is found in the group of "... materials used or consumed in a business," which would include such items as fuel used in the operations and containers used to package the goods sold.\(^{45}\) It is doubtful if items such as these would be included under the present bulk sales law, but their inclusion seems desirable.

The changes in coverage of article 6 with respect to business and property are more than changes in terminology, they are changes in concept. With the new definitions of the Uniform Commercial Code, placed in a commercial law setting, much less is left for the

\(^{41}\) UCC § 9-109, Comments 3 and 5.

\(^{42}\) UCC § 6-102(2).

\(^{43}\) Ohio Rev. Code § 1313.54, supra note 6.


\(^{45}\) UCC § 9-109, Comments 3 and 5.
courts in the process of inclusion and exclusion. At the same time even though there is a reasonable degree of certainty provided by article 6, the courts will no doubt still have a number of cases come to them on borderline situations. In the past the lack of uniformity in coverage of the various state acts, both as to businesses and as to property included within them, has been apparent. With improvement in the system and increased uniformity, we may soon expect to find a high degree of certainty in spite of the use of new terms in article 6.

**EXCEPTED TRANSACTIONS AND EXCEPTED PROPERTY**

Article 6 sets out a list of transfers not subject to the article. Although some of these provisions are new to the law of Ohio, none were unknown on a national basis. The first exception, transfers made as security for an obligation, seems to work no change in the present Ohio law as it has been held not to cover bulk mortgages. The second exception, assignments for the benefit of creditors, seems to be in accord with the policy of bulk sales legislation generally and Revised Code Chapter 1313, and probably works no change. The third exception, transfers in settlement or realization of a lien, also

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47 UCC § 6-103 reads as follows:

Section 6-103. Transfers Excepted From This Article.

The following transfers are not subject to this Article:

(1) Those made to give security for the performance of an obligation;

(2) General assignments for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder;

(3) Transfers in settlement or realization of a lien or other security interest;

(4) Sales by executors, administrators, receivers, trustees in bankruptcy, or any public officer under judicial process;

(5) Sales made in the course of judicial or administrative proceedings for the dissolution or reorganization of a corporation and of which notice is sent 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.


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seems to represent the present law in Ohio, although, of course, if the transfer were to satisfy a pre-existing debt not secured by a lien it would come within the bulk sales law both as it now exists and under the Uniform Commercial Code. The fourth exception, sales by executors, administrators, receivers, trustees in bankruptcy, or any public officer under judicial process, is substantially identical with the present Ohio law.

The fifth exception, transfers made in the process of a judicial or administrative dissolution or reorganization of a corporation, seems to be new to the law of Ohio, but sound inasmuch as the creditors will have full protection and notice. The sixth exception, transfers made to a person in business who assumes the obligations of the transferor, and the seventh exception, transfers made to a new business enterprise which assumes the obligations of the transferor, are both new to the law of Ohio, and seem to present some problems. While it seems the creditors are not likely to be hurt generally by such transfers, as after the transfer both the original debtor and the transferee will be liable to them, the position of the creditor whose name was omitted from the list given to the transferee is not indicated. Must the transferee pay him and seek reimbursement from the transferor? Or is the creditor now to pursue only the transferor? The solution is not indicated in the Code or the comments. If the policy of the bulk sales legislation, when it does apply, is used here it would seem that the omitted creditor would have recourse only to the transferor. Further, as the bulk transfers article does not apply, presumably once the public notice is given as required in the statute the transaction is entirely valid and the transferee is bound to pay only those creditors known to him.

The eighth exception, property exempt from execution, seems logical and in accord with the present Ohio law.

Auctions

When article 6 becomes the law of Ohio, it will be clear for the first time that auctions are covered by the bulk sales legislation to the

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50 Winters National Bank and Trust Co. v. Midland Acceptance Corp., supra note 49.
52 Ohio Rev. Code § 1313.53. This section also excepts sales by guardians.
53 Uniform Commercial Code § 6-104(3) reads: "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."
54 Grossman v. Endicott-Johnson Corp., 12 Ohio L. Abs. 51 (1931). See also Can-
extent that the auctioneer knows the auction constitutes a bulk transfer.\textsuperscript{55} Whether or not auctions come within the more usual bulk sales laws has resulted in different views, but few will disagree with the idea of making it clear in the act that they either are or are not covered. The burdens on the auctioneer do not seem too great and the limitation of his liability to situations where he knows the sale is one in bulk further reduces his risk. The major risk he seems to face is that his attorney may not notify him of the change in the law until after he has conducted an auction of goods known to constitute the major part of the inventory of a business.

**FORMALITIES AND CONSEQUENCES**

Let us now compare article 6 and the present Ohio legislation from the standpoint of an attorney who had determined that the stock of goods his client is about to purchase constitutes a major part of an inventory, and is not excepted from the operation of the bulk transfers legislation. Present typical bulk sales legislation requires the *buyer* to demand and receive a certified statement showing the names and addresses of the creditors of the seller as well as the amounts due each of them. Then the *buyer* is required to notify each of the creditors of the fact and the terms of the proposed sale a period of time before the transfer is completed.\textsuperscript{56} The burden on

\textsuperscript{55} UCC § 6-108 reads as follows:

Section 6-108. Auction Sales; "Auctioneer."

(1) A bulk transfer is subject to this Article even though it is a sale by 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 (Section 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 Article (Section 6-104);
- (b) give notice of the auction personally or by registered 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 but not exceeding the net proceeds of the auction. If the auctioneer consists of several persons their liability is joint and several.

\textsuperscript{56} See Ohio Rev. Code § 1313.54.
the buyer in the present Ohio legislation is repeated in article 6, but the new provisions are easier to read and understand. Under both the present law and article 6 the buyer is required to notify not only each person whose name appears on the list but also any other creditor known to him whose name may have been omitted from the list. A new and desirable provision of article 6 makes it clear that the list of creditors is to include also the names of all persons known to the transferor who assert claims against him, even if such claims are disputed. This new provision may well require some changes in the forms used by attorneys for the buyer, as the better part of prudence would dictate that the sworn statement clearly indicate that the names of all persons asserting claims against the transferor are included even though these claims are disputed.

Notification of the creditors of the transferor by the transferee is required both by article 6 and by the present bulk sales legislation. In the present legislation the time established for the giving of this notice before the transferee either pays or takes possession is five days. In article 6 this period of time is set at ten days, as the shorter period of time was felt insufficient to permit the creditors of the transferor to police the transaction. While the present bulk sales law requires generally notification to the creditors "of the proposed sale and of the price, terms, and conditions thereof," article 6 sets out in substantial detail what the notice shall contain. The detail established for the contents of the notice no doubt will be of aid to the average attorney but may well require changes in the contents of forms used in the past, and certainly will necessitate a re-examination of the old forms to see if changes are needed.

Neither the present bulk sales legislation nor article 6 as enacted in Ohio requires the transferee to apply the proceeds of the bulk sales to the payment of the consideration for the sale. 

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57 See UCC §§ 6-104, 6-105, and 6-107.
58 Ohio Rev. Code § 1313.54, supra note 56; Uniform Commercial Code § 6-105, supra note 57. Uniform Commercial Code § 6-109, indicating the creditors who are protected, modifies this notice requirement a bit.
59 UCC § 6-104(2), supra note 57.
60 Strict compliance with the requirements of the bulk sales legislation has been the rule in Ohio in the past. See Mollen, Thompson and James Co. v. Klein, 19 Ohio N.P. (ns) 415 (1917) (if the seller states there are no creditors, the buyer must obtain an affidavit to that effect if he is to be protected); Romeo and Co. v. Nassif, 7 Ohio App. 382 (1917) (as the affidavit was framed in terms of trade creditors and did not include non-trade creditors, the buyer was not protected).
61 See Ohio Rev. Code § 1313.54, supra note 56.
62 UCC § 6-105, supra note 57. See also Comment 3 to § 6-101.
63 Ohio Rev. Code § 1313.54, supra note 56.
64 UCC § 6-107, supra note 57.
transfer to the payment of debts of the transferor. Such a provision is included in article 6, section 6-106, on an optional basis but was not adopted in Ohio.

The present Ohio bulk sales legislation states both the effect of non-compliance with the provisions and also the effect of compliance with them. A change in the law may have been made by the omission from article 6 of any affirmative statement indicating that if the transferee complies with the terms of article 6 he will not be held accountable to anyone for the merchandise he has received. Presumably under article 6 even if the transferee has taken all actions required by the article, he still may be liable to creditors if in fact he has knowingly assisted the transferor in perpetrating a fraud. Under the purely objective test of the present bulk sales law it may well be that even in the situation supposed, the transferee would hold free of the claims of creditors. If in fact the law is changed, the change clearly is desirable for there seems no good reason to protect one who was fraudulent in fact or knowingly aided another in perpetrating a fraud.

One additional change from the present laws must be noted. This change is dictated neither by the need for uniformity nor obvious desirability. In 1945 the bulk sales law was amended so as to require an affidavit from the county treasurer showing all taxes due and payable had been paid. This amendment was carried forward into the Revised Code. No such provision appears in the Uniform Com-

65 Ohio Rev. Code § 1313.54 states in part: "The sale, . . . in bulk, . . . is void as against creditors of the seller, . . . ."

66 In the Uniform Commercial Code it is stated in § 6-104 that the transfer is "ineffective" unless the schedule of property and list of creditors is made, in § 6-105 the transfer is "ineffective" unless the creditors are notified, in § 6-108 the auctioneer is "liable" if he does not follow the proceedings indicated, and in § 6-111 no action nor levy may be made more than six months after the transferee took possession of the goods. At no point is it stated that the transferee is not to be held accountable if he conforms to the provisions of the article.

67 This same policy is reflected in Uniform Commercial Code § 6-110, dealing with the liability of subsequent transferees of goods subject to the bulk sales act. It reads as follows:

When the title of a transferee to property is subject to a defect by reason of non-compliance with the requirements of this Article, then: (1) a purchaser of any of such property from such transferee who pays no value or who takes with notice of such non-compliance takes subject to such defect, but (2) a purchaser for value and in good faith and without such notice takes free of such defect.

68 Ohio Rev. Code § 1313.54, last sentence, reads:

...Unless the purchaser . . . demands and receives from the seller . . . a certificate, in the form prescribed by the bureau of inspection and supervision of public offices, from the county treasurer showing that all taxes due and payable have been paid, such sale . . . is void as against any county treasurer for
mmercial Code, where, presumably, the county treasurer's claim for
taxes is treated the same as the claims of any other creditor. The
legislature in adding a new clause to article 6 has included only a
portion of the prior provision involving the county treasurer. Re-
vised Code section 1306.03 (D), effective July 1, 1962, reads as
follows:

(D) Unless the transferee receives from the transferor a certificate
in the form prescribed by the bureau of public inspection and super-
vision of public offices, from the county treasurer showing that all
taxes due and payable have been paid, such transfer is ineffective
against any claim for county taxes due from such transferor.

Omitted from this provision is any clause comparable to the one in
Revised Code section 1313.54, last sentence, extending the period
of limitations for the claims of the county treasurer. Presumably
the omission was intentional and the claims of county treasurers are
intended to be barred by the six months period of limitations of
article 6, even as the claims of creditors generally are barred. The
wisdom of the change may be apparent to businessmen, but not many
busy county treasurers are likely to agree.

REMEDIES

Under the present Ohio legislation the only remedy of a creditor
in cases where the transferee has not observed the requirements of
the statutes, is to have the transferee held as a trustee for the goods.
When the transferee is declared a trustee under this provision, he is
held a trustee only for those creditors who have acted within the
ninety day period of limitations, although when one creditor has
started an action others may intervene during the ninety day period.
How far article 6 has changed the remedies of creditors is not clear,
but some change seems certain as the legislation now speaks in terms

\[\text{taxes due from such seller ... and the limitation of ninety days contained in}
\] section 1313.55 of the Revised Code does not apply to any county treasurer's
claim for taxes. (Emphasis added.)

69 Id.

70 UCC § 6-111 reads as follows:
No action under this Article shall be brought nor levy made more than six
months after the date on which the transferee took possession of the goods unless
the transfer has been concealed. If the transfer has been concealed, actions may
be brought or levies made within six months after its discovery.

71 Ohio Rev. Code § 1313.55, supra note 65; United Sales Promotion Co. v. Anderson,
100 Ohio St. 58, 125 N.E. 106 (1919).

72 United States Promotion Co. v. Anderson, supra note 71.
of both "levy" and "action." In comments to the Uniform Commercial Code it is stated:

"Levy," which is not a defined term in the Code, should be read broadly as including not only levies of attachment, garnishment, trustee process, receivership, or whatever proceeding, under the state's practice is used to apply a debtor's property to the payment of his debts.

The policy of this comment is in accord with the earlier statements in article 6 that the transfer is "ineffective" unless the formalities set out are followed. The intent seems to be to permit the creditor in such cases at his option to treat the goods as those of the transferor and to levy on or attach them, or to proceed against the transferee to have him declared a trustee of the goods. As a remedy for violation of bulk sales legislation the direct action against the goods is new to Ohio. There also will be a change in the law of Ohio, when an action is brought against the transferee, if the only remedy available is that of having the transferee declared a trustee or receiver of the goods for all creditors. However, in view of past strict construction of bulk sales legislation, it may well be expected that the courts will hold that the transferee is a trustee or receiver for only those creditors who have acted within the six month period of limitations. If so, the law of Ohio will not be changed in this respect.

CONCLUSIONS

The desirability of uniform legislation in the field of bulk transfers seems undeniable even though the Commissioners on Uniform State Laws proposed neither a model act nor a uniform one. The recent growth of corporations on a national basis through purchase of assets of smaller corporations may well have been the factor that triggered the decision to include legislation on bulk transfers in the Uniform Commercial Code. In any event, it is there and Ohio has adopted it.

Adoption of article 6 in Ohio has, perhaps surprisingly, made few major changes in the prior bulk sales law. The principal changes have been two: the new "major part" provision and the new provisions on "inventory," "equipment," and "enterprises." These provisions are new to Ohio and the definitions in the latter group are new to all bulk sales legislation, although they are substantially in accord with the result reached in many states by court decision.

73 See UCC § 6-111, supra note 70.
74 UCC § 6-111, Comment 2.
75 UCC §§ 6-104, 6-105, supra note 57.
76 See also Folkerth, "Sales in Bulk," 15 Ohio St. L.J. 43, 47 (1954).
No new rush of litigation to ascertain the meaning of article 6 is anticipated. For the "good man" interested in knowing what he needs to do to comply with the act, the steps are indicated much more clearly than in the prior legislation. In turn the "bad man" who wishes to avoid compliance with the act will find that many of the loopholes he might wish to use are not available. Litigation to some extent may be anticipated in connection with the provisions noted above and also perhaps in connection with some of the exceptions in section 6-103. The advantages of Article 6 of the Uniform Commercial Code seem more than sufficient to justify the abandonment of the reasonably well known bulk sales law as it exists today.