

Business Credit News

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**NOVEMBER 2011 Chairman: Frank Cernosek,
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“Revised Article 6 Bulk Transfers”

This is another segment where we examine the purpose of the articles contained in the Uniform Commercial Code. Although revised article six has been enacted by forty states since it was introduced in 1989, most of whom repealed the article, there are still ten states and two districts who have not addressed the revisions suggested by the National Conference of Commissioners on Uniform State Laws (NCCUSL) twenty-two years ago. This year Virginia and the District of Columbia have proposals on their legislative dockets.

Article 6 of the Uniform Commercial Code (UCC) was established to provide protection to creditors from those businesses that sell merchandise from inventory. Creditors of these business were, at the turn of the century, vulnerable to a "bulk sale,@ in which the business owner sold all or a large part of his inventory to a single buyer outside the ordinary course of business, following which the owner took the proceeds of the sale and often fled to another state. The original Article 6 of the UCC required that "bulk sale" buyers provide notice to the seller's creditors and to maintain a list of the seller's creditors and a list of the property sold in a "bulk sale,@ for six months after the "bulk sale" took place. Unless these procedures were followed, the creditors had the right to void the sale. Third parties such as auctioneers, who handle merchandise in bulk, were given similar procedures to follow.

The purpose of Article 6 was to replace numerous bulk sales laws enacted in the various states. These state laws protected local business creditors from inventory liquidations that could take merchandise and proceeds beyond the creditors' ability to obtain a remedy. Article 6 introduced the quality of uniformity of these protections for creditors regardless of the state they were in by introducing a "long arm" statute that permitted the creditor to void the sale.

As the credit environment eventually changed, so did the risk of the business owner selling off his inventory in bulk and fleeing with the proceeds to another jurisdiction. Business creditors today can evaluate creditworthiness far better than was the case when the UCC was first envisioned, and they can pursue delinquent customers across state lines with much less difficulty. Further, modern fraudulent transfer actions under the Uniform Fraudulent Transfer Act overlap Article 6 in a significant way. Widespread inventory financing under Article 9 of the UCC, which provides even more significant protections for creditors, simply bypassed the Article 6 protections. In 1988, as revisions of Article 6 were being considered, there was a large majority in favor that supported the repeal of Article 6. That majority perceived that the balance of equities had swung from protection for creditors to unnecessary burdens placed upon the "bulk sale" buyer.

It was never determined, however, that repeal of Article 6 was a uniform solution or a uniformly acceptable recommendation in every state and jurisdiction. So the Revised Article 6 of the UCC was provided with two alternatives. Alternative A offers the states the option of repealing the entire original Article 6. Alternative B offers a revised and updated Article 6 to those states and jurisdictions so that they can evaluate the positions of creditors, sellers, and buyers, and then decide whether to retain a bulk sales law or not. Many states that have repealed Article 6 have incorporated several of the components of both Article 6 and alternative plan B into their individual state business and commerce laws. The question often asked is "How is uniformity achieved 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 original Article 6 has been repealed, then there is no bulk sales law applicable to the sale unless the bulk sales law now exists in the states' business and commerce code. If the state enacted Revised Article 6, it applies.

Revised Article 6 remedies the problems of the original Article 6. It minimizes the burdens placed upon the bulk sale buyer. The object was to identify the creditor's risk and to narrow the reach of the statute to cover that risk and nothing more. Much improvement accrues through the definitions of such terms as "assets,@ "bulk sale,@ "date of bulk sale,@ all of which increase the certainty of Revised Article 6. None of these terms were defined in the original Article 6.

A "bulk transfer" under original Article 6 took place when there was a 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 scope of Article 6 is more clearly defined 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 scope of Revised Article 6 is limited and more clearly defined than under the original Article 6. The risk to creditors arises from the sale whereby 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 accepted 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, exempts, 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 Revised Article 6. The small amounts are determined to be a nuisance, and the very large "bulk sale" is considered to be unable to transact in a manner unknown to creditors. What a buyer in a bulk sale does under Revised Article 6 is primarily the same as what that buyer did 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 claimants, 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 the state requires) rather than by giving written notice to all claimants. One of the great burdens to buyers under original Article 6 was the individual notices to large numbers of creditors. Revised Article 6 simplifies the process.

Revised Article 6, also, provides for different types 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 no longer requirements under 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, regardless in what manner it is given.

The final significant change from the original Article 6 found 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 equal to the creditors' 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.

Third parties such as 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 specific and tailored to auction or liquidation sellers.

Revised Article 6 also extends the statute of limitations on creditor's actions from six months to one year. Original Article 6 only provided for six months. The period commences on the date of the "bulk sale." Any concealed sales extend the statute of limitations in Revised Article 6 just as they did in the original Article 6. Repeal or revision is the two options offered to the states under the Revised Article 6 of the UCC. Repeal is the recommended option of the NCCUSL, however the revisions in Alternative B eliminate the significant difficulties creditors encountered under original Article 6, and is still a reasonable alternative to repeal.

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***** **NOVEMBER 2011** *****

Day	Date	Group	Location	Time
Tues	8	Austin Construction	Texas Land & Cattle, 6007 N IH 35 & Hwy 290, Austin TX	11:30
Tues	8	Coastal Bend	Holt Cat, 1325 South Padre Island Dr, Corpus Christi TX	11:30
Wed	9	Rio Grande Valley	Best Western Palm Air, Weslaco TX	11:30
Thurs	10	SW Food Credit Group	Las Palapas, 4802 Walzem Rd, San Antonio TX	11:00
Fri	11	SA Ad Media	Teleconference Meeting 1-800-791-2345	10:00
Wed	16	Victoria Credit Group	Sky Restaurant, 236 Foster Field, Victoria TX	11:30
Thurs	17	Austin Ad Media	Santa Rita Tex Mex, 1206 W38th St. Austin TX	11:30
Thurs	17	Fuel & Lube/Heavy Eq.	Teleconference Meeting 1-800-791-2345	2:00
Fri	18	SW Electrical Group	Onion Creek Country Club, 2510 Onion Creek Pkwy, Austin TX	11:30
Tues	22	Austin Construction	Texas Land & Cattle, 6007 N IH 35 & Hwy 290, Austin, TX	11:30
Tues	22	SA Construction	Las Palapas, 4802 Walzem Rd, San Antonio TX	11:30
Wed	29	Laredo Credit Group	Laredo Country Club, Laredo TX	11:30

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