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ARTICLE SIX BULK TRANSFERS: THIRTY YEARS OF CONFUSION

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I. INTRODUCTION

Article 6 is thirty years old this year. Designed to protect unsecured creditors from debtors who might surreptitiously sell off inventory collateral and disappear with their debts unpaid, Article 6 has remained essentially unchanged since Pennsylvania became the first state to adopt it in 1953. A few minor amendments were added by the Permanent Editorial Board in 1962, and states have occasionally contributed their own nonuniform modifications, but the version of Article 6 in effect in fifty-one jurisdictions today was basically complete before the end of the Korean War.

Based on the assumption that a bulk seller of inventory ("transferor") is likely to default upon his debts, Article 6 requires that the bulk purchaser ("transferee") give notice of the impending sale to the transferor's creditors or temporarily lose the protection otherwise available to him as a bona fide purchaser for value of the goods conveyed. Nineteen states and the Virgin Islands (hereinafter "minority jurisdictions") have adopted the additional re-

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1 Cosponsored by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, the first Official Text of the Uniform Commercial Code was published as the “1952 Official Text.” The new Code, including Article 6, was enacted first by Pennsylvania in 1953, effective July 1, 1954. See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 4 (1980) [hereinafter cited as WHITE & SUMMERS] (citing Schnader, A Short History of the Preparation and Enactment of the Uniform Commercial Code, 22 U. MIAMI L. REV. 1 (1967)]. Unless otherwise indicated, all UNIFORM COMMERCIAL CODE citations contained herein are to the 1972 Official Text.

2 In this, Article 6 merely continues the protection extended by its predecessor bulk sales laws in the United States. See Billig, Bulk Sales Laws: A Study in Economic Adjustment, 77 U. PA. L. REV. 72 (1928).

3 In 1962, amendments were made to § 6-103 (adding final paragraph defining “public notice”); see text following infra note 93 for full text of § 6-103); § 6-104 (adding last sentence of subsection (2); see infra note 114 for full text of § 6-104); § 6-106 (adding optional subsection (4) regarding payment of consideration into public office; see infra note 211 for full text of § 6-106); § 6-107 (adding reference to certified mail, as well as registered mail, for proper notice under subsection (3); see infra note 195 for full text of § 6-107); and § 6-108 (adding reference to certified mail, as well as registered mail, for proper notice under subsection (3)(b); see infra note 272 for full text of § 6-108).

4 For example, several jurisdictions have amended their versions of § 6-102 to include certain service-related businesses among the enterprises subject to Article 6. See infra note 88 and accompanying text.

5 These jurisdictions are all the states (with the exception of Louisiana), the District of Columbia and the Virgin Islands. See 2A U.L.A. 314 (1977 & Supp. 1983).
quirement that the transferee must see to it that the proceeds of the trans-
action are applied to discharge the claims of the transferor’s creditors.  

In their simplest form, the steps for compliance with Article 6 by the 
transferee are these:

1. Require the transferor to furnish a list of his existing creditors;
2. Prepare with the transferor a schedule of the property to be conveyed;
3. Give notice of the transfer to the listed creditors, and any other creditors of which the transferee has knowledge, at least ten days before payment or transfer of the goods, whichever occurs first; and
4. Assure, where section 6-106 has been enacted, that the consideration is applied to payment of the listed debts of the transferor in the order of their priority.

Precisely how complex and consequential these four steps can be is the major concern of this article.

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6 Section 6-106, requiring the transferee to assure proper distribution of the consideration to the transferor’s creditors, has been adopted by Alaska, California, Florida, Idaho, Kansas, Kentucky, Maryland, Mississippi, Montana, New Jersey, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virgin Islands, Washington and West Virginia. 2A U.L.A. 314 (1977 & Supp. 1983).

The California version of § 6-106 contains a qualification absent in other jurisdictions, limiting the application of this statute to the situations “where the consideration is less than one million dollars ($1,000,000) and is substantially all cash or an obligation of the transferee to pay cash in the future to the transferor or a combination thereof.” Cal. Com. Code § 6106(1) (Deering Supp. 1983).


Because of the potentially complex nature of compliance, in circumstances where the seller is solvent and will be within reach if any problems arise the parties may elect to waive compliance with Article 6 for the sake of administrative convenience. The parties may also combine their waiver with an express indemnification clause in the sales agreement, as in the following example:

The buyer hereby waives compliance by the seller with the provisions of Article 6 of the Uniform Commercial Code, or equivalent bulk transfer laws, of any state under whose laws this agreement shall be construed and/or enforced. The seller hereby agrees to indemnify and hold harmless the buyer against any and all expense, loss, damages or liability, including attorney fees and court costs, which the buyer may suffer as a result of claims asserted by third parties against the buyer due to noncompliance by the seller and buyer with applicable bulk transfer laws.

Such a waiver does not, of course, affect the rights of creditors of the transferor, who are not parties to the agreement. Nor does an indemnification agreement “assure” the proper application of proceeds under § 6-106 or relieve the transferee of this particular procedural burden in minority jurisdictions. The transferee should clearly understand that he is buying himself a lawsuit in the event that creditors of the transferor seek remedies against the transferee and the transferee refuses to honor the indemnification agreement. See Atlas Merchandising Co. v. Johnny’s California Market, Inc., 7 Pa. D. & C.3d 776, 25 U.C.C. Rep. Serv. (Callaghan) 1427 (Ct. Comm. Pl. 1977) (transferee cannot comply with § 6-106 by merely obtaining the transferor's promise that debts will be paid).

An additional consideration for parties contemplating a waiver is that an attempt to waive Article 6 has been held to be an act of concealment sufficient to toll the running of the six-month
Article 6 has been widely criticized. Its relatively large number of undefined terms has been thought to undermine the effectiveness of a statutory scheme that is basically procedural. Thirty years of case law and commentary have provided some clarification, but many questions remain. Indeed, the absence of remedies from Article 6, the short statute of limitations, and the fact that sophisticated creditors will protect themselves with security interests under Article 9 and avoid Article 6 altogether, may lead one to wonder if the continued existence of Article 6 can be justified.

Although it is currently in the process of revision, Article 6 does not appear to be in jeopardy of being dropped from the Code. An understanding of Article 6 is therefore important to counsel for transferors because Article 6 can furnish grounds for breach of contract. It is important to counsel for transferees because Article 6 can rob transferees of the benefits of their purchases, or worse. It is important to counsel for creditors because Article 6 may be their only hope of recovery.
II. THE PURPOSE OF ARTICLE SIX

A. Section 6-101

The original purpose of Article 6 was "to simplify and make uniform the bulk sales laws of the states" already in effect when Article 6 was drafted. Those prior bulk sales laws were directed at "two common forms of commercial fraud:

(a) The merchant, owing debts, who 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 anyone for any price, pockets the proceeds, and disappears leaving his creditors unpaid."

The first type of fraud was thought by the draftsmen of Article 6 to be covered by the Uniform Fraudulent Conveyance Act, and was therefore not viewed as the principal evil which Article 6 was intended to correct. Preventing the second type of debtor fraud was the central purpose of the Article.

It was planned that Article 6 would protect creditors by requiring a transferee to provide the transferor's creditors with notice of certain transactions before they were completed, giving creditors a chance to pursue remedies against the transferor which were available to the creditors under other, already existing laws. However realistic or necessary this notice posed a de minimis exemption from Article 6 for transfers of small businesses having total assets of less than $10,000. HAWKLAND U.C.C., supra note 10, at § 6-104:08.

This paper is organized under headings intended to present the separate sections of Article 6 in useable clusters, centering on the problem or issue they are intended to resolve. Within the scheme, the individual sections of Article 6 are presented and analyzed for purpose and effect. Attention is directed to those questions which appear to have been settled by case law as well as those which remain after the first thirty years of Article 6.

16 "[W]hat existed under pre-Code law was a patchwork quilt of forty-eight legislative acts embroidered with approximately two thousand judicial decisions that could not be reconciled by rhyme or reason." Lakin, Bulk Transfers: What Hath the Uniform Commercial Code Wrought?, 35 Md. L. Rev. 197, 198-99 (1975) [hereinafter cited as Lakin] (citing Billig, Article 6—Order Out of Chaos; a Bulk Transfer Article Emerges, 1952 Wis. L. Rev. 312, 316).
17 U.C.C. § 6-101, Official Comment 2.
18 U.C.C. § 6-101, Official Comment 3.
19 U.C.C. § 6-101, Official Comment 4: "The second form of fraud suggested above represents the major bulk sales risk, and its prevention is the central purpose of the existing bulk sales laws and of this Article."
20 U.C.C. § 6-101, Official Comments 3 and 4. In states which have adopted § 6-106, Article 6 is both a procedural and a substantive weapon against debtor fraud, requiring not only notice of an impending bulk sale to the transferor's creditors, but also that the transferee assure payment of the proceeds to those creditors.
scheme may have appeared in 1953,21 it is clear that the improving sophistication of creditors since that time, particularly their extensive reliance upon Article 9 in commercial transactions in the United States, has diluted much of the original significance of the Article 6 notice provisions. Rather than triggering a scramble for the courthouse by unsecured creditors applying for a remedy, notice now appears most often to signal commencement of a time for calm computation of priorities among already secured parties.22

In spite of the eroding utility of Article 6, however, a transferee must follow precisely the notice provisions of the Article. Good faith is no defense,23 and a defective notice can create liability. Official Comment 2(b) to section 6-101 notwithstanding,24 the transferor is not required to disappear before Article 6 applies to a bulk transfer, nor are the transferor's creditors required to first pursue their remedies against the debtor before relieving the transferee of goods he may have obtained in a noncomplying bulk transfer.25 The only certain protection available to the bulk transferee is the "negative benefit"26 of having satisfied the statutory requirements of Article 6.27

21 See Lakin, supra note 16, at 198 n.5.
22 Unperfected secured creditors should perfect their security interests immediately upon receipt of notice. See W. Hawkland, Sales and Bulk Sales 215-16 (3d ed. 1976) (hereinafter cited as Hawkland, Sales and Bulk Sales).
24 Supra note 17 and accompanying text.
25 Suppose, for instance, that the transferee fails to give proper notice even though the transferor has complied by providing an accurate list of creditors. The transferor will not have breached any warranties of title, and if his creditors choose to levy upon the goods in the transferee's possession, the transferee will be forced to sue the transferor in equity under a theory of unjust enrichment, if a suit in equity can even be entertained with the transferee at fault. See infra notes 111 and 248 and accompanying text.
26 Kove, Procedural Problems in a Bulk Sale Under the Uniform Commercial Code, 1 U.C.C. L.J. 91 (1968) [hereinafter cited as Kove]:
Since the great majority of transfers subject to Article 6 will involve financially weak companies, the statute should be viewed as granting what might be called a "negative benefit" to the transferee. This negative benefit arises in a number of ways. The obvious benefit is that the transferee, having complied with the statute (and assuming that there has been no fraudulent conveyance) acquires as against the creditors of the transferor good title to the assets.
Id. at 94.
27 With laudable candor, U.C.C. § 6-101, Official Comment 5, confesses: "The objections are chiefly delay and red tape on legitimate transactions, and the possibility of a trap for the unwary buyer. It is hard to avoid the latter danger."
Perhaps the greatest trap for the unwary buyer is the possibility that he will not even know
III. SCOPE OF ARTICLE SIX

A. Section 6-102

According to the four subsections of section 6-102, Article 6 applies to transfers in bulk of goods within the state by enterprises whose principal business is the sale of merchandise from stock which are transferring a major part of their inventory in a transaction which is outside the ordinary course of their business. Although this formulation appears straightforward enough, for thirty years controversy has been generated in courts and among commentators over the meaning of almost every substantive word or phrase (in italics above) contained in section 6-102. Coupled with the fact that the applicability of Article 6 is a threshold issue in every case, it is not surprising that section 6-102 should be the most frequently litigated section of Article 6.29

Unlike the compliance sections of Article 6, section 6-102 does not require that the parties do anything, only that they be in a posture which subjects them to the operation of the Article. Subsection 6-102(1) requires that the parties be engaged in a bulk transfer, defined therein as "any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory of an enterprise subject to this article."29 According to subsection 6-102(2), a transfer of equip-
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ment may also be a bulk transfer if the amount conveyed represents "a substantial part" of the equipment of the transferor and the transfer is made in connection with a bulk transfer of inventory. Subsection 6-102(3) announces that the enterprises intended to be covered by Article 6 "are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell." Finally, subsection 6-102(4) states that, except for transactions exempt under section 6-103, "all bulk transfers of goods located within this state are subject to this article."

1. "Major Part"

The definition of bulk transfer in Article 6 requires that the transfer consist of a "major part" of the inventory of the transferor, and historically the biggest debate over section 6-102 Has concerned the meaning of the phrase "major part" as it appears in subsection (1). This debate can be subdivided

of investment securities are not covered by the Article, nor are transfers of money, accounts receivable, chattel paper, contract rights, negotiable instruments, nor things in action generally. Such transfers are dealt with in other Articles, and are not believed to carry any major bulk sales risk." U.C.C. § 6-102, Official Comment 3. See Creditthrift Financial Corp. v. Guggenheim, 232 So. 2d 400, 7 U.C.C. Rep. Serv. (Callaghan) 728 (Fla. Dist. Ct. App. 1970) (Article 6 does not apply to transfers of intangibles such as the notes receivable of a small loan company); Standard Milling Co. v. Yoss, 16 U.C.C. Rep. Serv. (Callaghan) 815 (N.Y. Sup. Ct. 1975) (sale of bakery delivery routes was sale of contract rights, intangibles not subject to Article 6). See also In re Weis Securities, Inc., 605 F.2d 590, 24 U.C.C. Rep. Serv. (Callaghan) 402 (2d Cir. 1978) (sale of assets of brokerage firm excluded from Article 6 since brokerage firm did not sell goods or merchandise).


"In connection with" appears to translate as part of the same transfer to the same transferee. This is important to purchasers of equipment who wish to avoid compliance with Article 6, since they can apparently guarantee their own exclusion by refusing to purchase any inventory with the equipment. No one has yet argued that a horizontal step transaction which disposes of inventory to one transferee and equipment to another transferee requires the equipment transferee to comply with Article 6. See generally infra notes 50 and 51.


33 Id.


34 A related question is the meaning of "substantial part" as applied to equipment under § 6-102(2). It would seem that the same analyses and questions should apply. Case law supports a proposition that "substantial" means a fraction or percentage far less than fifty percent. When one considers that amounts as small as five percent have been considered "substantial" in the context of Article 6, it becomes clear that, for most intents and purposes, "substantial part" might
into separate issues regarding the meaning of "major" and the meaning of "part." The first question regarding "major" is whether this word should be given a quantitative or a qualitative definition. Case law, commentators and common sense all favor a quantitative definition of "major," which would include transactions in Article 6 when the amount of inventory conveyed represents a determinable fractional percentage of the total inventory of the enterprise at the time of the transfer. This is opposed to a "qualitative" definition of "major" which would measure the impact of the transaction upon the enterprise. A transfer of even a relatively small percentage of the total inventory of the enterprise could be deemed a "major" part if the impact on the enterprise was to steer it into insolvency. Perhaps because of the enormity of the proof problems created by a qualitative definition, or perhaps because of a desire for a more legal and less equitable yardstick for commercial transactions, arguments for a qualitative definition of "major" have been pretty much ignored.

Of course, once a quantitative determination of "major" is agreed upon, it is still necessary to determine how much that is—what fraction or percentage should be used as the mathematical measure of this portion. Although the proper mathematical measure was unclear for several years, if only because of the absence of case law regarding Article 6 generally, it now appears settled nationally that a "major part" is more than fifty percent. At least one case has held that an even fifty percent is not enough to constitute a "major part"; it must be more than half. The fears triggered long ago by In re Shirts "N" Slax, Inc., which suggested that the transfer of approximately thirty percent of the transferor’s inventory might represent a "major

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[38] Hawkland, U.C.C. § 6-102, supra note 29, at 86; Lakin, supra note 16, at 201 n.24.

[39] See WHITE & SUMMERS, supra note 1, at 760.


part" for purposes of bringing the transaction under Article 6, have not been realized.\textsuperscript{42}

A third question regarding the proper meaning of "major" is the proper standard of valuation. Does "major" mean more than fifty percent of the dollar value of the inventory or more than fifty percent of the number of items of inventory (or any other method of counting)? Common sense dictates that dollar value is the appropriate standard of valuation,\textsuperscript{43} since dollars are the real concern of the unsecured creditors whom Article 6 is ostensibly trying to protect.\textsuperscript{44} A numerical total of items of inventory, divorced from dollar value, would have in most instances little meaning to creditors and could be misleading.\textsuperscript{45} It thus seems proper to note that this issue, although providing a quibble for commentators, has never troubled the courts, which have consistently applied dollar value as the standard of valuation.\textsuperscript{46}

Directly related to the issue of dollar valuation is the meaning of the words "in bulk" as they appear in subsection 6-102(1) in apparent qualification of the nature or mechanism of Article 6 transfers.\textsuperscript{47} The basic question is

\textsuperscript{42} Id. In re Shirts "N" Slax held only that the question whether less than half of the inventory could be a "major part" raised a "substantial issue" preventing summary disposition of the case. This possibility was not, however, realized in In re Shirts "N" Slax or any subsequent reported case deciding the meaning of "major part."

\textsuperscript{43} E.g., Lakin, \textit{supra} note 16, at 202.

\textsuperscript{44} This is the position of the Permanent Editorial Board, which rejected Wisconsin's nonuniform amendment of subsection 6-102(1): "a major part in value of the inventory (Section 9-109) of an enterprise . . . " (emphasis added). The Board stated: "The words 'in value' are redundant, especially with the deletion of specific references here, in view of the purposes of Article 6." \textit{Report No. 2 of the Permanent Editorial Board for the Uniform Commercial Code}, at 105 (1965) [hereinafter cited as \textit{Report No. 2}]. (The "specific references" alluded to by the Board are the words "materials, supplies, merchandise.")

\textsuperscript{45} \textit{But see Duesenberg & King, \textit{supra} note 34, at § 15.02[1], for an analysis under which a court might apply a numerical counting test rather than a value test.}

\textsuperscript{46} Both the dollar value and the numerical counting methods appear to leave creditors somewhat at the mercy of the transferor's accountants. The numerical method would, at its simplest, depend upon the internal inventory record keeping of the transferor. Similarly, one unanswered problem with the dollar value method is whether the total inventory of the enterprise should be valued at its cost, wholesale or retail value for purposes of determining whether the fifty percent threshold has been reached. Fair market value, whether wholesale or retail, would seem to be the measure that is most fair to creditors. However, this could be the least fair to the transferor and the transferee if the transferor is planning the sale on the basis of his cost (probably the most appropriate measure in a liquidation situation), rather than a fair market value that will never be realized, and the transferor believes in good faith that he is under the limit for Article 6. Of course, cost valuation may give the transferor too much control over the numbers, since the transferor chooses his own method of inventory valuation. It will obviously be easier to avoid the fifty percent threshold with a FIFO-valued (first in, first out) inventory than a LIFO-valued (last in, first out) inventory.

\textsuperscript{47} Billig, \textit{Article 6—Order Out of Chaos: A Bulk Transfers Article Emerges}, 1952 \textit{Wis. L. Rev.} 312 (1952) [hereinafter cited as Billig, \textit{Article 6}], notes this significant distinction:

The term "in bulk" clearly is quantitative in character. It involves a comparison of the
whether the words "in bulk" represent a quantitative requirement in addition to that already present in the words "major part."48 Professor Frank W. Miller, writing in 1954 before any cases had been decided under Article 6,49 suggested that the term "in bulk" was intended to cover certain step transactions50 which would otherwise fall outside of Article 6.51 It has also been argued that the "in bulk" requirement was actually intended to exclude single-item transactions from the operation of Article 6, even when the single item, although only one of many, represents more than fifty percent of the total value of the transferor's inventory.52 This author is inclined to disagree with both interpretations, suspecting instead that the draftsmen of section 6-102, recognizing its importance as a definitional section, and wishing to clearly establish the fact that Article 6 represented a continuation of the

value of the goods disposed of with that of the whole stock. The phrase "otherwise than in the ordinary course of trade" or "out of the ordinary course of business," on the other hand, is in a sense qualitative, although no rule of thumb has been devised which will segregate the ordinary transaction from the extraordinary. However, as these phrases have been associated with bulk sales laws since the beginning, the Reporter for Article 6 was wise in retaining them.

Id. at 317.

48 See generally supra note 36.

49 Miller, Bulk Sales, supra note 36, at 324.

50 Counsel desiring to sidestep the imprecisions of Article 6 may want to consider a step transaction. Since Article 6 is a procedural article and strict construction appears to be the rule, the opportunity would seem to be available to structure certain transactions to avoid Article 6. As Chancellor Hawkland noted in 1976, post-Code courts have apparently not applied a step transaction analysis in situations where several transactions have occurred, transferring inventory on successive days to separate unrelated transferees. Hawkland, Sales and Bulk Sales, supra note 22, at 206. This is so in spite of Professor Miller's early arguments that inclusion of the phrase "in bulk" was intended to bring such transactions under the operation of Article 6. Miller, Bulk Sales, supra note 36, at 324. However, Chancellor Hawkland also noted that the apparent permissibility of step transactions does not affect the proportionally greater percentage of the total inventory assigned to each successive transferee as the total inventory shrinks with each successive transfer. Hawkland, Sales and Bulk Sales, supra note 22, at 206; Hawkland, U.C.C. § 6-102, supra note 29, at 84-86. Thus, it is conceivable that a transferee who takes but ten percent of the inventory possessed by the transferor on Monday could also be purchasing sixty percent or more of the inventory in the transferor's possession when he buys the same amount on Friday, bringing the transaction into the ambit of Article 6.

51 Authority, based principally upon pre-Code case law, does exist for the proposition that Article 6 should apply to step transactions (see White & Summers, supra note 1, at 760 n.34), but since the burdens of Article 6 tend to fall upon transferees rather than upon transferors, such arguments seem ultimately to be arguments to widen the range of innocent victims. Imagine the plight of a first-level transferee of ten percent of the inventory of the transferor, which transferee has not complied with Article 6, believing it to be inapplicable. Now imagine the difficulty faced by the transferee in trying to prevent the transferor from selling the rest of his inventory the subsequent week to an unrelated party so that he will not be completing a step transaction that will put the first transferee in violation of Article 6. Accordingly, this writer endorses the position of the ABA Committee to Review Article 6, that successive transferees are not to be treated as participating in a "step transaction" so long as they are acting individually and not in concert for purposes of the transfer.

52 Hawkland, U.C.C. § 6-102, supra note 29, at 85.
tradition of the earlier bulk sales laws, employed the phrase "in bulk" as a signal that the term "bulk transfer" is not an orphan term of art but has historical precedent, demonstrated by inclusion of the term "in bulk" without independent definition.\(^5\) Significantly, the ABA Committee to Review Article 6 is of the opinion that the term "in bulk" should be deleted from section 6-102 as being merely redundant.\(^6\)

The word "part" fathers its own set of questions. Can "part" be deemed to refer to a portion of a particular product line, or must a "part" be determined in reference to the entire inventory, including all product lines of the enterprise? What does "enterprise" mean in this context? If a business entity owns three stores in the same state, each with an equal dollar amount of inventory, does the sale of one of the three stores trigger the application of Article 6, on the principle that the sale represents one hundred percent of the inventory at that particular location? If a business enterprise owns three stores in three different states, each with an equal dollar value of inventory, and sells one of its stores, is the sale of that store considered an Article 6 transaction,\(^5\) at least in regard to creditors whose rights are determined under the law of that state?

Authority exists that a particular product line is not a sufficiently inclusive inventory against which to measure a "part."\(^5\) It has also been held that the total inventory of a multistate enterprise is the appropriate inventory against which to measure a "part," not merely the inventory within a particular state.\(^5\) Nevertheless, it has been argued that compliance with Article 6 should be required when the sale of a single store in a chain occurs.\(^5\) Moreover, since an enterprise only becomes subject to Article 6 when it under-

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\(^5\) This conclusion is also implied by Professor Billig in the closing sentence of the passage quoted at supra note 47. See also Miller, The Effect of the Bulk Sales Article on Existing Commercial Practices, 16 LAW & CONTEMP. PROBS. 267, 270 (1951) [hereinafter cited as Miller, The Effect of the Bulk Sales Article].

\(^6\) Hawkland, U.C.C. § 6-102, supra note 29, at 85. Formal deletion of "in bulk" from § 6-102 would only memorialize the silence which has attended the issue in the courts for thirty years.

\(^5\) See Hogan, The Highways and Some of the Byways In The Sales and Bulk Sales Articles of The Uniform Commercial Code, 48 CORNELL L.Q. 1, 35-36 (1962) [hereinafter cited as Hogan].

\(^5\) Reed v. Anglo Scandinavian Corp., 298 F. Supp. 310, 6 U.C.C. Rep. Serv. (Callaghan) 714 (E.D. Cal. 1969), aff'd, 9 U.C.C. Rep. Serv. (Callaghan) 103 (9th Cir. 1971) ("part" is part of entire inventory, not a particular item or line).

\(^5\) In re Albany Brick Co., 12 U.C.C. Rep. Serv. (Callaghan) 165 (M.D. Ga. 1972) (all inventory, even that located in different states, must be considered together).

\(^5\) Hogan, supra note 55. See also National Bank of Royal Oak v. Frydlewicz, 67 Mich. App. 417, 241 N.W.2d 471, 19 U.C.C. Rep. Serv. (Callaghan) 688 (1976) (the inventory of the single retail outlet of a wholesale furniture dealer represented a major part of the transferor's inventory for purposes of Article 6). Noting that the inventory transferred represented 100% of the retail inventory of the transferor, the court stated that its ruling would effectuate the underlying purpose of Article 6 as stated in Comment 2 to § 6-101. This case may be distinguished on its facts, since the retail outlet had at all times been treated by both the transferor and the transferee as a separate entity from the transferor.
takes a bulk transfer of inventory, it does not seem unreasonable to subtract, as redundant, the phrase "of an enterprise" from subsection 6-102(1), leaving a definition of bulk transfer as "any transfer in bulk... of... inventory... subject to this Article." This definition of bulk transfer, when paired with subsection 6-102(4), applying Article 6 to "all bulk transfers of goods located within this state," would support a conclusion that one hundred percent of the inventory subject to the jurisdiction of the state is the proper quantum of inventory against which to measure a "part." However, in view of the ineluctable trend toward multistate business entities in this nation, the court in In re Albany Brick, Inc., is probably correct that the proper measure of the inventory of a multistate enterprise is the entire inventory of the enterprise, wherever located.

2. "Ordinary Course"

Subsection 6-102(1) states that a bulk transfer is one "not in the ordinary course of the transferor's business..." Since the scheme of Article 6 is to warn the transferor's creditors of the pending disposition of inventory in a manner that might prejudice those creditors, it is in perfect keeping with the intention of Article 6 that the transferor's ordinary course of business should be the standard of comparison, not the ordinary course of the transferee. On the other hand, this merely intensifies the transferee's problem of determining when he is involved in a bulk transfer, which is one of the great unsolved problems of Article 6. Moreover, inclusion of the express term "transferor's business" appears to render unnecessary any examination by the transferee of the business practices of other merchants or businesses which appear to be similar to that of the transferor. Regardless of appearances, it would seem that the transferor is entitled under the statute to say that this is his ordinary manner of conducting business.

Further complicating matters, "ordinary course of business" is not a defined term in the Code. This is perhaps less of a problem for actions brought under other Articles where questions regarding the ordinary course of business of the parties will more often arise in situations where both parties are

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20 In Martin-Marietta Corp. v. New Jersey Nat'l Bank, 505 F. Supp. 946, 950, 30 U.C.C. Rep. Serv. (Callaghan) 1399, 1403-04 (D.N.J. 1981), the court indicated that, for a new enterprise, where there is no established pattern of business behavior with which to compare the transfer, even the intent of the transferor would be considered in judging whether a transaction was in the ordinary course of business. But see European-American Bank & Trust Co. v. Sheriff of Nassau County, 97 Misc. 2d 549, 411 N.Y.S.2d 851, 25 U.C.C. Rep. Serv. (Callaghan) 1137 (1978) (intent of the transferor is irrelevant; it is either a bulk transfer or it is not).
21 Hudak & King, Reforming and Rewriting Article Six of the U.C.C., 1976 Com. L.J. 284, 285 [hereinafter cited as Hudak & King], suggest, "Perhaps it should be clarified as a 'consistent and regular practice, not necessarily frequent, and wholly consistent with the aims and continuance of business.'" Id. at 285.
before the court and testimony on customary practice is available from the parties themselves. Article 6, however, is intended to address situations where the transferor may have disappeared from the jurisdiction. In this case, Professor Miller's argument that the transfer of a major part itself usually means a transaction is not in the "ordinary course of business" may be a useful sword in the hands of creditors.\textsuperscript{62} Professor Leonard Lakin, noting that neither the Code nor the bulk sales laws which preceded Article 6 define the term "ordinary course of business," has pointed out that pre-Code case law does suggest that one important consideration is "whether the transferee is within the class of customers with whom the transferor usually deals on a volume basis."\textsuperscript{63}

3. "Transfer"

Case law and commentary both indicate that "transfer" covers a much wider range of transactions than only sales transactions.\textsuperscript{64} In \textit{Danning v. Daylin, Inc.},\textsuperscript{65} Article 6 was held to apply to an exchange of inventories. Several pre-Code cases had held that certain types of business reorganizations were also subject to the bulk sales rules, and in \textit{Marlow v. Ringer}\textsuperscript{66} a transfer by a retail grocer of a one-half interest in his business to a new partner was held to be a bulk sale. More recently, in the Code case of \textit{Aluminum Shapes, Inc. v. K-A-Liquidating Co.},\textsuperscript{67} the court stated that a reorganization

\textsuperscript{62} [T]he "not in ordinary course" criterion usually will be automatically satisfied if a major part is sold, for the circumstances are uncommon in which one-half of the chattels of a business are sold in the ordinary course of trade. Still the language is necessary in order to exclude the rare business in which it is not unusual to sell that much. Miller, \textit{Bulk Sales}, \textit{supra} note 36, at 323.

\textsuperscript{63} Lakin, \textit{supra} note 16, at 209. For application of this principle under the Code, see Aab \textit{v. Loehmann's, Inc.}, 8 Bankr. 777, 30 U.C.C. Rep. Serv. (Callaghan) 1411 (Bankr. S.D. N.Y. 1981), holding that a routine sale in bulk, by a dress manufacturer to a discount chain, of out-of-season merchandise was not a bulk transfer for purposes of Article 6. \textit{But see Pastimes Publishing Co. v. Advertising Displays}, 6 Ill. App. 3d 414, 286 N.E.2d 19, 10 U.C.C. Rep. Serv. (Callaghan) 1218 (App. Ct. 1972), in which Article 6 was held to apply because, although the transferee had been a previous customer of the transferor in the ordinary course of the transferor's business, the transaction represented a termination of the transferor's business, meaning it could not possibly be in the "ordinary course" of that business.

Altogether, this merely demonstrates the precarious nature of the transferee's position. The sale of ordinary inventory to ordinary customers through ordinary channels for an extraordinary purpose (termination of the enterprise) can be a bulk transfer. \textit{See also supra} note 27.

\textsuperscript{64} See Lakin, \textit{supra} note 16, at 200 n.14 (gift is a transfer but not a sale).

\textsuperscript{65} 488 F.2d 185, 13 U.C.C. Rep. Serv. (Callaghan) 691 (9th Cir. 1973).

\textsuperscript{66} 79 W. Va. 568, 91 S.E. 386 (1917).

\textsuperscript{67} 290 F. Supp. 356, 5 U.C.C. Rep. Serv. (Callaghan) 1194 (W.D. Pa. 1968). It should be noted, however, that this case has several distinguishing features which cheapen its value as precedent. The transfer was an actual transfer of assets, not stock or a merger. The "creditor" was a plaintiff in an unadjudicated contract action, and, as such, was held not to be a proper creditor under this court's interpretation of subsection 1-201(12). The transfer had not been concealed, and yet the ac-
for tax purposes or other bona fide business purposes would not be deemed a transfer for purposes of Article 6.68

4. “Inventory”

To define inventory, subsection 6-102(1) incorporates by reference section 9-109 of Article 9.69 This, it is said, gives “inventory” the broadest possible meaning.70 It has also been suggested that the breadth of the Article 9 definition of “inventory” renders redundant and unnecessary the companion terms “materials, supplies, and merchandise” which also appear in subsection 6-102(1).71

Of particular significance to attorneys in mining states is the fact that the term “inventory” is broad enough to include severed coal, oil and gas awaiting use, sale or delivery,72 and possibly even unsevered minerals in cer-

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68 The distinction is between business reorganizations which effect a disguised sale of goods, such as the sale of a partnership interest (including a share of partnership assets) to a new partner, and those reorganizations which change only the form of the enterprise, not the owners or the assets, and therefore, lack the aspect of a disguised sale. Marlow v. Ringer, 79 W. Va. 588, 91 S.E. 386 (1917) is an example of the former; Aluminum Shapes, Inc. v. K-A-Liquidating Co., 290 F. Supp. 356, 5 U.C.C. Rep. Serv. (Callaghan) 1194 (W.D. Pa. 1968) represents the latter.

69 “(1) A 'bulk transfer' is any transfer . . . of a major part of the materials, supplies, merchandise or other inventory (section 9-109) of an enterprise . . . .” U.C.C. § 6-102(1).


(4) “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.

Official Comment 3 to § 9-109 states further that: “The principal test to determine whether goods are inventory is that they are held for immediate or ultimate sale. Implicit in the definition is the criterion that the prospective sale is in the ordinary course of business.”

Professor Miller commented on this change from prior law:

Obviously inventory, as defined in the Code, is a much broader term than merchandise, as defined by the courts under the existing statutes. Even the most liberal courts, those which have in effect considered the finished products of a manufactory to be merchandise, have not included the raw materials or works in process as does the Code. Furthermore, only a few courts have included such things as supplies consumed in the business, e.g., fuel used or stationery, as merchandise, although some courts have included them within the term “fixtures.”


71 Hawkland, U.C.C. § 6-102, supra note 29, at 85.

72 See supra note 70. Official Comment 3 to § 9-109 declares that “[T]he principal test to determine whether goods are inventory is that they are held for immediate or ultimate sale.” When minerals are held for sale, the only remaining question is whether the minerals are “goods” for purposes of § 9-109 and Article 6. Severed minerals, becoming personalty at the instant of
tain instances. Few coal mine operators may consider themselves in the business of selling goods from stock, yet it appears that for purposes of Article 6 many of them quite clearly are. The implications for transactions disposing of coal mining operations could be considerable. Since severed coal is inventory, its sale is a bulk transfer if a major part of the severed coal on hand is included in the transaction. Thus, upon sale of a coal mining operation, including coal reserves and equipment, Article 6 would apply if only a few tons of severed coal were included, because even that few tons would constitute one hundred percent of the severed coal inventory on the date of the transfer. While having little effect on unsevered coal, characterization of the transaction as a bulk transfer could have drastic consequences to the transferee if equipment is included in the transaction, since the equipment

severance, are clearly goods. Martin Marietta Corp. v. New Jersey Nat'l Bank, 612 F.2d 745, 27 U.C.C. Rep. Serv. (Callaghan) 1153 (3d Cir. 1979). Cfr. U.C.C. § 1-201(9) ("All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind.")

In 1972, the Permanent Editorial Board amended § 2-107, "Goods To Be Severed From Realty; Recording," to read:

(1) A contract for the sale of minerals or the like including oil and gas or a structure or its materials to be removed from realty is a contract for the sale of goods within this article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

Although, as Official Comment 3 to § 2-107 points out, the definition of goods in Article 9 differs from the definition of goods in Article 2, it is not clear which definition, if either, should control for purposes of characterizing a transaction under Article 6.

The Article 9 definition of goods, also amended in 1972, appears at § 9-105(1)(h): "Goods includes all things which are movable at the time the security attaches ... but does not include ... minerals or the like (including oil and gas) before extraction...." Whereas the Article 9 definition would appear to be the correct section for calculating liability, if any, arising from the collateral qua collateral, it does not appear nearly so clear that Article 9 is appropriate for characterizing the business of the transferor, which seems at least equally a topic for Article 2. See generally Thomas, National Resources and the Uniform Commercial Code, 7 NAT. RESOURCES LAW. 439, 443 (1974).

Among other evidences of this, U.C.C. § 1-201(9), defining buyer in the ordinary course of business, also states that: "All persons who sell minerals or the like (including oil and gas) at wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind." (emphasis added). Regarding sales "from stock," see infra text accompanying notes 84-85.

It would not appear that operators could have it both ways—claiming they should be allowed to count unsevered resources as part of their total inventory for measuring "major part" (to escape Article 6), but claiming also that unsevered coal is not inventory for deciding whether they are in the business of selling merchandise from stock (to escape Article 6).

See supra notes 50 and 51.

Unsevered coal would most likely not be deemed inventory or equipment for the purpose of measuring transferee liability for noncompliance with Article 6 since unsevered coal would still have been real property at the date of transfer, notwithstanding § 2-107(1). See Martin Marietta Corp. v. New Jersey Nat'l Bank, 612 F.2d 745, 27 U.C.C. Rep. Serv. (Callaghan) 1153 (3d Cir. 1979). See also supra note 73.
could become subject to the claims of unsecured creditors if the transferee
does not comply with the procedural requirements of Article 6.  

Nor would Article 6 characterization of mineral conveyances as bulk
transfers necessarily be unfair. Although there is something distasteful
about dragging a transaction backward into Article 6 by virtue of the fact
that it may have been tainted by the inclusion of a relatively miniscule
amount of inventory, this is arguably a just result when it is recognized that,
for Article 6 to apply, the enterprise must already have been determined to
have been one "whose principal business is a sale of merchandise from stock,
including those who manufacture what they sell."79 It is this requirement
which mandates the inclusion of these enterprises under Article 6 and justi-
fies the taint rule. The fact that the majority of a coal inventory may be
shielded from Article 6 by virtue of its character as realty may account for an
initial impression of disproportion, but this does not alter the true character
of the transferor or the proper characterization of the transfer.

5. "Principal Business"

Section 6-102 requires that, for Article 6 to apply, the transfer must be
from an enterprise the principal business of which is the sale of merchandise
from stock. Thus, the transferor may take the position that its principal busi-
ness is not the sale of merchandise from stock and certainly not the sale of
that particular merchandise from stock.80 One thing the transferor must keep
in mind, however, is that its principal business will be determined by its
character before the bulk transfer, since, by definition, the bulk transfer is
outside the ordinary course of that business. This was the approach of the
Ninth Circuit Court of Appeals in Danning v. Daylin, Inc.,81 holding that a
transferor's change from a sales business to a leasing business immediately
after the bulk transfer would not exempt it from the requirements of Article
6.

An additional question that arises in regard to "principal business" is the
meaning of "principal." Suppose sales by an enterprise are essentially a
sideline. What quantum of revenues must be generated before the sale of
merchandise becomes a principal business? Can an enterprise have more than
one principal business? Even if it is determined that an enterprise can have

78 Further increasing the possibility of characterizing this type of transaction as an Article 6
bulk transfer is § 9-109(4), which includes as "inventory" the following items: "raw materials, work
in process or materials used or consumed in a business." Official Comment 3 to § 9-109(4) advises:
"Examples of this class of inventory are fuel to be used in operations...." Thus, in the example
posed, it would be no relief to argue that a few stray tons of coal present were not for sale, but
merely for the company's own use in operations.
79 U.C.C. § 6-102(3). See supra note 74.
80 For instance, the few stray tons of coal in the mineral hypothetical discussed above.
81 488 F.2d 185, 13 U.C.C. Rep. Serv. (Callaghan) 691 (9th Cir. 1973).
only one principal business, how does one determine what that principal business is? This author has been unable to locate any reported cases treating this question.

A related issue is whether subsection 6-102(3) was meant to include all manufacturers under Article 6 since all manufacturers must sell their products. Against this, it has been suggested that the phrase “including those who manufacture what they sell” was intended to modify “whose principal business is the sale of merchandise from stock” and should be confined in its application to those manufacturers who sell from stock as a regular practice (as opposed, presumably, to those manufacturers who manufacture only under contract or upon order).

Regarding the coal mine hypothetical presented earlier, it might be argued that a coal mine operator is exempt from the operation of Article 6 as a manufacturer who does not deal principally in sales of inventory from stock. That is, even though the operator's revenues come from the sale of a commodity identifiable as “inventory,” it is not a sale “from stock” because the coal is produced and sold under a long-term contract executed when the inventory was still considered real property. Therefore, since the coal is never inventory and stock at the same time, the operator cannot be in the business of selling inventory from stock. One difficulty with this argument is that the definition of goods to be severed from realty under section 2-107 of Article 2 clearly indicates that minerals to be severed by the seller, the usual case for coal under a long-term contract, are to be considered “goods” at least for purposes of characterizing the transfer under Article 2. Nor does there appear to be any particular policy reason for refusing to employ Article 2 definitions of goods to interpret Article 6 in this regard.

A final question regarding section 6-102 is whether its operation should be extended to cover businesses which deal in services rather than sales of merchandise. This is essentially a policy question, because section 6-102 is quite clear on its face that service businesses are excluded. Official Comment 2 to section 6-102 adds this further clarification:

The businesses covered are defined in subsection (3). Notice that they 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. While some bulk sales risk exists in the excluded businesses, they have in common

\[^{82}\text{See Miller, The Effect of the Bulk Sales Article, supra note 53, at 271.}\]
\[^{83}\text{Hogan, supra note 55, at 36; Lakin, supra note 16, at 207-08.}\]
\[^{84}\text{See supra notes 72-79 and accompanying text.}\]
\[^{85}\text{Supra note 73.}\]
\[^{86}\text{See generally DUESNERG & KING, supra note 34, at § 15.02[2]; WHITE & SUMMERS, supra note 1, at 759; Hudak & King, supra note 61, at 285.}\]
the fact that unsecured credit is not commonly extended on the faith of a stock of merchandise.

In spite of this, counsel for creditors have made repeated efforts to obtain Article 6 treatment for service-related businesses, particularly bars and restaurants, and in some instances courts have been willing to grant it. A few jurisdictions have simply amended Article 6 to include certain service-related businesses. The rationale most frequently advanced to exclude service-related businesses from Article 6, beyond the clear and obvious wording of the statute itself, is that provided by Official Comment 2 to section 6-102, cited above, that “unsecured credit is not commonly extended on the faith of a stock of merchandise.” Counsel for creditors have urged, however, that significant exceptions exist to this general rule and that unsecured creditors may in fact be relying upon what they perceive as stock in trade for a bar or restaurant.

Conceptually, of course, creditors are only interested in dollar value, whether the source is the sale of stock in trade, the sale of equipment or the sale of goodwill. The Code position that Article 6 protection should only be available to creditors for merchandising operations and not service operations is therefore difficult to justify when redress of creditor grievances is accepted as the purpose of the Article. Of course, from the transferee’s perspective, limitation of the application of Article 6 to bulk transfers of inventory frees him from procedural restrictions when purchasing other types of businesses. Still, since the Code is designed to give a limited preference to

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88 California, Florida, Idaho, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Oregon and Washington have amended § 6-102(3) to include restaurants, and several of these also include bars and taverns. Wisconsin omits restaurants but has amended § 6-102(3) to include retailers of alcoholic beverages. California and Washington have also amended their versions of § 6-102(2) to apply Article 6 to bulk transfers of equipment whether or not such transfers are connected with bulk transfers of inventory. 2A U.L.A. 288-89, Supp. 110-11 (1977 & Supp. 1983).
89 DUSENBERG & KING, supra note 34, at § 15.02[2]; WHITE & SUMMERS, supra note 1, at 760; Dempster, The Significance of the Distinction Between Sale of Goods and Sale of Services, 29 U. MIAMI L. REV. 597 (1975) [hereinafter cited as Dempster].
90 Silver, Bulk Sales and The Sale of Restaurants, 80 COM. L.J. 520 (1975). Dempster, supra note 89, at 601, would use reliance upon inventory by creditors as one of the key factors in his suggested method of analysis for courts confronted with businesses in the “gray area” between sales of merchandise and sales of services.
91 Courts have struggled with the classification, and yet it’s not apparent that there is any value in the distinction between the businesses covered. Perhaps on the extremes of the goods-services distinction there is some purpose, but the usual case is borderline. Does it matter whether credit is extended on “inventory” or some other assets in the debtor’s hands? This writer believes it does not. . . . (citations omitted).
Hudak & King, supra note 61, at 285.
the claims of creditors over the rights of noncomplying bulk transferees of goods, it is difficult to understand why the draftsmen did not extend this same limited preference to those transactions which involve service-related businesses.\textsuperscript{92} That the law generally is moving to include service-related businesses under Article 6 suggests no one else has been able to rationalize this inconsistency either.

B. \textit{Section 6-103}

Sections 6-102 and 6-103 together limit the margins of Article 6. Section 6-102 defines transactions which are subject to the Article, while section 6-103 defines eight types of transactions which are excluded from the operation of the Article:\textsuperscript{93}

(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 interests;

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

(5) Sales made in the course of judicial or administrative proceedings for the dissolution or reorganization of a corporation and of which notice is sent to the creditors of the corporation pursuant to order of the court or administrative agency;

(6) Transfers to a person maintaining a known place of business in this State who becomes bound to pay the debts of the transferor in full and gives public notice of that fact, and who is solvent after becoming so bound;

(7) A transfer to a new business enterprise organized to take over and continue the business, if public notice of the transaction is given and the new enterprise assumes the debts of the transferor and he receives nothing from the transaction except an interest in the new enterprise junior to the claims of creditors;

(8) Transfers of property which is exempt from execution.

Public notice under subsection (6) or subsection (7) may be given by publishing once a week for two consecutive weeks in a newspaper of general circulation where the transferor had its principal place of business in this state an adver-

\textsuperscript{92} The danger of fraud in bulk sales of service businesses is no less, and the burden of compliance no greater, than in bulk sales of mercantile or manufacturing businesses; no valid reason exists why similar regulations should not apply in all cases.

Levit, \textit{supra} note 36, at 696.

\textsuperscript{93} U.C.C. § 6-103.
tisement including the names and addresses of the transferor and transferee and the effective date of the transfer.54

These eight exemptions find common expression in the principle “no harm, no foul.” Creditors are not prejudiced by these eight types of transactions because they have other means available to protect their interests, they have no assertable interests, or they enjoy substituted assets to protect their interests.55 Although it may be only the consequence of a greater clarity of expression, the relative absence of case law and commentary surrounding section 6-103 support a conclusion that creditors in general have felt little need to quarrel with this section of Article 6.

Nonetheless, four areas of concern regarding section 6-103 should be noted. First, some question exists whether security transfers should be exempted from the operation of section 6-103.56 Second, in jurisdictions which have not enacted the final paragraph of section 6-103, defining “public notice,”57 the issue may still arise regarding precisely what constitutes acceptable public notice.58 Third, some criticism has been leveled at the practical value of the “succession to assets” exemptions (subsections (6) and (7)) as presently formulated. Finally, counsel will want to remember that at least two cases have held that the exemptions available under section 6-103 are affirmative defenses which must be pled by the defendant or will be considered waived.59

The essential problem with the exemption of security interests under subsections 6-103(1) and 6-103(3) is that, through the mechanism of a security interest, a debtor could effect a disposition of his inventory and yet remain exempt from the procedural requirements of Article 6. All that would need be done would be to convert the sales transaction to a security transaction by the additional step of generating a security agreement with default provisions that would allow the secured party to take advantage of a preplanned default and assume possession of the collateral. It has been argued that such

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54 This final paragraph defining public notice was added to § 6-103 in 1962, but has not been adopted in all Code jurisdictions. Alaska, California, Nebraska, Oklahoma, Oregon and Rhode Island do not include this provision. 2A U.L.A. 296 (1977 & Supp. 1983).
55 Hogan, supra note 55, at 35 n.184.
56 The rationale for exempting security transfers from Article 6 is at least three-pronged: (1) Though possible, it is still less likely that the transferor will skip; (2) Article 9 already provides for public notice of certain transfers; (3) Making security transfers subject to Article 6 would make it unjustifiably burdensome for businessmen to borrow money. White & Summers, supra note 1, at 762. See also Hawkland, The Trouble with Article 6 of the U.C.C.: Some Thoughts About Section 6-103, 77 Com. L.J. 113 (1977) [hereinafter cited as Hawkland, U.C.C. § 6-103], for a discussion of the problems and politics surrounding the passage of § 6-103 in its present form.
57 See supra note 94.
58 Rapson, supra note 9, at 227.
a transaction would not be exempt from Article 6 because, with the parties
intending a sale rather than a security interest, a valid security interest
would not have been formed.\textsuperscript{103} Although this argument has theoretical merit,
one must wonder about the proof problems involved,\textsuperscript{104} particularly since the
transferor may not be available for discovery and trial.\textsuperscript{105}

Regarding the practical value of excluding from Article 6 certain
transfers wherein the transferee assumes the debts of the transferor, it
should be noted that in 1952 when subsections 6-103(6) and 6-103(7) were
drafted, they represented an idea unlike anything that had existed in the pre-
Code bulk sales acts.\textsuperscript{106} Employing subsection 6-103(6), an anxious buyer could
elect to assume liability for the transferor and thus assure completion of the
desired transaction.\textsuperscript{107} Of course, as subsequent commentators have pointed
out,\textsuperscript{108} in the face of such an agreement it is probably irrelevant to the trans-
feree whether he remains subject to Article 6.\textsuperscript{109}

The real risk would seem to be that an attempt to sidestep Article 6 by
blindly following subsection 6-103(6), without also including a limitation on
the assumed liability, could create a liability for the transferee greater than
the risk of loss for noncompliance with Article 6. Noncompliance with Article
6 merely renders the transfer "ineffective" against creditors, allowing them
to reach inventory and equipment in the noncomplying transferee's hands,
but the risk of loss is normally limited to the value of the collateral. Slavish
adoption of the wording of subsection 6-103(6) could commit the transferee to
"pay the debts of the transferor in full," a potentially much greater liability.

To counter this possibility, Professor Miller once suggested that the
transferee demand the transferor obtain a bond if the transferee were not
certain of the extent of the transferor's debts.\textsuperscript{110} Nonetheless, for the above-
stated reasons, and the additional reason that, as a practical matter, few
transferees will ever be willing, under any circumstances, to assume all of
the debts of a business (at least as opposed to all of the "disclosed" debts of

\textsuperscript{103} Hawkland, \textit{U.C.C. § 6-103, supra} note 96, at 116.
\textsuperscript{104} The task would be to demonstrate that the secured party had intended to realize upon the
collateral rather than the underlying obligation, although this would seem to prove either too
much or too little. In any case, this argument is available to creditors at the present time where it
can be shown that the secured party had no realistic hope of satisfaction of the underlying obliga-
tion for which the security interest was granted. The author is not aware of this argument having
been made in any reported cases.
\textsuperscript{105} The "intent required by the U.C.C. is not the subjective intent of the parties; rather, it is
the objective intent gleaned from 'the facts of each case.'" \textit{In re} Eastern Equipment Co., 11 Bankr.
\textsuperscript{106} Miller, \textit{The Effect of the Bulk Sales Article, supra} note 53, at 273.
\textsuperscript{107} \textit{Id.} See generally Lakin, \textit{supra} note 16, at 211-12.
\textsuperscript{108} Levit, \textit{supra} note 36, at 698.
\textsuperscript{109} Hawkland, \textit{U.C.C. § 6-103, supra} note 96, at 116.
\textsuperscript{110} Miller, \textit{The Effect of the Bulk Sales Article, supra} note 53, at 274.
the ABA Committee to Review Article 6 has recommended the following revision of subsection 6-103(6):

(6) Transfers to a person maintaining a known place of business in this state who assumes the known, disclosed or reasonably discoverable debts of the transferor in full and gives public notice of that fact, and who is solvent after becoming so bound.¹⁰⁸

Similar criticisms have been leveled at subsection 6-103(7) and a similar revision has been recommended.¹⁰⁹

IV. COMPLIANCE BY PARTIES TO THE TRANSACTION

A. Sections 6-104, 6-105, 6-106, 6-107, 6-109

Article 6 is aimed at the transferee, not the transferor. The transferee is obligated by section 6-105 to give notice of the transaction,¹¹⁰ and if the transfer is deemed ineffective for failure by the parties to comply with Article 6, the transferee will be the party faced with the possibility of paying twice.¹¹¹ This does not mean, however, that the transferor can ignore his own responsibilities under Article 6. Where the bulk transfer is a completely legitimate undertaking for the transferor, he may still risk losing the commercial benefit of the transaction, as well as finding himself the defendant in a suit for breach of contract, if he fails to comply with the requirements of Article 6.¹¹² Transferors attempting to perpetrate a fraud by omitting certain creditors from the list of creditors supplied to the transferee under section 6-104 may also face criminal penalties for false swearing.¹¹³ Thus, although

¹⁰⁸ Hawkland, U.C.C. § 6-103, supra note 96, at 117.
¹⁰⁹ Id.
(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 known, disclosed or reasonably discoverable debts of the transfer in full and he receives nothing from the transaction except an interest in the new enterprise junior to the claims of the creditors.
¹¹⁰ See infra note 174 for full text of U.C.C. § 6-105.
¹¹¹ See Hudak & King, supra note 61, at 287.
¹¹² [Transferee] had a duty to comply with the bulk transfer law and failed to do so. Therefore the risk of loss must be borne by the transferee. It is also evident that [transferee] received everything it was promised under the sales contract and therefore there is no failure of consideration.
¹¹⁴ This will depend on whether the sale contract provides for rescission and breach in the event of noncompliance by the transferor. See infra note 117 and accompanying text.
¹¹⁵ “The sanction for the accuracy of the list of creditors is the criminal law of the state relative to false swearing . . . .” U.C.C. § 6-104, Official Comment 3. Florida has enacted its own nonuniform addition which presents a criminal sanction as part of § 6-104 and makes false swearing a misdemeanor of the second degree. See Fla. Ann. § 676.6-104(4) (West Supp. 1983).
the following discussion of compliance by the parties emphasizes the pro-
cedural obligations of the transferee, it should be rememebred that trans-
ferors have key duties of their own.

B. Section 6-104

Under the notice scheme of Article 6 the transferee is required to obtain
and preserve two primary pieces of information: the names of the parties
entitled to notice; and descriptions of the particular items of inventory or
equipment involved in the bulk transfer.\textsuperscript{14} Subsection 6-104(1)(a) states that
the transferee must require the transferor to furnish a list of his existing
creditors, while subsection 6-104(2) requires the transferor to swear to the
list he provides. To ascertain the property involved in the transaction,
subsection 6-104(1)(b) requires that "the parties prepare a schedule of the pro-
perty transferred sufficient to identify it . . . ." Finally, subsection 6-104(1)(c)
requires the transferee to preserve the creditor list and the schedule of prop-
erty for six months following the bulk transfer to permit inspection of these
two documents by creditors of the transferor.\textsuperscript{15}

The principal issues that have arisen in connection with section 6-104 are
the practical effect of the transferee’s obligation to require the transferor to
furnish a list of creditors, the exact reach of the term "creditors," the timing
of the transfer with the preparation of the list of creditors and the schedule
of property, and the practical consequence to the parties when noncompli-
ance with section 6-104 renders a bulk transfer "ineffective."

\textsuperscript{14} U.C.C. § 6-104. Schedule of Property, List of Creditors.
(1) Except as provided with respect to auction sales (Section 6-108), a bulk transfer
subject to this Article is ineffective against any creditor of the transferor unless:
(a) The transferee requires the transferor to furnish a list of his existing
creditors prepared as stated in this section; and
(b) The parties prepare a schedule of the property transferred sufficient to
identify it; and
(c) The transferee preserves the list and schedule for six months next follow-
ing the transfer and permits inspection of either or both and copying
therefrom at all reasonable hours by any creditor of the transferor, or files the
list and schedule in (a public office to be here identified).
(2) The list of creditors must be signed and sworn to or affirmed by the transferor
or his agent. It must contain the names and business addresses of all creditors of the
transferor, with the amounts when known, and also the names of all persons who are
known to the transferor to assert claims against him even though such claims are
disputed. If the transferor is the obligor of an outstanding issue of bonds, debentures or
the like as to which there is an indenture trustee, the list of creditors need include only
the name and address of the indenture trustee and the aggregate outstanding principal
amount of the issue.
(3) Responsibility for the completeness and accuracy of the list of creditors rests on
the transferor, and the transfer is not rendered ineffective by errors or omissions
therein unless the transferee is shown to have had knowledge. As amended 1962.
\textsuperscript{15} See infra note 159.
1. "List of Creditors"

The effectiveness of a bulk transfer depends, among other things, on whether the transferor furnishes a list of his existing creditors to the transferee. Consequently, as a tactical matter the transferee should expressly require in the sales contract that the transferor provide a list of his creditors according to the requirements of subsection 6-104(2). Making the provision of the list of creditors a condition of the transaction is necessary because general language to the effect that "Article 6 shall apply to this transaction" may not be sufficient to protect the transferee. A willingness to take one's chances, and to accept the penalties for noncompliance, could be taken as "applying" Article 6 to a transaction. Under this analysis, failure by the transferee to demand affirmative action by the transferor and require that he supply a list of creditors could cost the transferee the right to rescind the contract or sue the transferor for breach in the event the transferor did not supply the list of creditors.

A collateral issue is whether the transferee has any duty of inquiry regarding creditors of the transferor, or whether the transferee may safely ignore the possibility of the existence of creditors not appearing on the transferor's list. Almost all of the pre-Code bulk sales statutes contained provisions similar to subsection 6-104(1), and placed an obligation upon the transferee to require a list of the transferor's creditors and to share in the preparation of a schedule of the property involved in the transaction. However, a major controversy under the pre-Code bulk sales acts was the extent, if any, of the transferee's duty to inquire regarding creditors who might have been omitted by the transferor. Since some of these creditors could be judgment creditors, and the transferee would be considered to have constructive notice of their existence, the question was raised whether, in the face of this constructive notice, transferees should be allowed to plead ignorance as an

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116 Kove, supra note 26, at 95.

Where compliance with the bulk sales provisions of the Code is expressly made a condition of the contract, failure to comply may justify recission. Here, there was no such provision and the appellants themselves did not comply with the Code. Therefore, they have no standing to complain.


119 Miller, The Effect of the Bulk Sales Article, supra note 53, at 275.
The recognition of governmental taxing authorities as having at least the status of creditors added another dimension to the controversy. The draftsmen of Article 6 attempted to resolve this matter by stating in subsection 6-104(3) that the responsibility for the accuracy of the list remains on the transferor and that the transfer will not be rendered ineffective by errors or omissions "unless the transferee is shown to have had knowledge." Under the general definitions of Article 1, "knowledge" is defined as "actual knowledge," meaning that constructive knowledge only on the part of the transferee is not enough to charge the transferee with noncompliance under subsections 6-104(1) and 6-105. Case law has supported the draftsmen of the Code with a literal interpretation of section 6-104, and in the case of Adrian Tabin Corp. v. Climax Boutique, a lower court which attempted, in line with prior New York law, to read a duty of inquiry into section 6-104, was reversed on appeal. The New York Supreme Court, Appellate Division, held that under Article 6 the transferee has no duty to inquire regarding the possibility of omitted creditors when he has no actual knowledge of their existence.

Professor Lakin appears to believe that the transferee's awareness of the continual accrual of taxes is of an impliedly higher order than normal "constructive" notice, requiring that taxing authorities be notified of the impending transfer as creditors of the transferor even though absent from the list provided by the transferor. Lakin, supra note 16 at 220-21. Duesenberg and King think it "would be wise" to include taxing authorities in the list of creditors receiving notice. DUESENBERG & KING, supra note 34, at § 15.04[4]. Compare WHITE & SUMMERS, supra note 1, at 771. See also infra notes 124, 236-37.

Some question has been raised regarding the scope of the term "creditors" as employed in section 6-104. "Creditors" is one of the few defined terms in Article 6: "The creditors of the transferor mentioned in this Article are those holding claims based on transactions or events occurring before the bulk transfer..." Amplifying this, the general definition of "creditor" in subsection 1-201(12) "includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate." Several commentators have shared the belief that, since the term "creditor" is not limited in any way by Article 6, all creditors of whatever nature must be included on the transferor's list, including contingent or disputed tort claimants. This kitchen sink approach is supported by case law, and parties considered creditors for purposes of Article 6 have included the holder of a mechanic's lien, an unpaid broker under a contract granting an exclusive agency to sell real estate, vested pensioners, the plaintiff in an action for fraud, and a claimant for wages due under an employment contract whose suit for breach was filed but unadjudicated. It has even been suggested that a lessor under a long term lease would qualify as a creditor for purposes of Article 6.

In the majority of states, since the transferee is not obligated to oversee distribution of the proceeds of the transaction, a broadly inclusive definition of creditors is less obviously a hazard for the transferee than in states which transactions under the Code. It has therefore been suggested that the transferee be held to some sort of "reasonable man" standard of inquiry in the proper circumstances. The ABA Committee to Review Article 6 obviously agrees with these suggestions, for it has proposed an amendment of § 6-104(3) that would put the transferee under a limited duty of inquiry. See Hawkland, U.C.C. § 6-104, supra note 118, at 366. See also U.C.C. § 6-104, Official Comment 3.

132 U.C.C. § 6-109(1).
133 U.C.C. § 6-104, Official Comment, Definitional Cross References, cites §§ 1-102 and 6-109 to define "creditor."
134 E.g., DEUSENBERG & KING, supra note 34, at § 15.04[2]; Kove, supra note 25, at 96; Clontz, supra note 10, at 216.
have passed section 6-106. In these latter jurisdictions, the existence of a
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large contingent tort claimant could create difficulties for the transferee and creditors as well by preventing any distribution at all. In another respect it
would appear that an overly broad definition of creditors could redound to the misfortune of the transferor in all jurisdictions. Depending on the word-
ing of the sales agreement, even the good faith omission of a contingent tort claimant by the transferor could serve as grounds for rescission by the trans-
feree. Similarly, the transferee could have actual knowledge of a creditor holding a pending tort claim and yet fail to recognize him as a creditor who is
due notice under subsection 6-107(3). A transferor attempting to sell out his assets and remove himself from the jurisdiction before the jury returned on a
large contingent tort claim would probably be subject to the state's criminal penalties for false swearing if he omitted the tort claimant from his Article 6 list of creditors.
Partly because of these problems, and partly because of the statement in Official Comment 2 to section 6-102 that Article 6 was
drafted principally to protect creditors who extend unsecured credit "on the faith of a stock of merchandise," it has been suggested that section 6-104 be amended to limit creditors as "trade creditors" only.

2. "Schedule of Property"

Under subsection 6-104(1)(b) the parties share the obligation to "prepare a schedule of the property transferred sufficient to identify it."
Since the transferee normally participates in the preparation of a list of items being purchased in a commercial transaction, it is generally believed that subsection 6-104(1)(b) presents no added hardship for the transferee. However, at least one commentator disagrees, asserting that the schedule of property should be treated in the same fashion as the list of creditors—as a respon-
sibility of the transferor only.

1 Clontz, supra note 10, at 217.
2 DUSENBERG & KING, supra note 34 at § 15.04[2][i], caution:
An extreme case could be where the seller's wife had an automobile accident which
would impose liability upon the seller himself; the injured claimant would be considered
a creditor who must appear upon the list. This does not make too much sense but it is of-
erred here as a warning....
3 Not to mention this transferor's liability under the fraudulent conveyance statutes of the jurisdiction. See HAWKLAND U.C.C., supra note 12, at § 6-106:04.
5 E.g., Clontz, supra note 10, at 217; DUSENBERG & KING, supra note 34, at § 15.02[1]. The ABA Committee to Review Article 6 has proposed an amendment of § 6-109 which would limit the protection of Article 6 to "consensual" creditors of the transferor and exclude tort claimants. HAWKLAND U.C.C., supra note 10, at § 6-106:04, § 6-109:01.
6 See supra note 114 for the full text of U.C.C. § 6-104. Apparently the term "schedule" was chosen to differentiate this compilation from the "list" of creditors.
7 DUSENBERG & KING, supra note 34, at § 15.04[2]; Lakin, supra note 16, at 218.
8 Kove, supra note 26, at 97: "The better procedure would be to have both documents [list of
An additional question about the contents of the schedule of property is the meaning of the phrase "sufficient to identify it." Did the draftsmen intend that the price of the goods should be included? Professor Lakin, contemplating the amount of detail needed in the schedule of property, has concluded that subsection 6-104(1)(b) requires less specific information than was required by the old bulk sales laws, and more specific information than the "general description" required in the notice to creditors under section 6-107.

3. "Timing"

When the list of creditors and the schedule of property should be prepared is another question. Since section 6-105 requires that notice be given to creditors at least ten days before the transfer, preparation of the list of creditors will have to take place before that date to enable the transferee to give proper notice. However, it is not required that the schedule of property be included in the notice to creditors, so preparation of this document could be delayed past the date of notice to creditors. Since under subsection 6-104(1)(c) the transferee must preserve the list and schedule for six months following the transfer, it is clear that preparation of the schedule of property cannot be delayed past the date of the transfer.

One point that should be noted about the requirement in section 6-104 that the transferor furnish a list of creditors is the absence of any earliest date by which that list of creditors must be furnished. One benefit to creditors of a rule placing transferees upon inquiry notice would be that any substantial delay between the date of preparation of the list of creditors by the transferor and the date of notice to creditors by the transferee would trigger the transferee's reasonable duty to inquire.

Subsection 6-109(1) advises that "creditors who become such after notice to creditors is given . . . are not entitled to notice." This presents a timing creditors and schedule of property] prepared by the transferor. There is no reason why the transferee should be subjected to an exposure over which he has no control."

142 Mr. Kove, for one, argues that price quotations could be misleading. Kove, supra note 26, at 98.
143 Lakin, supra note 16, at 217 (citing DUESENBERG & KING, supra note 34).
144 It is not required that the schedule of property itself be sent to each creditor under § 6-105; only a "general description" need be included in the notice under § 6-107.
145 Judging from the fact that no cases on the sufficiency of the description contained in the schedule of property have been litigated in thirty years, this particular issue, minor to begin with, appears to present little difficulty to creditors or transferees.
146 Text at infra note 174. See also infra notes 188-193 and accompanying text regarding counting of 10-day interval.
147 See Hogan, supra note 55, at 38.
148 U.C.C. § 6-109. What Creditors Protected; [Credit for Payment to Particular Creditors]

(1) The creditors of the transferor mentioned in this Article are those holding claims bas-
problem for creditors. Although creditors covered by subsection 6-109(1) are still entitled to file their claims and participate in the distribution of proceeds in jurisdictions which have passed section 6-106 and subsection 6-107(2)(e), in the majority of jurisdictions notice is all that creditors are entitled to receive, and creditors who become such after notice is given receive no benefit at all from Article 6.

In the event the transfer is found to be noncomplying for failure to notify other creditors who were properly due notice, an argument might be made that subsequent creditors barred from notice under subsection 6-109(1) are also entitled to treat the transfer as ineffective. Arguments based on defective notice to others have not succeeded outside of bankruptcy for creditors who themselves have been paid, but these subsequent creditors will not have been paid. Moreover, in section 6-106 jurisdictions these creditors would share in the distribution of proceeds in spite of the absence of notice, so long as they filed their claims within thirty days.

The possibility exists for a second hole to develop in the timing scheme of Article 6—a gap between the date of compliance by the transferor in preparing a list of his “existing” creditors, and the date of compliance by the transferee in giving notice to creditors of the transferor. If a new creditor appears in the gap, should the transfer be considered noncomplying? Would this depend on the length of the delay by the transferee in giving notice after the list of creditors was placed in his possession? Resolution of this issue may depend on the particular jurisdiction’s feeling about the transferee’s duty of inquiry. Without such a duty the transferee has no apparent reason to give notice promptly upon receipt of the transferor’s list of creditors beyond the transferee’s self-interested desire to complete the transaction. A duty of inquiry would justify an assignment of responsibility to the transferee for these “hidden” creditors and would motivate the transferee to give notice promptly upon receipt of the transferor’s list of creditors, thereby reducing the transferee’s own risk of noncompliance and attendant liability.

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ed on transactions or events occurring before the bulk transfer, but creditors who become such after notice to creditors is given (Sections 6-105 and 6-107) are not entitled to notice.

(2) Against the aggregate obligation imposed by the provisions of this Article concerning the application of the proceeds (Section 6-106 and subsection (3)(c) of 6-108) the transferee or auctioneer is entitled to credit for sums paid to particular creditors of the transferor, not exceeding the sums believed in good faith at the time of the payment to be properly payable to such creditors.

Note: The words in brackets are optional.

149 See HAWKLAND, U.C.C., supra note 10, at § 6-104:07.
150 See generally infra notes 170-73 and accompanying text.
151 Ironically, the sort of delay that might create this problem is very likely under Article 6, where the uncertainties suffusing Article may evoke a considerable number of time-consuming second thoughts on the part of counsel at every stage of the transaction.
An additional timing problem is determining the precise moment when the transfer occurs for purposes of timing the preservation of the list of creditors for six months under subsection 6-104(1)(c) and for excluding from notice creditors who become such after notice is given under subsection 6-109(1). Professor Lakin, noting that section 6-104 fails to define "transfer date," has suggested that the transfer occurs when title is conveyed to the transferee. On the other hand, Professor William E. Hogan, questioning whether the critical moment is the time of possession, the time of payment, or even the time of identification of the goods to the contract under section 2-501, has pointed out that the exact moment of transfer is probably a non-issue since section 6-105, which states the requirements for dispatch of notice, measures compliance from the time of possession of the goods or payment, whichever happens first.

4. "Preservation and Inspection of Lists"

Under subsection 6-104(1)(c) the transferee is required to preserve the list of creditors and schedule of property for six months after the date of the transfer to permit inspection of these documents by creditors of the transferee. The transferee is given the option of keeping these documents in his own possession, for inspection "at all reasonable hours" by the transferor's creditors, or the transferee may file the list and schedule in a public office identified in the statute of each state which adopts this subsection of section 6-104.

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152 Lakin, supra note 16, at 218 (citing W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE U.C.C. 849 (1964)).
153 Hogan, supra note 55, at 37.
154 Id. at n. 191.
155 This is also the guideline employed by the ABA Committee to Review Article 6, whose proposed revised draft of § 6-104 would define transfer as being made when the transferee takes possession or pays more than one-half of the purchase price. See Hawkland, U.C.C. § 6-104; supra note 118, at 362.
156 This represents a change from the Proposed Final Draft of Spring 1950 of the initial Bulk Transfer Article as corrected by Professor Bunn, the Reporter for Article 10, which effectively measured the date of transfer from the earlier of any of three acts of the transferor: "the goods are moved or the transferee takes possession of them or the interest of the transferor passes to the transferee..." See Miller, The Effect of the Bulk Sales Article, supra note 53, at 263 n.5, and 276.
157 See supra note 148 for the full text of U.C.C. § 6-109.
158 Regarding multistate transactions, question has been raised whether the list and schedule must be kept in more than one jurisdiction. See Kove, supra note 26, at 98 n.10. See generally Starman v. John E. Wolfe, Inc., 490 S.W.2d 377, 12 U.C.C. Rep. Serv. (Callaghan) 333 (Mo. Ct. App. 1973) (transfer noncomplying where payment made in different state at different time than stated in notice).
159 In West Virginia, the appropriate public office for this filing is the office of the clerk of the county commission of the county in which the transferor maintains its principal place of business. W. VA. CODE § 46-6-104(1)(c) (1966).
The purpose of preserving the list and the schedule is twofold: Creditors will have six months to determine whether the parties to the transaction have complied with Article 6; and, even if Article 6 has been complied with, the transferor’s creditors will be given access to information necessary to mount a collateral attack upon the transaction under either the bankruptcy laws or the fraudulent conveyance laws of the particular jurisdiction. It has been suggested that, partly because of these risks, and also because of legitimate preferences for secrecy, transferees will not avail themselves of the alternative public filing unless the office of the filing is far removed from the situs of the transaction. For the same reasons, it has been argued that filing in public offices should be made mandatory and not be left to the discretion of the transferee. California, for one, has deleted section 6-104 from its code in favor of a public recordation statute designed to obtain the same result.

5. “Ineffective”

Noncompliance with Article 6 renders a transfer ineffective against creditors of the transferor. Employment of the term “ineffective” raises a question of procedure. If “ineffective” is read to mean “void,” then creditors of the transferor should be able to execute upon the goods still in the possession of the transferor, or in the possession of the transferee as constructive trustee for the transferor, without initiating an additional action against either the transferor or the transferee for violation of Article 6. This appears clearly to have been the intention of the draftsmen of Article 6, who were planning a system that would not require additional litigation. However, if “ineffective” is interpreted to mean “presumed to be void,” then it

102 Miller, The Effect of the Bulk Sales Article, supra note 53, at 276.
101 Kove, supra note 26, at 98 n.10.
102 Hudak & King, supra note 61, at 226.
103 Duesenberg & King, supra note 34, at § 15.04[3].
104 This sanction is articulated only in §§ 6-104 and 6-105.
106 For an explanation of the distinctions between “void,” “voidable” and “presumed to be void” as they appeared in pre-Code law and to an observer on the eve of the birth of Article 6, see Weintraub & Levin, Bulk Sales Law and Adequate Protection of Creditors, 65 HARV. L. REV. 418 (1952) [hereinafter cited as Weintraub & Levin]. Post-Code courts have continued to mix and match these terms to suit themselves. Compare In re Gruber Indus., Inc., 345 F. Supp. 1076, 11 U.C.C. Rep. Serv. (Callaghan) 558 (E.D.N.Y. 1972) (“ineffective” means “voidable,” not “void”), with Danning v. Daylin, Inc., 488 F.2d 185, 13 U.C.C. Rep. Serv. (Callaghan) 691 (9th Cir. 1973) (failure to give notice renders the bulk transfer “fraudulent and void” against the transferor’s creditors).
108 U.C.C. § 6-104, Official Comment 2: “[C]reditors may therefore disregard the transfer and levy on the goods as still belonging to the transferee. . . .”
has been argued that it may still be necessary for the creditors of the transferor to obtain new judgments, setting aside the transfer under Article 6 before the creditors can reach the goods.\footnote{169}

An additional question is, even if a noncomplying transfer is rendered ineffective, who are the creditors against whom the transfer is ineffective? If the transfer is noncomplying because not all creditors of the transferor received proper notice, is the transfer ineffective against all creditors of the transferor, or only those who did not receive proper notice? Subsection 6-104(1) states that the transfer is "ineffective against any creditor of the transferor . . .,"\footnote{170} and several commentators have concluded that this means a transfer ineffective for one is ineffective for all.\footnote{171} Of course, failure to give notice is not the only ground for noncompliance, and it would seem that some forms of noncompliance could affect all creditors,\footnote{172} justifying a blanket remedy. Still, it has been argued that a transfer should be deemed "ineffective" regarding only the particular omitted creditor when omission of a creditor is the basis of noncompliance.\footnote{173}

C. Section 6-105

Section 6-105 requires that the transferee give notice of the bulk transfer

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\footnote{169} The word "ineffective" was selected by the U.C.C. draftsmen in preference to the words "void" or "voidable" that were commonly used in pre-Code bulk sales laws in the hope that some confusion surrounding those terms would be eliminated. Case law interpreting the word "ineffective," however, makes it plain that this goal has not been achieved, and the committee has spent some time and effort in trying to work out a more appropriate statement of the sanction. At one point, I suggested that it might be well to state simply that a noncomplying bulk transfer was a fraudulent conveyance. It seems to me that this would make available to creditors of the transferor the well-developed fraudulent conveyance law of their respective states; would clearly make a noncomplying bulk transfer an "act of bankruptcy" so as to trigger an involuntary bankruptcy in a proper case, and, at a very minimum, would educate lawyers and judges that the real purpose of the bulk transfer law is to plug a loophole in the law of fraudulent conveyances.

\footnote{170} (Emphasis added.) \textit{Compare} U.C.C. § 6-104, Official Comment 2 which states "a defect can always be cured by paying off the unpaid creditors." If only omitted creditors need be paid to extinguish a noncomplying transferee's liability, it seems fair to conclude that the draftsmen of § 6-104 believed only omitted creditors have a cause of action under the Article.

\footnote{171} \textit{E.g.,} \textit{Duesenberg & King, supra} note 34, at 15.04[3]; Hudak & King, \textit{supra} note 61, at 286.

\footnote{172} For instance, omitting a large portion of the inventory from the schedule of property may be regarded as another form of noncompliance.

\footnote{173} \textit{White & Summers, supra} note 1, at 770 n.89 and accompanying text; \textit{Hawkland U.C.C., supra} note 10, at § 6-104:07. The ABA Committee to Review Article 6 has proposed an amendment to § 6-104 that will establish the fact that only omitted creditors have standing.
to creditors of the transferor at least ten days before the transferee takes possession of the goods, or pays for them, whichever occurs first. Facing a possible transplant, this section is "the heart of the Article," the express command that notice to creditors be given.

Section 6-105 shares several problems with section 6-104, including its perhaps over-inclusive definition of creditors and the question whether a duty of inquiry should be imposed upon the transferee. Section 6-105 also raises the issue of the procedural consequences of the term "ineffective," and whether the transfer should thus be considered void, voidable, or both, depending on the identity of the plaintiff. In terms of sanctions, section 6-105 brings us again to the issue whether a noncomplying transfer is ineffective against all creditors of the transferor or only against those creditors prejudiced by lack of notice. Finally, section 6-105 also raises the question of the proper treatment of creditors who become so only after notice has been given. All of these issues have been treated in connection with section 6-104.

1. "Downpayments"

On the other hand, section 6-105 raises questions unique to itself which must be considered. Chief among these is the impact of a downpayment or deposit on a bulk transfer—whether it automatically puts the parties in violation of Article 6. Since notice must be given to creditors at least ten days before the transferee takes possession of the goods or pays for them, does an earnest money deposit, pre-dating any possibility of notice, prevent compliance with Article 6? Although substantial authority exists for the proposition that downpayments or other deposits were never intended by the draftsmen

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174 U.C.C. § 6-105. Notice to Creditors.
In addition to the requirements of the preceding section, any bulk transfer subject to this Article except one made by auction sale (Section 6-108) is ineffective against any creditor of the transferor unless at least ten days before he takes possession of the goods or pays for them, whichever happens first, the transferee gives notice of the transfer in the manner and to the persons hereafter provided (Section 6-107).

175 The ABA Committee to Review Article 6 has included in its proposed revision of Article 6 a new § 6-104(11)(d), replacing the present § 6-105 since, it is argued, "[t]here seems to be no good reason for listing the compliance requirements in different sections of Article 6..." Hawkland, U.C.C. § 6-104, supra note 118, at 362.

176 U.C.C. § 6-105, Official Comment 1.

177 The formal contents of the notice and the allowable methods of delivery are addressed in § 6-107.

178 See supra notes 125-33 and accompanying text.

179 See supra notes 118-20 and accompanying text.

180 See supra notes 164-69 and accompanying text.

181 See supra notes 170-73 and accompanying text.

182 See supra notes 148-50 and accompanying text.

183 See Rapson, supra note 9, at 228; Kove, supra note 27, at 100; Clontz, supra note 10, at 221.
of section 6-105 to constitute "payment" for purposes of this section, the conservative wisdom is to forego all deposits or downpayments whatsoever. To settle this issue, the ABA Committee to Review Article 6 is proposing a revision of section 6-105 that requires a payment of one-half of the total consideration agreed upon before the requisite threshold to constitute "payment" will have been reached.

2. "Timing"

Another issue arising from the notice requirement of section 6-105 is the meaning of "gives notice." Under the Code, a party "gives a notice" by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. Therefore, it is contended that the ten-day period mentioned in section 6-105 begins to run on the day notice is received at the creditor's place of business. This would require that mailings be made at least twelve days before the planned transfer, to assure compliance with the ten-day limit. The motive for this technically conscientious reading of section 6-105 is apparently an uneasiness over the extremely short time which creditors of the transferor have to react, a particularly significant problem in majority jurisdictions, which have

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184 See Lakin, supra note 16, at 222; White & Summers, supra note 1, at 766: "The statute does not say that a downpayment or earnest money payment causes the period to run, and we doubt that it does."

Commenting on its rejection of Wisconsin's nonuniform amendment of section 6-105 to read "before he takes possession of the goods or pays the major part of the purchase . . .," the Permanent Editorial Board said: "The change is intended to make it clear that the ordinary earnest money payment does not bring the section into operation. It seems unnecessary for that purpose." REPORT No. 2, supra note 44, at 112 (emphasis added).

In its third report, dated 1966, the Permanent Editorial Board made a similar observation regarding a similar nonuniform Connecticut amendment: "The proviso is intended to make it clear that a small deposit or an escrow does not bring the section into operation. It seems unnecessary for that purpose." REPORT No. 3 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE at 93 (1967) [hereinafter cited as REPORT No. 3].

185 E.g., Duesenberg & King, supra note 34, at § 15.04(3); Hogan, supra note 55, at 38.

186 Supra note 155.

187 U.C.C. § 1-201(26).

188 [T]he transferee should give notice to creditors so that they receive the notice at least ten days prior to taking possession of the goods or prior to paying for them." Starman v. John E. Wolfe, Inc., 490 S.W.2d 377, 12 U.C.C. Rep. Serv. (Callaghan) 333 (Mo. App. 1973). See also Goodyear Tire & Rubber Co. v. Tabs, Inc., 26 U.C.C. Rep. Serv. (Callaghan) 1290 (Conn. Super Ct. 1979) (neither the day of mailing nor the day of sale would be included in counting the ten-day period required under § 6-105).

189 Kove, supra note 28, at 99. See also Goodyear Tire & Rubber Co. v. Tabs, Inc., 26 U.C.C. Rep. Serv. (Callaghan) 1290 (Conn. Super. Ct. 1979) (day of mailing and day of transfer not counted in determining 10-day period). On the other hand, one can allow too much time between the dates of notice and transfer. Thus, in Goodyear Tire, it was held that a six-month wait between the dates of notice and transfer rendered the transfer noncomplying under § 6-105.
not passed section 6-106. If the ten-day period begins to run when notice is sent, then effective notice, with due consideration for normal delivery and holidays and weekends, could be as little as five days. On the other hand, Chancellor Hawkland is of the opinion that "the draftmen undoubtedly meant that the notice must be sent ten days before the transfer," and this is also the language of the revision of section 6-105 proposed by the ABA Committee to Review Article 6.

D. Section 6-107

Section 6-107 contains the formal requirements of the actual notice which section 6-105 requires be sent to creditors of the transferor. This section is

192 Weintraub & Levin, supra note 166, at 433: "In view of the complexity often involved in investigating such transactions, it would seem that a fifteen-day period would be minimal, especially in the New York type jurisdictions where this is virtually the only protection afforded creditors."

191 Lakin, supra note 16, at 22 (citing Weintraub & Levin, supra note 166, at 433).

192 Hawkland, U.C.C. § 6-104, supra note 118, at 362.

193 Id. The proposed revision would add § 6-104(1)(d), which reads: "The transferee, at least fifteen days before the transfer is made, sends or delivers personally notice of the transfer in the manner and to the persons hereafter provided (§ 6-107)."

194 Because the interrelationship of § 6-107 with § 6-105, the author has elected to interrupt the numerical sequence this paper has followed heretofore and treat § 6-107 before § 6-106. Section 6-105, dealing with the application of proceeds, will be treated in the section immediately following.

195 U.C.C. § 6-107. The Notice

(1) The notice to creditors (Section 6-105) shall state:
   (a) that a bulk transfer is about to be made; and
   (b) the names and business addresses of the transferor and transferee, and all other business names and addresses used by the transferor within three years last past so far as known to the transferee; and
   (c) whether or not all the debts of the transferor are to be paid in full as they fall due as a result of the transaction, and if so, the address to which creditors should send their bills.

(2) If the debts of the transferor are not to be paid in full as they fall due or if the transferee is in doubt on that point then the notice shall state further:
   (a) the location and general description of the property to be transferred and the estimated total of the transferor's debts;
   (b) the address where the schedule of property and list of creditors (Section 6-104) may be inspected;
   (c) whether the transfer is to pay existing debts and if so the amount of such debts and to whom owing;
   (d) whether the transfer is for new consideration and if so the amount of such consideration and the time and place of payment; [and]
   (e) if for new consideration the time and place where creditors of the transferor are to file their claims.

(3) The notice in any case shall be delivered personally or sent by registered or certified mail to all the persons shown on the list of creditors furnished by the transferor (Section 6-104) and to all other persons who are known to the transferee to hold or assert claims against the transferor.

As amended 1962. Note: The words in brackets are optional.
relatively free of controversy, but a couple of minor points should be noted regarding compliance.

Section 6-107 provides for two forms of notice, a so-called "short form" and an alternative "long form." The long form is to be used "if the debts of the transferor are not to be paid in full as they fall due or if the transferee is in doubt on that point. . . ." Conversely, "if the debts of the transferor are to be paid in full as they fall due," the short form of notice may be used. As a practical matter, the transferee will almost never be certain that the transferor's debts will be paid when they fall due. Therefore, not only should the short form rarely be used, but it has been recommended that the short form alternative be dropped from Article 6 since it represents a needless trap for the unwary.

The long form of notice requires the same core of information as the short form, but it also requires particular information regarding the location and description of the property, the transferor's existing creditors, the total amount of debt, the consideration for this transaction, and the time and place of payment. It is apparent from the nature of this additional information that it is provided to enable creditors to better assess their position vis-a-vis the transfer as they sort through alternative choices of action. Under the short form of notice, no details are required because, with payment in full being assured, no decisions regarding remedies are necessary. It has also been suggested that the additional information provided by the long form is intended to aid creditors in assessing the adequacy of the consideration where inadequate consideration represents a potential cause of action. As noted earlier, in spite of the emphasis on additional detail under the long

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195 U.C.C. § 6-107(1).
196 U.C.C. § 6-107(2).
197 Id. (emphasis added).
198 U.C.C. § 6-107, Official Comment 2. (emphasis added).
199 See, e.g., DUSENBERG & KING, supra note 34, at § 15.04[4]; Rapson, supra note 9, at 228; Hudak & King, supra note 61, at 287.
200 Kove, supra note 26, at 99-100. The depth of the trap is suggested by Mr. Rapson: "A statement by the buyer that everyone will be paid seems tantamount to a representation or warranty, in which case he might as well assume the debts and take advantage of the exceptions in Section 6-103(6) and (7) (citations omitted)." Rapson, supra note 9, at 228. See also Hudak & King, supra note 61, at 287:

What is the situation of the transferee who publicly notices he will pay the debts of the transferor, when the list of creditors is correct, but the amounts owed exceed the representations of the transferor to the transferee? It would seem the transferee could be liable, but the result would be harsh. Pro rata payment would be more equitable.

201 For a suitable form outline, see BENDER'S UNIFORM COMMERCIAL CODE SERVICE, Vol. 4A, MODERN U.C.C. LITIGATION FORMS (Rev. 1982), at 6-11.
202 Miller, The Effect of the Bulk Sales Article, supra note 53, at 278-79.
203 Id.
form of notice, only a "general description" of the property itself is required, and the formal schedule of property prepared by the parties under subsection 6-104(1)(b) does not have to be included in the notice.

Subsection 6-107(3) lists the allowable methods of delivery of notice, stating that the notice "shall be delivered personally or sent by registered or certified mail to all the persons shown on the list of creditors . . . and to all persons who are known to the transferee to hold or assert claims against the transferor." If expense is not a problem, mail with return receipt requested is better, because this will supply the transferee with proof of delivery. Unanswered is the question of the transferee's obligation when notices are returned undelivered. The general obligation of good faith under the Code would seem to require that the transferee attempt to obtain new addresses where reasonably possible, but there is no requirement under Article 6 that a second attempt at mailing be made. Presumably, obsolete or inaccurate addresses remain the transferor's responsibility under subsection 6-104(3).

E. Section 6-106

In minority jurisdictions which have included optional section 6-106 in their version of Article 6, the transferee is required to assure that all new

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205 U.C.C. § 6-107(2)(a).
206 All but nine states (Alaska, California, Indiana, Nebraska, Ohio, Oklahoma, Oregon, Rhode Island and Wyoming) have adopted this version of § 6-107(3), providing for either certified or registered mail delivery. 2A U.L.A. 319 (1977 & Supp. 1983).
207 Kove, supra note 26, at 100.
208 Id.
209 See supra note 114 for full text of U.C.C. § 6-104.
210 The minority jurisdictions are listed at supra note 6.
211 U.C.C. § 6-106. Application of the Proceeds

In addition to the requirements of the two preceding sections:

(1) Upon every bulk transfer subject to this Article for which new consideration becomes payable except those made by sale at auction it is the duty of the transferee to assure that such consideration is applied so far as necessary to pay those debts of the transferor which are either shown on the list furnished by the transferor (Section 6-104) or filed in writing in the place stated in the notice (Section 6-107) within thirty days after the mailing of such notice. This duty of the transferee runs to all the holders of such debts, and may be enforced by any of them for the benefit of all.

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

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

Optional Subsection (4)

(4) The transferee may within ten days after he takes possession of the goods pay the consideration into the (specify court) in the county where the transferor had its principal place of business in this state and thereafter may discharge his duty under this section by giving notice by registered or certified mail to all the persons to whom the duty runs that the consideration has been paid into that court and that they should file their
consideration for the bulk transfer will be applied to discharge the known debts of the transferor. This concept is drawn from the old "Pennsylvania form" of bulk sales act: if you cannot trust the seller to pay his debts, make sure that the buyer pays for him. Only fresh consideration is included under section 6-106 because it is only fresh consideration that the transferee will have in its possession to pay.

Although section 6-106 requires the transferee to assure proper application of the proceeds of the transaction, it does not dictate any particular method which the transferee must use to accomplish this. Subsection 6-106(4) provides for the payment of consideration "into the (specify court) in the county where the transferor had its principal place of business in this state" should the transferee so elect, coupled with the giving of notice to those parties known to entertain claims against these proceeds. However, this alternative is optional. Escrow accounts are far more popular mechanisms for withholding payment of the consideration until all potential claims have been received and a distribution can be made with confidence that no undisclosed liability lurks over the horizon. Some waiting period before distribution is ordinarily necessary, because the consideration must be allocated not only between the debts originally appearing on the transferor's list of creditors, but also among all additional claims filed in writing at a place stated in the notice within thirty days of the date of mailing of the notice. In recognition of the potential problems confronting the transferee under section 6-106, subsection 6-109(2) states that the transferee will be allowed credit for sums paid to creditors of the transferor, even if mistakenly paid, so long as the transferee was acting in good faith.

claims there. On motion of any interested party, the court may order the distribution of the consideration to the persons entitled to it.] As amended in 1962.

See Billig, Article 6, supra note 47, at 315; Miller, The Effect of the Bulk Sales Law, supra note 53, at 277; Lakin, supra note 16, at 223.

Seemingly the draftsmen of § 6-106 were comfortable in the assumption that any preferential transfers to the transferee in discharge of preexisting obligations would be adequately addressed by the bankruptcy laws regarding preferential transfers or state laws regarding fraudulent conveyances. Transfers in satisfaction of legitimate priority liens or security interests are exempt from Article 6 under § 6-103(3).


In West Virginia, this means payment into the circuit court. W. VA. CODE § 46-6-106(4) (1966).

U.C.C. § 6-106(1).

Additional claimants would include creditors who had not extended credit until after notice had been properly given. These creditors could not have appeared on the transferor's list of creditors (at least not for these particular debts), and would therefore not be entitled to notice under § 6-109(1), but they would nonetheless be entitled to share in the distribution of the proceeds.

U.C.C. § 6-107(2)(e) (optional subsection).

See supra note 148 for full text of U.C.C. § 6-109.
1. "Fairness"

A major policy question regarding section 6-106 is whether this section is fair to transferees. A related issue is the proper measure of the transferee's liability, once section 6-106 saddles him with additional responsibility. Should the liability of the transferee be confined to the amount of the consideration, or should it be measured by the value of the goods transferred if this amount is greater than the consideration paid? Should the transferee be liable only to the extent of the collateral in his possession, or should the transferee be deemed personally liable if he has already disposed of the goods? Might the transferee even be held liable for the claims of creditors in amounts greater than the value of the goods received?

Regarding the fairness of section 6-106, the fact is that the majority of jurisdictions have chosen to delete this section from Article 6. Nevertheless, persuasive arguments have been raised in its defense. Section 6-106 does operate in derogation of common law, depriving the transferee of the luxury of indifference to consequences ordinarily accorded a bona fide purchaser for value, but the overall scheme of Article 6 operates in derogation of common law in that respect anyway, even in majority jurisdictions.

Adoption of section 6-106 has been recommended as a cure for the plight of creditors who complain that the transferee should have some duty of inquiry, although this would not seem necessarily to solve the problem. Section 6-106 allows omitted creditors an opportunity to participate in the distribution of proceeds so long as they file their claims within the thirty-day period following notice (which they, not receiving actual notice, must learn of through some other avenue of information). This does not help the omitted creditor who could have been found but was not sought, and who did not learn of the transfer independently in time to file a claim within the thirty-day period. Of course, the situation for creditors in majority jurisdictions is still worse. As Mr. Donald Rapson stated in his famous discussion of Article 6

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220 Compare Kove, supra note 26, at 101: "Although, obviously, the result of some ingenious mind, Section 6-106 is an unfortunate addition to Article 6 and should be deleted in its entirety," with Hudak & King, supra note 61, at 287: "Where it serves need, however, there is nothing illogical about imposing a statutory duty."

221 See Lakin, supra note 16, at 230-31; Rapson, supra note 9, at 229; Hawkland, U.C.C. § 6-104, supra note 118, at 366; WHITE & SUMMERS, supra note 1, at 770-72.

222 See Hudak & King, supra note 61, at 288.


224 See Hudak & King, supra note 61, at 288; Rapson, supra note 9, at 228; Note, Tabin Corp. v. Climax Boutique—Open Door for Commercial Scoundrels?, 40 Ala. L. Rev. 355 (1976).

twenty years ago: "where the statute merely requires the buyer to obtain a creditors list and give them notice, creditors receiving notice of a bulk sale ten days before its consummation rarely have a meaningful opportunity to protect themselves." Mr. Rapson then gave voice to the fundamental philosophical justification for section 6-106: "Hence, on the ground that any statute designed to protect a certain group is grossly inadequate if the protected group can still be prejudiced notwithstanding full compliance with the statute, the writer favors the Application of Proceeds Rule of Section 6-106."

2. "Payment Mechanisms"

A major practical issue faced by transferees is selection of a mechanism to assure payment of the proceeds to creditors of the transferor. A collateral issue is the length of time the transferee must be prepared to withhold the consideration from distribution in order to protect himself from liability. Official Comment 3 to section 6-106 offers these suggestions:

[The buyer] may, for instance, by agreement with the seller hold the consideration in his own hands until the debts are ascertained, or deposit it in an account subject to checks bearing his counter-signature, or deposit it in escrow with an independent agency. If the affairs of the seller are so involved that nothing else is practical the buyer will no doubt pay the consideration into the registry of an appropriate court and interplead the seller's creditors. If optional subsection (4) is enacted, specific provision is made for such a procedure.

Optional subsection 6-106(4) may not be the best solution, however, even when available. Since payment must be made into the court within ten days of the time the transferee takes possession of the goods, selection of this alternative may cause the transferee to part with the consideration before he has had time to examine the goods for breach of warranty by the transferor. In transactions where the seller's breach of warranty would pose a definite risk, and where the buyer may need more than ten days to determine such a breach, the buyer is advised to select a payment alternative that does not require him to part with the consideration until he is satisfied that the transferor has properly performed under the sales agreement.

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225 Rapson, supra note 9, at 228.
226 Id. This same writer, however, also notes that, in spite of the theoretical justification for § 6-106, this section is unfair to the transferee as a practical matter when undefined terms and unclarified issues arising from Article 6 make it unnecessarily difficult for the transferee to comply with the obligation placed upon him.
227 Kove, supra note 26, at 103-04.
228 Another possibility suggests itself, based on the fact that Article 6 contains no statement regarding when consideration is to pass to the transferor. Since the timing of the passage of consideration is left to the private agreement of the parties, it appears possible to provide the
3. "Timing"

How long the transferee should wait before making a distribution to the transferor's creditors is not completely clear. Official Comment 3 to section 6-106 states that "the transferee's obligation runs, not to all possible creditors of the transferor who may appear at any time in the future, but only to existing creditors whom the transferee has a chance to identify in one of the ways provided in subsection (1)." Since the creditors mentioned in subsection (1) are those shown on the transferor's list of creditors or those filing claims at the location stated in the notice "within thirty days after the mailing of such notice," it would appear that the transferee may safely make a distribution on the 31st day following the mailing of notice to creditors. Nevertheless, situations may exist in which a transferee will wish to wait for a longer period than thirty days. It has been suggested that a large contingent tort claim could make it impossible for the transferee to make any distribution until that claim is decided. Confusion over this issue is, in part, attributable to uncertainty regarding subsection 6-109(2). Although this latter section provides that "the transferee . . . is entitled to credit for sums paid to particular creditors of the transferor, not exceeding the sums believed in good faith at the time of payment to be properly payable to such creditors," it leaves unanswered the question whether this will protect the transferee who makes a good faith payment to the wrong creditor, or the transferee with a degree of leverage in satisfying creditors under the general obligation of § 6-106 to distribute proceeds. If the transferee were given the right to delay payment of the consideration under the sales agreement—that is, to delay payment into the escrow account or other payment mechanism, the transferee could possibly use this negative power to negotiate priorities among competing claimants anxious to get their hands on a portion of the consideration.

Since Article 6 is directed at the problem of transferors who might take the proceeds and disappear, it was apparently assumed by the draftsmen that the consideration would pass on or near the date of the transfer of the goods. However, there may be many transactions falling under the ambit of Article 6 in which the transferor is not motivated by a desire to leave the jurisdiction. Therefore, bowing to the existence of Article 6 and to the recognition that all or most of the proceeds will end up in the hands of creditors in any event, the transferor could be willing to delay almost indefinitely the receipt of the consideration from the transferee under the sales agreement.

Against this, creditors may be expected to argue that the transfer is structured to diminish the recovery of certain classes of creditors and, to that extent, is vulnerable to attack as a fraudulent conveyance.

See supra note 211 for full text of U.C.C. § 6-106(1).

See Peterelt v. Mid-West Marko, Inc., 564 S.W.2d 442, 23 U.C.C. Rep. Serv. (Callaghan) 727 (Tex. Civ. App. 1978) (recovery barred to creditor failing to file within 30 days); Rapson, supra note 9, at 228; Miller, The Effect of the Bulk Sales Law, supra note 59, at 277-78. But see Kove, supra note 26, at 104.

Clontz, supra note 10 at 217 and text accompanying supra note 134.

The absence of any reported cases construing or applying § 6-109 completes the circle of murk.

See supra note 148 for full text of U.C.C. § 6-109.
transferee who makes a good faith payment to the right creditor but in the wrong amount. Additionally, regarding contingent tort claims, once the transferee is advised of the existence of such a claim, it is unclear how great a likelihood there must be that the claimant will recover in order for the transferee to include the claimant as a creditor of the transferor. It is similarly unclear how great a likelihood of any particular amount of recovery there must be to allow the transferee to properly allocate the consideration even if the transferee withholds the tort claimant's share until the claim is judicially determined. Indeed, it may appear to the transferee in such circumstances that the only safe course of action is to delay distribution for six months and take advantage of the limitations period of section 6-111.255

An additional problem which a six-month waiting period would solve for transferees in jurisdictions which have adopted section 6-106 is the question of the rights of governmental taxing authorities as super-creditors. One central question is whether constructive notice of governmental tax liens is somehow of a higher order than constructive notice of other claims against the transferor, such as recorded judgments. The transferee is relieved of liability under Article 6 regarding notice to any creditors of which he does not have actual knowledge, but it has been argued that taxing authorities are not, for this purpose, mere "creditors" of the transferor and that, even if the transferee does not ordinarily have a duty to inquire, some recognition of the special status of taxing authorities should be required.256 Subsection 6-109(2) would appear to protect the transferee who, pursuant to section 6-106, pays

255 It appears that the transferee could avoid the statutory obligations and headaches of § 6-106 by complying with the notice provisions of Article 6 but structuring the transaction itself so that the consideration would not pass to the transferor until a certain date more than six months after the date on which the transferee took possession of the goods. See supra note 229. Section 6-106, as noted previously, requires only that the transferee assure that the consideration is applied to the known debts of the transferor. It contains no requirement regarding the relation of the date of payment of consideration to the date of transfer of possession of the goods to the transferee. At the same time, § 6-111 states quite clearly that: "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." Compliance with the notice provisions of Article 6 would eliminate any question whether the transfer had been concealed. At the same time, delay in the payment of the consideration beyond six months following the date the transferee took possession of the goods would deprive creditors of the opportunity to bring any action against the transferee under Article 6. Nor would such a strategy necessarily prejudice creditors, since it would give them six months to explore their non-Article 6 statutory and common law remedies against the transferor, or garnish, suggest, or enjoin the transferee from distributing proceeds to the transferor.

256 A further problem is what to do about taxing authorities who are neither listed nor file claims, but, who obviously may have claims which, in certain instances, are entitled to priority under either Federal or state law . . . . It would be foolhardy to make a distribution and ignore the possibility of such authorities having actual claims.

Kove, supra note 26, at 105.
the consideration to the creditors of the transferor of which the transferee has actual knowledge, even if the transferee omits payment to taxing authorities of which he has only constructive knowledge—but maybe not.227 Suppose the transferee were to withhold payment of all or a portion of the consideration on the assumption that there were tax claims outstanding against the transferor which represented a lien upon the goods? Would the listed creditors of the transferor of which the transferee had actual knowledge then have a cause of action against the transferee for noncompliance with section 6-106?

4. “Priorities”

Finally, it should be noted that if the proceeds are not sufficient to pay all creditors in full, subsection 6-106(3) states that “distribution shall be made pro rata.”228 Although unsecured creditors may dearly wish to argue that this subsection erases the priorities otherwise enjoyed by secured creditors and puts all creditors, secured and unsecured, in the same boat, the correct reading of this subsection is that it applies only to unsecured creditors. Case law and commentary both support the position that priorities among creditors established under Article 9 are to be observed when claims of creditors are at issue under Article 6.229 This applies to priorities among lienors as well as among secured parties.230 Application of Article 9 priorities can simplify things enormously for the transferee when a sufficient number of creditors with determinable priorities exist to absorb the entire consideration, because the certainty this provides allows the transferee to quickly discharge his payment obligation under section 6-106.

V. REMEDIES AND THEIR LIMITATIONS

Article 6 provides no remedies for disappointed creditors, and efforts at recovery will require recourse to other statutory and common law
This was the intention of the draftsmen of Article 6, as indicated by Official Comment 2 to section 6-104: "[When noncompliance occurs] any such creditor or creditors may therefore disregard the transfer and levy on the goods as still belonging to the transferor, or a receiver representing them can take them by whatever procedure the local law provides." Although it has been held that the remedies available to creditors under the old bulk sales laws are still available under Article 6, this position was questioned by the Fifth Circuit Court of Appeals in *Indon Industries Inc. v. Charles S. Martin Distributing, Co.*, wherein the court stated that pre-Code remedies would not necessarily be available under Article 6. Jurisdictions adopting section 6-106 have created a substantive cause of action against the transferee when the transferee's noncompliance is, or results in, a misapplication or nonapplication of the consideration. However, it does not appear that this cause of action should be available to creditors where the noncompliance was by the transferor or the complaint of the creditors is inadequacy of consideration.

Under sections 6-104 and 6-105, noncomplying bulk transfers are deemed to be ineffective. As discussed in an earlier section of this paper, the precise meaning of "ineffective" will have important consequences to creditors seeking a remedy. If a transfer is considered void vis-à-vis creditors, then they should be allowed to obtain the collateral without legal action directed at the transferee. On the other hand, a transfer that is merely "presumed to be void" may require an additional judicial determination of the rights of the transferee in the collateral before the creditor can take possession.

Article 6 provides no remedies for transferees against transferors. Consequently, if the transferee makes a mistake, he may not only lose the collateral to creditors of the transferor, but, since the transfer is only

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241 See HAWKLAND U.C.C., supra note 10, at § 6-104:05-11, for a survey of remedies available to secured and unsecured creditors. See also Note, supra note 165; Lakin, supra note 16, at 228-34.


244 Assuming the transferee was himself complying in good faith, he should be protected from the claims of the transferor's creditors by §§ 6-104(3) and 6-109(2). See supra note 231.

245 Section 6-106 limits the duty of the transferee to the assurance "that such consideration is applied so far as necessary to pay off those debts of the transferor ...." (emphasis added). An action for inadequate consideration might be brought, but it would be in the nature of an action to set aside a fraudulent conveyance, hence, it would not be an action under § 6-106. See supra note 211 for full text of U.C.C. § 6-106.

246 See supra notes 164-69 and accompanying text.
“voidable,” and thus valid between he and the transferor, the transferee may find himself still required to pay the seller. This is so even though, ultimately, it is the seller’s failure to pay his creditors that caused the transferee’s loss of collateral. Escrow of a portion of the proceeds of the transaction has therefore been recommended to protect the transferee even in jurisdictions which have not adopted section 6-106.24

The absence of remedies from Article 6 merely follows the pre-Code bulk sales laws of most states. Since, however, in the majority of jurisdictions unsecured creditors must reduce their claims to judgment and levy on the goods within a ten-day period to assure recovery, one must question the practical applicability of the non-Code remedies of levy and execution in these situations. Case law and commentary also support the application of equitable remedies,249 and it would appear that the short reaction time allowed creditors in majority jurisdictions would require the use of equitable remedies in many instances.

A. Personal liability of transferee

An important question in jurisdictions which have adopted section 6-106 is the extent of a transferee’s personal liability for a noncomplying bulk transfer.250 Although pre-Code law did not hold the transferee personally

248 Kove, supra note 26, at 97-98. It has also been suggested that, although he may lack the right to rescind the contract, the transferee may still maintain an action against the transferor for breach of warranty of title under § 2-312 and recover in that fashion. Hawkland, U.C.C. § 6-104, supra note 118, at 363. But see supra notes 25 and 111.

249 Belber v. H.S.F., Inc., 26 Pa. D. & C.2d 796, 1 U.C.C. Rep. Serv. (Callaghan) (Mont. Cty. Ct. 1961). See Note, supra note 165, at 758, citing General Tire Corp. v. Gabor, 3 U.C.C. Rep. Serv. (Callaghan) 990 (N.Y. Sup. Ct. 1966), in which an injunction in favor of the creditor was denied, for the principle that, although equitable remedies are available, the creditor must still prevail in a factual showing that the injunction is appropriate. Another New York court in H.L.C. Imports Corp. v. M & L Siegel, Inc., 98 Misc.2d 179, 413 N.Y.S.2d 605, 25 U.C.C. Rep. Serv. (Callaghan) 1424 (Civ. Ct. 1979), stated that only in exceptional instances of tortious conduct or breach of contract would it be possible for creditors to obtain a money judgment against a noncomplying transferee; instead, general creditors must sue in equity to set aside a transfer or obtain other appropriate equitable remedies.

liable in bulk sales situations, it has been said that the adoption of section 6-106 is indicative of legislative intent to change prior law. Where personal liability has been upheld, the transferee has ordinarily been held liable for the fair market value of the goods conveyed. Since the bulk transfer will normally represent a bargain purchase for the transferee, not only does a question arise over the appropriate method of determining fair market value of the goods (as bulk or individual retail or wholesale items) but, depending on the method of valuation, the consideration can almost always be labeled "inadequate," creating a liability for the transferee and a cause of action for the creditors of the transferor. It would seem that courts deciding this matter should follow the statute and confine the transferee's personal liability to the amount of the consideration paid. Since a complying transferee is only liable under section 6-106 to the extent of the consideration agreed upon, requiring a noncomplying transferee to assume personal liability for the fair market value of the goods would, when the fair market value was greater than the consideration, represent a penalty upon the transferee for noncompliance. Such a weighting of results hardly seems in keeping with the ordinarily impartial procedural spirit of Article 6. Still, it must be noted that the original Pennsylvania statute upon which section 6-106 was modeled did assign to the transferee responsibility to the extent of the fair market value of the property transferred. Also, if the noncomplying transferee is liable to the creditors of the transferor for conversion, then the transferee would appear to be liable for the fair market value of the goods, since this is the real value that was converted.

B. Section 6-110

Section 6-110 provides a transactional limit to the remedies of creditors
of the transferor by providing that, even though the transferee may not have complied with Article 6 and thus possesses only voidable title to the goods, a bona fide purchaser for value from the transferee takes free of the defect.\(^\text{258}\)

This is actually only a codification of the general pre-Code rule in these situations.\(^\text{257}\) It is also consistent with the provisions regarding passage of title under Article 2.\(^\text{258}\)

A related question is who prevails when the contest is between unsecured creditors of the transferor and the unsecured creditors of the transferee.\(^\text{259}\) General unsecured creditors of both the transferor and transferee, for whom timing of claims is not ordinarily a priority device, could conceivably find themselves lumped together in one large class participating in a pro rata division of the proceeds. Against this result, creditors of the transferor may justifiably contend that, to the extent their shares are diminished by a split with creditors of the transferee, the transfer is being treated as effective in violation of Article 6.

In the case of *In re Gruber Industries, Inc.*,\(^\text{260}\) the transferee's trustee in bankruptcy was given priority over the transferor's creditors. According to Chancellor Hawkland, although this decision is probably incorrect, the result is actually in accord with pre-Code law on this topic.\(^\text{281}\)

C. *Section 6-111*

In section 6-111, Article 6 contains its own six-month statute of limitations.\(^\text{262}\) The language selected by the draftsmen makes it clear that section 6-111 limits not only actions based upon Article 6 itself, principally actions under sections 6-106 or 6-108, but also limits remedies springing from actions

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\(^{258}\) U.C.C. § 6-110. *Subsequent Transfers*

When the title of a transferee to property is subject to a defect by reason of his non-compliance with the requirement 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 in good faith and without such notice takes free of such defect.


\(^{259}\) See U.C.C. § 2-403.

\(^{260}\) E.g. *White & Summers, supra* note 1, at 776; Hawkland, *U.C.C. § 6-104, supra* note 118, at 364-65. When secured claims are at issue, secured creditors of the transferor are entitled to assert their Article 9 priorities against creditors of the transferee.


\(^{262}\) Hawkland, *U.C.C. § 6-104, supra* note 118, at 364.

\(^{263}\) U.C.C. § 6-111. *Limitation of Acts and Levies*

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.
concluded before the bulk transfer occurred. According to the Permanent Editorial Board, because Article 6 imposes unusual obligations on buyers of property, a short statute of limitations was thought to be appropriate. Since Article 6 strips the buyer of the protection ordinarily accorded a bona fide purchaser for value under the common law, a brief statute of limitations was all that could be justified in balancing the competing interests.

Section 6-111 does not limit the remedies of the transferor’s creditors against the transferor, since those actions would not be arising under the Article, nor does Article 6 shield a complying transferee from an attack based on the ground that the transferee is a preferred creditor or a fraudulent conveyee.

Beyond establishing six months as the limitations period, section 6-111 states that: “If the transfer has been concealed, actions may be brought or levies made within six months after its discovery.” This raises the only really significant issue under section 6-111, which is whether defective notice to creditors may amount to “concealment” and thus toll the running of the statute. Where there has been an effort to comply with Article 6, defective notice has been held not to constitute “concealment” for purposes of section 6-111. On the other hand, where no effort whatsoever was made to comply with Article 6, it has been held that noncompliance was tantamount to “concealment” and did toll the running of the statute. At least one commentator

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263 The short statute of limitations is therefore made applicable to levies as well as actions. ‘Levy,’ which is not a defined term in the Code, should be read broadly as including not only levies of execution proper but also attachment, garnishment, trustee process, receivership, or whatever proceeding, under the state’s practice, is used to apply a debtor’s property to payment of his debts.

U.C.C. § 6-111, Official Comment 2.

264 U.C.C. § 6-111, Official Comment 1.

265 However, three jurisdictions (California, Florida, Georgia) have increased their limitations period under section 6-111 to one year. 2A U.L.A. 330 (1977 & Supp. 1983).


268 Although certainty in commercial transactions is desirable, one problem with section 6-111 is that a short statute of limitations may tempt transferees to gamble on the fact that their noncompliance will go unnoticed for at least six months, thus subverting the intention of the Article.


has concluded that this latter position “appears to emasculate needlessly” the six-month limitation of section 6-111.\(^{271}\)

VI. AUCTION SALES

A. Section 6-108 and subsection 6-109(2)

Bulk transfers effected by means of auction sales are subject to Article 6 under the particular rules set out in section 6-108,\(^{272}\) backed up with a good faith limitation which appears in subsection 6-109(2). Although only three states included bulk sales by auction in their pre-Code bulk sales laws,\(^{273}\) the absence of such a provision was keenly felt by the draftsmen of Article 6:

[If auctions were excluded entirely from the transfers covered by this Article the way would be open to a debtor to carry out a bulk transfer of his property without notice to his creditors and without any duty upon anyone to see to the application of the proceeds. The section attempts to meet this situation by imposing the obligation stated in the section upon the persons there described.\(^{274}\)

Under section 6-108, the transferor prepares a list of creditors as he would for a nonauction transfer.\(^{275}\) The auctioneer, defined as the person(s) other than the transferor who is responsible for the auction sale,\(^{276}\) performs

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\(^{271}\) Lakin, supra note 16, at 234.

\(^{272}\) U.C.C. § 6-108. Auction Sales; ‘Auctioneer’

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

(2) The transferor shall furnish a list of his creditors and assist in the preparation of a schedule of the property to be sold, both prepared as before stated (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 or certified mail at least ten days before it occurs to all persons shown on the list of creditors and to all other persons who are known to him to hold or assert claims against the transferor; [and]

(c) assure that the net proceeds of the auction are applied as provided in this Article (Section 6-106).]

(4) Failure of the auctioneer to perform any of these duties does not affect the validity of the sale or the title of the purchasers, but if the auctioneer knows that the auction constitutes a bulk transfer such failure renders the auctioneer liable to the creditors of the transferor as a class for the sums owing to them from the transferor up to but not exceeding the net proceeds of the auction. If the auctioneer consists of several persons their liability is joint and several. As amended 1962. Note: The words in brackets are optional.

\(^{274}\) U.C.C. § 6-108, Official Comment 1.

\(^{275}\) U.C.C. § 6-108(2).

\(^{276}\) U.C.C. § 6-108(3).
as the nonauction transferee normally would, assisting in the preparation of the schedule of goods under subsection 6-104(1)(b)\(^{277}\) and giving notice to creditors of the transferor as the nonauction transferee would be obligated to do under section 6-105 and subsection 6-107(3).\(^{278}\) Continuing the parallel between section 6-108 and nonauction situations, noncompliance with Article 6 by the auctioneer will not affect the title to goods in the hands of buyers at the auction,\(^{279}\) who are deemed bona fide purchasers for value. Instead, the auctioneer will be held liable to the transferor's creditors to the extent of the net proceeds of the auction, but only if the auctioneer knew that the auction represented a bulk transfer.

Section 6-108, while generating no reported cases to date, does provoke some mild conjecture. One wonders why the draftsmen of section 6-108 required that the transferor "shall furnish a list of his creditors," rather than employing the parallel language which, for nonauction transferees under subsection 6-104(1)(a), demands that the transferee "require" the transferor to furnish a list of his creditors.\(^{280}\) Does this mean the auctioneer under section 6-108 is given a cause of action against the transferor that is not available to the transferee in a nonauction situation? A question related to this first issue through the operation of subsection 6-108(4) is why did the draftsmen of Article 6 protect auctioneers with a higher standard of knowledge and burden of proof for establishing liability than was deemed necessary for ordinary merchant or nonmerchant transferees in the nonauction sections of Article 6? A noncomplying auctioneer who also has no knowledge that the transaction is a bulk transfer is free of liability under subsection 6-108(4). A noncomplying transferee in a nonauction situation is not similarly immune from the consequences of his noncompliance. Yet, which of these parties is in the better position to recognize a bulk transfer—the auctioneer who deals with bulk transfers as often as every day or week, or the merchant or nonmerchant transferee who may deal with a bulk transfer once in five years or a lifetime?

A final issue arising under subsection 6-108(4) is whether the language appearing in this subsection limiting auctioneer liability to sums "not exceeding the proceeds of the auction"\(^{281}\) should be read into section 6-106 also by courts attempting to determine the limit of the personal liability of a noncomplying transferee under that section? Or did the draftsmen of subsection 6-108(4) intend to reward auctioneers with a lower standard of valuation of their liability on the basis that nonauction transferees presumably bargain for the lowest possible price, while auctioneers attempt to obtain the highest possible price for the transferor?

\(^{277}\) U.C.C. § 6-108(3)(a).
\(^{278}\) U.C.C. § 6-108(3)(b).
\(^{279}\) U.C.C. § 6-108(4).
\(^{280}\) See supra note 144 for full text of U.C.C. § 6-104.
\(^{281}\) Emphasis added.
VII. CONCLUSION

Even after thirty years, little of summary significance can be said about Article 6. Its large number of undefined terms prevents certain application of many of its provisions. Relatively few cases have been reported to aid in defining and refining the Article, and even reported cases tend to cluster around a few particular issues. In the near future the Permanent Editorial Board will be considering a revision of Article 6 and will quite probably change the Article in several significant ways.

In this interim period, counsel for transferees and transferors can only try their best to comply with Article 6 in its present form (and possibly over-comply in certain instances to provide their clients with the requisite margin of safety), and take periodic relief from the six-month limitations period provided by section 6-111. Counsel for creditors are in a better position, since Article 6 was drafted for their clients’ benefit; however, they will likely find it to their clients’ advantage to avoid Article 6 altogether by obtaining perfected security interests under Article 9 when extending credit on the faith of a debtor’s inventory and equipment.