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CHAPTER 7

Article Six: Bulk Transfers

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§7.1. General. At common law, a purchaser of goods sold in bulk out of the ordinary course of trade took title free of the claims of the seller's unsecured creditors except where he was a party to the seller's fraud.\(^1\) Because such a seller was frequently unavailable following the bulk sale, there was universal creditor dissatisfaction which finally resulted in the imposition of statutory controls over such transfers in every state.\(^2\) The Massachusetts bulk sales statute was adopted in 1903.\(^3\)

Article 6 of the Massachusetts Uniform Commercial Code is, for the most part, substantially declaratory of the law relating to bulk sales under the prior statute and as this statute has been interpreted by our cases.\(^4\) Principally, Article 6 expands and clarifies, by definition and otherwise, the kind of transfer which may be the subject matter of a bulk sales transaction and the procedural steps — in the preparation of the schedule, in the content of the notice to creditors, and otherwise — which need to be followed to avoid liability for noncompliance. A comparison of the requirements of Article 6 with the prior statute will serve to point up the areas which have been so expanded and clarified. Section 6-107, wholly new in statutory concept, brings auction sales within the purview of the law. There is no statutory definition of the sanctions that may be imposed for noncompliance, except in the case of auctioneers; otherwise, as under the bulk sales law in effect prior to enactment of Article 6, the remedies and limits of the transferee's liability will need to be defined by the courts. Although compliance with the provisions of Article 6 is not always to be equated with

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2 Miller, Bulk Sales Laws: Businesses Included, 1954 Wash. U.L.Q. 1, 2.

3 G.L., c. 106, §§1. 2, hereinafter referred to as the "prior statute." This statute was held to be constitutional in Squire v. Tellier, 185 Mass. 18, 69 N.E. 312 (1904). It will continue in force until the UCC (Acts of 1957, c. 765) becomes effective on October 1, 1958.

4 Hereinafter Article 6 will sometimes be referred to as the "article."
nonliability to creditors of the transferor, failure to comply, on the other hand, can result in substantial civil liability for the transferee.

§7.2. Transfers prohibited: Exemptions. The prohibited transaction under the prior statute was "the sale in bulk of any part or the whole of the stock of merchandise, otherwise than in the ordinary course of trade and in the regular prosecution of the seller's business." "Merchandise" was considered to be "a word of large signification and has been held to be synonymous with tangible property which could be sold." It covered harnesses, tip carts and carriages, stock of a dry goods store, and stock in a butcher and grocery store. Tools and trade fixtures used by a merchant in the conduct of his business, however, were not subject to the statute.

The counterpart of the above quoted language is Section 6-102. A subject transfer is (a) one made 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 of a subject enterprise, and (b) one made of a substantial part of the equipment of a subject enterprise if made in connection with a bulk transfer of inventory. A subject enterprise is defined to mean one whose principal business is the sale of merchandise from stock, and this definition specifically includes manufacturers. A "major" part of the goods means more than one-half of the transferor's total stock. Equipment, exempt from the application

§7.2. 1 For a discussion of the law under the prior statute see Brown, The Sales in Bulk Law in Massachusetts, 14 B.U.L. Rev. 649 (1934).
3 Ibid.

7 It has been said that the general rule appears to be that the bulk sales laws relating to sales of merchandise have no application to sales by manufacturers.
of the prior statute, is now covered if the transfer is made in connection with a bulk transfer of inventory.

Section 6-102 expands the kind of goods that may be the subject matter of a bulk transfer by including the materials and supplies of a subject enterprise as well as of its merchandise or inventory. With the exception stated in Section 6-102 (4), all bulk transfers of goods located within Massachusetts are subject to the article.

Section 6-103 details, by exceptions, the transfers that are not subject to Article 6. Some of the exempted transactions are new. Others are declaratory of the prior law. The prior statute had no application to a chattel mortgage of a stock in trade given in good faith for a valuable consideration and duly recorded; this remains unchanged. The prior statute exempted sales by an assignee under a voluntary assignment for the benefit of creditors. Section 6-103 exempts only a transfer which is a general assignment for the benefit of all creditors. Both statutes exempt transfers made by executors, administrators, receivers, trustees in bankruptcy, or public officers under judicial process. Also exempted are (a) transfers made in settlement or realization of a lien or other security interest, a new statutory addition which covers, but is not necessarily limited to, transfers in foreclosure of a lien or other security interest, (b) a sale made in the course of judicial or administrative proceedings for the dissolution or reorganization of a corporation, notice of which is given to creditors of the corporation, and (c) transfers of property which is exempt from execution.

The two most important new exemptions involve transfers (a) to a person maintaining a known place of business within Massachusetts who becomes bound to pay the debts of the transferor in full, gives public notice of that fact and is solvent after being so bound, and (b)
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 receives nothing out of the transaction except an interest in the new entity junior to the claims of creditors.

The theory behind the first of these two exemptions is that if the transferee is willing to assume personal liability for all of the debts of the transferor, and is solvent after such assumption, there is no reason to subject the transaction to the delay and red tape which Article 6 otherwise imposes. In a jurisdiction (like New York, for example) where the creditors of the transferor have a direct cause of action against the transferee, there is no problem. Indeed, it has been said that such creditors are now "in a much better position than they otherwise would be." In Massachusetts, the situation is somewhat complicated by the circumstance that a creditor beneficiary may not enforce by direct action the transferee's promise to pay the transferor's debts, but must enforce such promise as an asset of the transferor by a bill in equity to reach and apply under G.L., c. 214, §3 (7). As to the second exception, there has been a conflict in jurisdictions other than Massachusetts as to whether bulk sales laws apply to this kind of transfer, a conflict which is resolved by this section.

§7.3. Schedule of property: List of creditors. Section 6-104 declares any transfer subject to Article 6 "ineffective" against creditors unless the transferee requires the transferor to furnish a list of his existing creditors and the parties prepare a schedule of the property to be transferred sufficient to identify it. The transferee must preserve the list and schedule for six months following the transfer and either permit them to be examined by any creditor of the transferor or file them in the office of the state secretary. The term "ineffective" can be equated with "fraudulent and void" as used in the prior statute. The schedule of the property to be transferred need only be sufficient to


§7.3. 1 A list of creditors was required under the prior statute. See Splaine v. American Powder Co., 298 Mass. 114, 117, 10 N.E.2d 87, 88 (1937); Rabalsky v. Levenson, 221 Mass. 289, 108 N.E. 1050 (1915).
§7.4 UNIFORM COMMERCIAL CODE: ART. 6 identify it and need not include, as was required under the prior statute, the cost price of each article. 3

Section 6-104 (2) requires not only that the list of creditors be signed and sworn to by the transferor and that it contain the names and addresses of all creditors with the amounts of their claims, but that it include "the names of all persons who are known to the transferor who assert claims against him even though such claims are disputed."

The provision of Section 6-104 (3) that responsibility for the completeness and accuracy of the list of creditors rests on the transferor, and that the transfer is not rendered ineffective by errors or omissions unless the transferee has knowledge thereof, although new statutory language, is probably declaratory of the prior law. 4

§7.4. Notice; Form; Time allowed. Section 6-105 increases the period of time between the giving of notice to creditors and the taking of possession of the goods, or paying for them, from five days (as required under the prior statute) to ten days. 1

The form of notice to creditors is governed by Section 6-106 which provides for two alternatives, depending upon whether the transferor's debts are to be paid in full or the transferee is in doubt on that point. If the transferor's debts are to be paid in full as they fall due as a result of the transaction, the notice need state only that a bulk transfer is to be made, the names and addresses of the transferor and the transferee, all other business names and addresses used by the transferor within the three years next preceding the transfer, and that the transferor's debts are to be paid in full. 2 If, however, the debts of the transferor are not to be paid in full or if the transferee is in doubt on that point, the notice must contain, in addition to the information above referred to, (a) the location and general description of the property to be conveyed and the estimated total of the transferor's debts, (b) the address where the list of creditors and schedule of property may be inspected, (c) whether the transfer is to pay existing debts and, if so, the amount of such debts and to whom they are due, and (d) whether the transfer is for new consideration and, if so, the amount thereof and the time and place of payment.

3 The list and schedule must be available for examination by the creditors during the short period of limitations provided in Section 6-110 "to aid in carrying out the policies of the Uniform Fraudulent Conveyances Act and of the Bankruptcy Act. Thus the schedule and list are available so that creditors may know whether they can attack the transfer as a conveyance fraudulent in fact, either in bankruptcy proceedings or otherwise, even though the Bulk Transfer Act has been complied with." Miller, The Effect of the Bulk Sales Article on Existing Commercial Practices, 16 Law & Contemp. Prob. 267, 276 (1951).

Although the method by which the notice is to be communicated to creditors — delivered in person or by registered mail — is the same as under the prior statute, the requirement that such notice be sent to any persons known to the transferee who hold claims against the transferor is new.

§7.5. Auction sales. Section 6-107 introduces a new concept into bulk sales laws. It subjects bulk transfers to Article 6 even though the transfer is one made at an auction sale. The transferor must furnish a list of his creditors and assist in the preparation of the schedule as stated in Section 6-104. The auctioneer must (a) retain the list of creditors and the schedule of property for the six-month period specified in Section 6-104, and (b) give notice of the auction to the same persons, in the same manner, and within the same period of time as would be the case if the sale were not held at auction. Failure on the part of the auctioneer to comply does not affect either the validity of the sale or the title of the purchasers, but Section 6-107 (4) imposes upon the auctioneer, and upon those who by definition are associated with him in joint and several liability, an obligation to account to the "creditors... as a class." Such liability is limited in amount to the net proceeds of the auction.

§7.6. Creditors protected. To the extent that Section 6-108 defines the creditors who are protected as those existing at the time of the bulk transfer it is declaratory of the prior law. To the extent that the word "claims" is broad enough to include "claims whether they are in tort or contract, are liquidated or unliquidated, are secured or unsecured, are contingent or fixed, are presently due or not," this section may be introducing a new concept.

§7.7. Subsequent transfers. Where there has been noncompliance, it is provided by Section 6-109 that a purchaser from the transferee who pays value in good faith and without notice of the noncompliance takes the property free of any defect, while a purchaser who pays no

3 See G.L., c. 4, §7, cl. 44, for the use of certified mail as a substitute for registered mail.

§7.5. 1 While there are no cases in Massachusetts, there has been a conflict, or at least a doubt, in other jurisdictions, as to whether auction sales are subject to bulk sales laws. See Weintraub and Levin, Bulk Sales Law and Adequate Protection of Creditors, 65 Harv. L. Rev. 418, 421 (1952); Hawkland, In re Articles 1, 2 and 6, 28 Temp. L.Q. 512, 526-527 (1955). The definition of "auctioneer" would seem to be broad enough to include the transferor's lawyer if he directs, controls or is responsible for the auction.

2 This is the only place in Article 6 where a sanction is specifically, and in definite terms, imposed for noncompliance.


2 This was suggested in Miller, The Effect of the Bulk Sales Article on Existing Commercial Practices, 16 Law & Contemp. Prob. 267, 280 (1951).

3 This was probably not the prior law. 3 Williston, Sales §643a (rev. ed. 1948).

value or who takes with notice of the noncompliance takes subject to the defect. While this is new statutory language, it is in accord with the prior law.¹

Under the prior statute, in a noncompliance case, it had been held that a creditor must proceed with "reasonable despatch" and before the rights of intervening parties acting in good faith became fixed.² Section 6-110 makes an important change when it limits the time for the commencement of an action under the article to six months after the date on which the transferee took possession of the goods, unless the transfer has been concealed, in which case the action may be brought within six months after the discovery of the transfer.³

Neither Article 6, except in the section dealing with auctioneers, nor the prior statute, makes any attempt to define the nature and the scope of the liability of a transferee for noncompliance. The only sanction imposed in statutory language is, under the article, that the transfer shall be "ineffective,"⁴ or, under the prior statute, that it shall be "fraudulent and void"⁵ as against creditors.

While it has been said that a creditor's remedies are "the same as those of other creditors in case of a sale in fraud of creditors,"⁶ it does not necessarily follow that the liabilities are the same. The transferee of a fraudulent conveyance "who without actual intent has given less than a fair consideration for the conveyance... may retain the property... as security for repayment."⁷ Under the bulk sales law a transferee, however innocent of fraudulent intent, may, if noncompliance exists, be required to give up the property or be accountable for its value with no correlative claim or security interest for the consideration paid—except, possibly, a claim against the transferor for indemnification or its equivalent, a subject which is beyond the scope of this paper.⁸

An unpaid creditor has no direct right of action against the transferee.⁹ As in the case of a fraudulent conveyance, the transfer may be disregarded and the property in the hands of the transferee levied

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³ The period of limitations is substantially coextensive with the period during which the transferee has an obligation to preserve the list of creditors and the schedule of property under UCC §6-104(1)(c).
⁴ UCC §§6-104(1), 6-105.
⁵ G.L., c. 106, §I.
⁷ G.L., c. 109A, §9(2).
upon or attached. Alternatively, or where the transferee no longer has the property in his possession, a creditor must proceed either by a bill in equity to set aside the transfer, or by trustee process. If the property is no longer existent or available, the transferee is liable to account to creditors for its value. It has been said that the transferee is to be considered a constructive trustee for the creditors.

Whatever may have been the rule prior to the enactment of the first bulk sales law — which held, in analogous situations that, if a transferee acting in good faith made a payment to a creditor of the transferor, this was equivalent pro tanto to a restoration of the goods or their proceeds to the transferor for his own use — it now seems clear that such a transferee, though acting in good faith and without participation in the fraud, gets full credit only for payments made to a creditor holding a security lien on the property transferred. Where payment is made to an unsecured creditor, the transferee at best is subrogated to the rights of the creditor so paid. A transferee who has paid out to creditors the full purchase price may still be liable to an unpaid creditor for that creditor's pro rata share of the value of the goods and, therefore, he disburses the fund at his peril so long as any creditor remains unpaid.

The rule under the prior statute, in respect of a transferee who has not complied, would appear to be analogous to the statutory liability now imposed upon auctioneers by Section 6-107 (4), namely, that such transferee shall be liable to the creditors of the transferor as a class for sums owing to them but not, in the case of the transferee, for an amount exceeding the value of the property. The general law provides ample procedures whereby, if attacked by creditors, the transferee may protect himself against double payment.

15 See Crowninshield v. Kittridge, 7 Metc. 520 (Mass. 1844); Thomas v. Goodwin, 12 Mass. 140 (1815).
17 Adams v. Young, 200 Mass. 588, 86 N.E. 942 (1909); see Note, 22 Harv. L. Rev. 447 (1909); Annotation, 8 A.L.R. 527 (1920).
19 In re Fox, 266 Fed. 134 (D. Kan. 1920).
21 For procedure relating to declaratory judgments, see G.L., c. 231A: Reed, Equity Pleadings and Practice §81 (1952). For interpleader procedure in an action at law, see G.L., c. 231, §40; Gonia v. O'Brion, 223 Mass. 177, 111 N.E. 787 (1916). For interpleader in equity, see 4 Pomeroy, Equity Jurisprudence §§1520 et seq.

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The need for transferees to be alert and for creditors to act with expedition is not substantially different under Article 6 than it was under the prior statute. Emphasis is supplied by raising this subject to the dignity of a separate article in the Code. The rules of the game have not been substantially changed.

(5th ed. 1941); Reed, Equity Pleadings and Practice §§10 (1952); Dangel, Equity Pleadings and Practice §§112 et seq. (1936). See also Rabalsky v. Levenson, 221 Mass. 289, 108 N.E. 1050 (1915); Fairbanks v. Belknap, 155 Mass. 179 (1888).