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Bulk Sales under the Uniform Commercial Code

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secondary to the quest for finding the "real party in interest" to fix title. The Code, by placing the title concept far in the background, streamlines the law of sales by presenting the issues narrowly, thus allowing the lawyer and the courts to deal with the specific issue in a given case without first having to find title in the goods and then dealing with the narrow issue. The fact that the rules set out in the Uniform Commercial Code apply "irrespective of title"²² should lead to consistent results in similar cases and remove the presently existing uncertainty and inconsistency prevalent in the elusive concept of title.

D. THOMAS KIDD

BULK SALES UNDER THE UNIFORM COMMERCIAL CODE

Article 6 of the Uniform Commercial Code does not introduce any strikingly new concepts or innovations. Rather, its major contribution is its definitive character resulting in a clarification of the problems that exist in the varied bulk sales acts which are now in effect in the various states. In the absence of a bulk sales act of some type, a creditor of a fraudulent transferor has no recourse against the bona fide purchaser who has paid an adequate consideration for the property transferred. The purpose of a bulk sales law is to protect the general creditors who, on the faith of a stock of merchandise, extend credit to a merchant. Such a merchant is in a position to commit a fraud upon his creditors by selling his stock in trade and disappearing with the proceeds. The bulk sales law protects the creditors by giving them notice before the intended transfer takes place so that they may take whatever action is necessary to protect their interests.

Wyoming, recognizing the desirability of protecting creditors of this type, has by statute¹ declared a transfer in bulk presumptively fraudulent and therefore void against the transferor's creditors unless certain requirements are performed. The purchaser of an inventory in bulk has the affirmative duty to ascertain the transferor's creditors and notify them of the proposed sale at least five days before the sale. An inventory must be compiled showing the quantity and the cost price to the seller at least five days before the sale.² Failure to comply with the requirements renders the transfer void as to the creditors of the transferor,³ and upon the application of any creditor of the seller, the transferee will become a receiver of the complaining creditors and be held accountable to the extent of the property he has acquired by virtue of the sale.⁴

22. *Supra* note 9.

1. Wyo. Comp. Stat. §§ 41-701 to 51-703 (1945), WS §§ 34-236 to 34-238.

2. Wyo. Comp. Stat. § 41-701 (1945), WS § 34-237.

3. *Ibid.*

4. Wyo. Comp. Stat. § 41-703 (1945), WS § 34-238.

The Wyoming law makes no exceptions as to the types of businesses which are covered, and seems to include any type of business which is transferred in bulk. The question of which businesses should or should not be subject to bulk sales law has never been litigated in Wyoming. However, a myriad of cases has arisen in other states concerning the type of businesses covered, and the holdings of the various courts have been far from uniform.⁵ The Uniform Commercial Code limits the type of businesses covered to those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell.⁶ This section differentiates businesses which have the primary purpose of selling from a stock of merchandise from businesses whose primary purposes are the selling of services. The official comments state that while certain bulk sales risks exist in the excluded businesses, unsecured credits is not extended to them on the faith of a stock of merchandise and hence there is no good reason for imposing the inconvenience of compliance.⁷

The Wyoming Bulk Sales Act applies to transfers that are made "otherwise than in the ordinary course of trade, and in the regular prosecution of the business of the seller. . . ."⁸ Although the question has never come before the Wyoming Supreme Court, other jurisdictions have had to determine whether a transfer fell within the transferor's regular conduct of business. A sale of 1,300 pairs of shoes which were out of season was held to be within the ordinary course of business,⁹ and the disposal of an entire bakery stock to prevent spoilage was held a transfer within the ordinary course of business,¹⁰ but a sale of part of a stock of dresses by a business which was changing its location was considered a sale outside the regular conduct of its business and therefore subject to a bulk sales law.¹¹ Section 6-102 (1) of the Uniform Commercial Code also requires that the transfer made is outside of the transferor's ordinary course of business before such transfer will be subject to the Act. This qualitative test is not defined under the Code, and the question of whether a bulk transfer is "not in the ordinary course of the transferor's business" will still be a matter for judicial determination.

Another source of dispute which courts have had to resolve is the issue of what portion of the stock would have to be transferred before

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5. *Farmer's Drovers' National Bank v. Hannaman*, 115 Kan. 370, 223 Pac. 478 (1924) (a sale of goods and fixtures not within Bulk Sales Act); *contra*, *Minder v. Gurley*, 31 Wash.2d 137, 222 P.2d 185 (1950) (a sale whereby a partner transferred two-thirds of his restaurant property to partners constituted a transfer within the Bulk Sales Act); *Schultz, Baujan & Co. v. Bell*, 23 Tenn. App. 258, 130 S.W.2d 149, 168 A.L.R. 758 (1939) (sales in bulk does not apply to farms, hotels, bakeries, housekeepers and manufacturers unless they carry what might be designated as stock of merchandise); *Third National Bank of Nashville v. Keathley*, 35 Tenn. App. 258, 242 S.W.2d 760 (1951) (sale of automobile agency within Bulk Sales statute).
 6. Uniform Commercial Code § 6-102 (3).
 7. Uniform Commercial Code § 6-102, comment 2.
 8. Wyo. Comp. Stat. § 41-701 (1945), WS § 34-237.
 9. *Sternberg v. Rubenstein*, 305 N.Y. 235, 112 N.E.2d 210 (1953).
 10. *Hart v. Brierley*, 189 Mass. 598, 76 N.E. 286 (1905).
 11. *Cohen v. Calhoun*, 168 Miss. 34, 150 So. 198 (1933).

being subject to the bulk sales law. The Wyoming statute would apply to the sale of any part of an inventory as long as the transfer was not in the ordinary course of the transferor's business. This question has never come before the court in Wyoming, but where it has been litigated in states having similar statutory language the courts determined the question by the comparison of value test,¹² i.e., a determination of the value of the stock transferred with the value of the stock remaining in the transferor's hands. Courts, however, have refused to use this test when a transfer of a complete independent unit of a chain business occurs. The value of the goods of each unit is considered independently instead of looking at the value of the several units in their entirety.¹³ Successive transfers not large enough individually to become amenable to bulk sales laws are considered to be one transfer in determining whether a major or substantial part of the stock has been transferred. Sales of one kind of stock and equipment to one person and of another kind of stock and equipment to another person, the two sales constituting a major part of the seller's business and not being made in the ordinary course of business were covered by the Bulk Sales Law and were void where there was no attempt to comply with the provisions of such law.¹⁴

Under the Uniform Commercial Code, transfers in bulk subject to the provision of the act are limited to transfers of a "major part of the materials, supplies, merchandise or other inventory" outside the ordinary course of the transferor's business.¹⁵ A sale of a "substantial" part of the equipment, if made in connection with a bulk transfer of the inventory, is also included within the Article.¹⁶

The states have been far from uniform in deciding whether "bulk mortgages" should be subject to the bulk sales law. Usually, in the absence of a bulk mortgage act, states which have decided this question have excluded mortgages from the bulk sales law on the ground that when a mortgage is executed there is not a complete divestiture of the transferor's interest and that the purpose of the mortgage is to continue the operation of the business rather than bring it to an end.¹⁷ Some states, however, hold to the contrary.¹⁸ The Uniform Commercial Code expressly excludes from the operation of Article 6 any transfer made to give security for the performance of an obligation.¹⁹

Section 6-103 lists seven other types of bulk transfers which are exempt from the Article. Most of these exceptions have not previously been

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12. Billig and Branch, *The Problems Under Bulk Sales Laws: A Study of Absolute Transfers and Liquidating Trusts*, 35 Mich. L. Rev. 735, 742-745 (1937).
 13. *Young v. Lemieux*, 79 Conn. 434, 65 Atl. 436 (1907), *aff'd*, 211 U.S. 489 (1909).
 14. *Corrigan v. Miller*, 338 Ill. App. 212, 86 N.E.2d 853 (1949).
 15. Uniform Commercial Code § 6-102 (1).
 16. Uniform Commercial Code § 6-102 (2).
 17. *Farrow v. Farrow*, 136 Ark. 140, 206 S.W. 134 (1918); *Appel Mercantile Co. v. Kirtland*, 105 Neb. 494, 181 N.W. 151 (1920).
 18. *Citizens State Bank of Hiawatha v. Rogers*, 155 Kan. 478, 126 P.2d 214 (1942).
 19. Uniform Commercial Code § 6-103 (1).

considered "transfers" under the bulk sales acts. However, Subsection (6) of Section 6-103 should be noted. It exempts a bulk transfer from the Article if the transferee is operating a known-place of business in the state, assumes the debts of the transferor by giving public notice of that fact, and who is solvent after becoming so bound. The Article does not define the nature and extent of "public notice" required to apprise the creditors of the terms of the sale.²⁰ This should be expressly defined so that a purchaser who would otherwise qualify under this exemption would know exactly what notice is required to retain exemption.

A change in the business organization of an enterprise is another area in which a diversity of judicial opinion has arisen. The majority of the jurisdictions hold that a transfer of a partnership interest to a partner already existent in the firm is not within the bulk sales law.²¹ Many of the courts have distinguished the case of a sale by a partner to an outsider who thereby becomes a partner in the existing firm and made the transfers subject to the bulk sales law.²² A change to a corporate organization is usually held to be a transfer subject to bulk sales laws,²³ even though creditors may proceed against the corporate stock owned by the transferor. Other jurisdictions hold contra because the creditors can reach the proceeds of the corporate stock.²⁴

The Uniform Commercial Code makes changes in business organizations amenable to Article 6 unless public notice of the transaction is given, the new business assumes the debts of the transferor and the transferor receives nothing but an interest in the new enterprise which is junior to the claims of the creditors.²⁵

A type of transfer that has been without the purview of the various bulk sales laws has been the sale by auction. Courts have held sales by auction exempt from coverage, saying that the sale is public and not a secret one which would preclude creditors from knowledge of the contemplated transfer.²⁶ The Uniform Commercial Code expressly covers transfers by auction.²⁷ The purchaser's title to the merchandise transferred will not be affected by non-compliance of the auctioneer, but the auctioneer thereby becomes personally liable to the creditors.

What creditors are protected by the bulk sales law? The Wyoming statute—as do most state bulk sales acts—fails to define what creditors the act intends to protect. Some jurisdictions hold that their term "creditor" should be strictly construed,²⁸ but most courts construe the term liberally.²⁹

20. Steingeld, *Bulk Sales and the Uniform Commercial Code*, 59 Conn. L.J. 92-96.

21. *Fairfield Shoe Co. v. Olds*, 176 Ind. 526, 96 N.E. 592 (1911); contra, *Minder v. Gurley*, 37 Wash.2d 123, 222 P.2d 185 (1950).

22. *Sampson v. Boysen*, 9 Cal.App.2d 413, 50 P.2d 95 (1935).

23. *Smith-Calhoun Rubber Co. v. McGhee Rubber Co.*, 235 S.W. 321 (1921).

24. *Maskell v. Spokane Cycle & Auto Supply Co.*, 100 Wash. 16, 170 Pac. 350 (1918).

25. Uniform Commercial Code § 6-103(7).

26. *Lowe v. Fairberg*, 270 N.Y. 590, 1 N.E.2d 344 (1936).

27. Uniform Commercial Code § 6-108.

28. *Grant Motors, Inc. v. Federal Credit Co.*, 183 Miss. 872, 185 So. 196 (1938).

29. *United States v. Goldblatt Bros.*, 128 F.2d 576, cert. denied, 317 U.S. 662 (1942).

In Indiana (whose bulk sales act is the same as Wyoming's) the court said that a statute limited to merchandise creditors only was unconstitutional,³⁰ and the Arkansas court in *Prins v. American Trust Company*³¹ held that the debt did not necessarily have to arise out of a transaction concerning the goods that had been transferred. The federal government has been included as a creditor entitled to protection of the bulk law³² as have secured creditors.³³ A liquidated tort claim holder has been protected,³⁴ but an unliquidated tort claim holder was denied protection by the statute.³⁵ The Uniform Commercial Code goes farther than the state laws in protecting creditors by including holders of claims—liquidated or unliquidated—who become such before notice is given.³⁶

In Wyoming, as well as in most states,³⁷ the transferee, after notifying the creditors of the transferor, may pay the proceeds of the bulk sale to the transferor. Upon payment, the transferee is relieved of any further liability to the creditors providing that he has complied with all of the other requirements imposed by the bulk sales law. In order to collect the debt owing to him, the creditor must then take whatever action is necessary and available to him against the transferor.

Section 6-106 of the Article places a further imposition upon the transferee to assure that the consideration for the sale is applied to pay the "debts of the transferor which are either shown on the list furnished by the transferor or filed in writing in the place stated in the notice within thirty days after the mailing of such notice."³⁸ This Section is bracketed to indicate a division of opinion as to whether it should be included; and its adoption is to be left to the legislative discretion of the various states. It is said in the official comments that on this aspect "state enactments may differ without serious damage to the principle of uniformity."³⁹

Whether the legislature should adopt this Section should be determined by the purpose the state wishes to place upon the bulk sales act. If the purpose of the act is merely to give notice to the creditors of the intended transfer, Section 6-106 would not have to be included in the act. If the purpose of the act is to assure that the proceeds of the bulk sale are applied to satisfy the debts of the transferor, Section 6-106 should be adopted along with the other Sections of Article 6.

30. *McKinster v. Sager*, 163 Ind. 671, 72 N.E. 854 (1904).

31. 169 Ark. 455, 275 S.W. 914 (1925).

32. *United States v. Goldblatt Bros.*, op. cit.

33. *Ratliff v. Davis*, 133 Colo. 315, 294 P.2d 1109 (1956).

34. *Brinson v. Monroe Automobile and Supply Co.*, 180 La. 1064, 158 So. 558, 96 A.L.R. 1206 (1934).

35. *Hart v. Evans*, 320 Ill.App. 385, 71 N.E.2d 546 (1947); *Harrison v. Riddell*, 64 Mont. 466, 210 Pac. 460 (1922).

36. Uniform Commercial Code § 6-109(1).

37. *Weintraub and Levin, Bulk Sales Law and Adequate Protection of Creditors*, 65 Harv. L. Rev. 418, lists thirty-eight states, including Wyoming, having no provision controlling disposition of the proceeds of a bulk sale.

38. Uniform Commercial Code § 6-106.

39. Uniform Commercial Code § 6-106, note.

CONCLUSION

Article 6 goes far toward setting up a uniform bulk sales law and should be acceptable to Wyoming. Bulk sales laws are primarily designed to prevent a transferor from putting assets beyond the reach of his bona fide creditors and also to protect the buyer who substantially complies with the law. The advantage of uniform legislation in this matter is very evident when one considers a creditor who extends credit to various debtors in a number of different states. With uniform laws in effect, the creditor would not be required to know the various bulk sales laws. Instead, he would have to be aware of only one set of laws and could act with more certainty and safety in extending credit. Many of the disputes that have arisen in other states have not been before the Wyoming courts. The acceptance of this Article by Wyoming would reduce the amount of litigation since its great asset is the clarification of many already litigated problems that have been troublesome to other states.

DEAN CLARK

SECURED TRANSACTIONS: REMEDIES ON DEFAULT

Article 9 of the Uniform Commercial Code seeks to unify the rules applicable to all secured transactions.¹ It applies to any transaction, regardless of its form, which is intended to create a security interest in personal property. Chattel mortgages, conditional sale contracts, trust receipts, and other security devices are included under this heading.² A lender, seller, or other person in whose favor there is a security interest is defined as a "secured party." The person who owes payment or other performance of the obligation secured is referred to as the "debtor." The property subject to a security interest is termed the "collateral."³ The Code further classifies the term "goods" into "consumer goods," "equipment," "farm products," and "inventory." "Consumer goods" are goods used or bought for use primarily for personal, family, or household purposes.⁴

The Code provisions with respect to the rights and liabilities of the debtor and the secured party in a default situation would introduce several changes in the existing Wyoming law. These changes would not substantially affect current commercial practices, but would give statutory recognition and approval to them.

A change appears under the Code by allowing the secured party to take possession of the collateral on default without resorting to judicial process.⁵ Wyoming provides for statutory foreclosure only;⁶ however, our

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1. Hereafter referred to as the Code.
 2. Uniform Commercial Code § 9-102.
 3. Uniform Commercial Code § 9-105. See generally for definitions.
 4. Uniform Commercial Code § 9-109(1).
 5. Uniform Commercial Code § 9-503.
 6. Wyo. Comp. Stat. §§ 59-115 through 59-118 (1945).