

1-1-1969

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Recommended Citation

Joseph L. Cook, *Article 6: Rights of an Aggrieved Creditor of a Bulk Transferor*, 10 B.C.L. Rev. 281 (1969), <http://lawdigitalcommons.bc.edu/bclr/vol10/iss2/4>

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UNIFORM COMMERCIAL CODE COMMENTARY

ARTICLE 6: RIGHTS OF AN AGGRIEVED CREDITOR OF A BULK TRANSFEROR

Like the earlier Uniform Fraudulent Conveyance Act¹ and the various bulk sales laws, Article 6 of the Uniform Commercial Code was promulgated to prevent the wrongs effected by certain types of commercial fraud.² Once it is determined that the enterprise in question is subject to Article 6,³ *i.e.*, that the transfer is a "bulk transfer,"⁴ and that the transfer is not excepted from

¹ The National Conference of Commissioners of Uniform State Laws promulgated the Uniform Fraudulent Conveyance Act in 1918 in an attempt to make uniform the law relating to fraudulent conveyances. The primary value of the Act lies in its provisions establishing a definite concept of insolvency and a clear definition of persons legally injured by a fraudulent transfer. These provisions facilitate an understanding of what constitutes a fraudulent transfer and who has standing to challenge the fraud. In contrast with earlier fraudulent conveyance statutes, this Act is not drafted with a presumption of fraudulent intent as a basis for declaring a transfer void. Certain transfers are void irrespective of intent, while others require proof of actual intent. Twenty-three states and the Virgin Islands have adopted the Act without substantial change from the uniform version.

² Official Comment 2 to U.C.C. § 6-101 defines the common forms of commercial fraud which the various bulk sales laws are designed to prevent:

(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 any one for any price, pockets the proceeds, and disappears leaving his creditors unpaid.

The first example is the typical fraudulent conveyance and the substantive law concerning it has been codified in the Uniform Fraudulent Conveyance Act. See note 1 *supra*.

The second example represents the major bulk sales risk, and its prevention is the central purpose of Article 6. See U.C.C. § 6-101, Comments 2, 3, 4. Unless otherwise indicated all Uniform Commercial Code citations are to the 1962 Official Text.

³ U.C.C. § 6-102(3) states:

The enterprises subject to this Article are those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell.

Unlike most earlier bulk sales laws, Article 6 specifically subjects manufacturers to its provisions. The businesses covered do not include those which deal primarily in services rather than the sale of merchandise. U.C.C. § 6-102, Comment 2.

⁴ U.C.C. § 6-102(1) states:

A "bulk transfer" is 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 (Section 9-109) of an enterprise subject to this Article.

Whether or not a transfer is in fact a "bulk transfer" has been the subject of much litigation under the pre-Code bulk sales acts. See Miller, *Bulk Sales Laws: Businesses Included*, 1954 Wash. L.Q. 146. The draftsmen have selected the phrase "major part" in defining the amount of materials, supplies, merchandise or other inventory of an enterprise subject to Article 6 which must be transferred to constitute a bulk transfer. The phrase "major part" appeared in four pre-Code bulk sales laws: Conn. Gen. Stat. Ann. tit. 42, ch. 734, § 42-101 (repealed 1961); Ill. Ann. Stat. ch. 121½, § 78 (Smith-

coverage under the Article,⁵ the Code provides for the prevention of commercial fraud by requiring that notice⁶ of the proposed bulk transfer be given to all creditors of the bulk transferor.⁷ This comment will examine the rights and remedies of a transferor's aggrieved creditors when there has been non-

Hurd 1960) (repealed 1961); R.I. Gen. Laws Ann. § 6-16-2 (repealed 1962); S.C. Code Ann. § 11-201 (repealed 1968). The phrase has been construed on only one occasion. In *Zenith Radio Distrib. Corp. v. Mateer*, 311 Ill. App. 263, 35 N.E.2d 815 (1941), the appellate court of Illinois held that the sale of only 50% of a partnership did not constitute the transfer of a "major part" of the business. The court, in construing the bulk sales act strictly as a derogation of the common law, concentrated on a quantitative rather than a qualitative approach.

These disparate approaches may be illustrated in the following manner. Assume a jeweler has an inventory of fifty diamonds, ten of which have a greater combined value than the other forty. A sale of these ten diamonds does not constitute a transfer of a major part of the inventory if viewed from a quantitative approach. A "quantity" of twenty-six diamonds, regardless of their total value, must be sold to qualify as a major part of inventory under the quantitative approach. However, a sale of the ten diamonds which total over 50% of the value of the inventory would be a transfer of a major part of the inventory if viewed from the qualitative approach. The emphasis here is on the value of the assets transferred whereas the quantitative approach emphasizes the number of assets transferred.

The Rhode Island pre-Code statute added the words "in value" to "major part," and thus stressed the qualitative rather than the quantitative approach. The qualitative approach seems to be correct, particularly in light of U.C.C. § 1-102(1) which requires a liberal construction to effect the underlying policies of the Act. See W. Willier & F. Hart, *Forms and Procedures under the Uniform Commercial Code* ¶ 61.04[2] (1965). Idaho, Iowa and Wisconsin have added the phrase "in value" after "major part" in their version of § 6-102(1). The Iowa Code commentators stated that this addition was made "for the purpose of clarification; it states explicitly what is believed to be implicit in the Official Text. This does not appear to be a substantive change." Iowa Code Ann. § 544.6102, Comment (1967 revision). The Permanent Editorial Board has stated in regard to these additions that "the words 'in value' are redundant, especially . . . in view of the purpose of Article 6." W. Willier & F. Hart, *Uniform Commercial Code Reporter Digest* 1-446. Because the very meaning of the word "redundant" is "excessive," adding nothing of substantial importance, the position taken by the Permanent Editorial Board lends support to the proposition that a qualitative rather than a quantitative approach should be followed.

Section 6-102(2) uses the word "substantial" in defining that part of the equipment of a subject enterprise which must be transferred to constitute a bulk transfer. In earlier bulk sales legislation the term "substantial" appeared only in Cal. Civ. Code § 3440.1 (West 1954). It has been construed to include a pledge of 6% of stock in trade. *Markwell & Co. v. Lynch*, 114 F.2d 373 (9th Cir. 1940). However, a transfer of equipment is regulated by Article 6 only if it is made in connection with a bulk transfer of inventory. U.C.C. § 6-102(2).

⁵ Under U.C.C. § 6-103, eight types of transfer are not subject to Article 6.

⁶ U.C.C. § 6-105 states:

[A]ny 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).

⁷ Advance notice to the seller's creditors of the impending sale is an important protection against commercial fraud. Having such notice, the creditors can investigate the price and other circumstances of the sale before it occurs, and determine at that time whether they should try to stop the sale or impound the proceeds. U.C.C. § 6-101, Comments 3, 4.

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compliance⁸ with Article 6 or when there has been compliance coupled with a "preference."⁹

I. CREDITORS WHO QUALIFY FOR PROTECTION UNDER ARTICLE 6

Article 6 is designed to prevent commercial fraud by giving creditors of a bulk transferor the right to treat a non-complying transfer as ineffective. However, in some cases it may be difficult to determine who is a creditor of the transferor and thus a member of the protected class. Article 6 defines creditors as "those holding claims based on transactions or events occurring before the bulk transfer. . . ."¹⁰ This definition changes the law in jurisdictions where unliquidated and contingent claims were considered insufficient to bring the claimant within the class of parties protected by the bulk sales laws.¹¹ One holding an unliquidated claim now clearly qualifies as a creditor under the Code.¹²

Although Article 6 has clearly defined the status of a person holding an unliquidated claim, it has not so defined the status of a person holding a contingent claim.¹³ In construing pre-Code bulk sales legislation, most courts held that contingent claims did not fall within the scope of the statutory protection.¹⁴ The Article 6 definition of creditor and the comments thereto do not specifically refer to this type of claim. However, a comparison of the definitions of creditor found in Article 1¹⁵ and Article 6¹⁶, indicates that there

⁸ Non-compliance, as used in this comment, refers to any party's failure to fulfill the duties imposed on him by U.C.C. §§ 6-104 to 6-108.

⁹ Bankruptcy Act § 60(a)(1), 11 U.S.C. § 96(a)(1) (1964) defines a preference: A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

¹⁰ U.C.C. § 6-109(1).

¹¹ For instances in which unliquidated claims were held to be insufficient, see, e.g., *Griffin v. Allis-Chalmers Mfg. Co.*, 65 N.D. 379, 259 N.W. 89 (1934); *Electrical Prods. Corp. v. Ziegler*, 157 Ore. 267, 71 P.2d 583 (1937).

For instances in which contingent claims were held to be insufficient see, e.g., *Trust Co. of Chicago v. Ferguson*, 340 Ill. App. 344, 92 N.E.2d 211 (1950).

¹² U.C.C. § 6-109, Comment 1.

¹³ A contingent claim ordinarily implies a liability which may or may not occur depending on some future event. For example, an indorser's liability on a negotiable instrument is contingent. The indorser is not liable on the instrument unless and until there has been a dishonor. See U.C.C. § 3-414(1).

¹⁴ See, e.g., *Apex Leasing Co. v. Litke*, 173 App. Div. 323, 159 N.Y.S. 707 (App. T. 1916). The *Litke* court, like most courts speaking of the bulk sales acts, stated that this legislation was in derogation of the common law and for that reason must be construed strictly. *Id.* at 326, 159 N.Y.S. at 709. 3 S. Williston, *Sales* § 643(a) (rev ed. 1948).

¹⁵ U.C.C. § 1-201(12) states:

"Creditor" 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.

¹⁶ U.C.C. § 6-109(1) states:

The creditors of the transferor mentioned in this Article are those holding claims based on transactions or events occurring before the bulk transfer . . .

are two important additions in the Article 6 definition which make it reasonable to conclude that contingent claimants are protected. These additions are: a) a reference to time—those holding claims based on transactions or events occurring *before* the bulk transfer; and b) an elaboration of the Article 1 use of the term “general” creditor.¹⁷ A general creditor has been defined as one to whom a debt is due from another person called the debtor.¹⁸ When a claimant is a general creditor a relationship exists with a debtor which is based on an obligation extending from the debtor to the creditor. Article 6 requires only that there be *some relationship* based on some event or transaction occurring before the bulk transfer. Article 6 does not require that the claim be the foundation for a present obligation on the part of the transferor. A party will be within the protected class if his claim meets the definitional requirement necessary to establish *some relationship* with the transferor (his debtor). A contingent liability, such as an indorser’s contract, establishes *some relationship* between the indorser and subsequent holders but there is no obligation until dishonor occurs. The indorser’s contract seems to meet the Article 6 requirement that there be a claim based on some event occurring before the bulk transfer.

Some significance must be given to the language which has been added by Article 6 to the Article 1 definition of creditor.¹⁹ A meaning must be attributed to the term as defined in Article 6, which meaning would not be within the Article 1 definition. A construction which holds contingent claims within the scope of Article 6 would give such meaning to the expanded definition of general creditor. Furthermore, such construction is consistent with the definition in the Uniform Fraudulent Conveyance Act,²⁰ with some pre-Code bulk sales decisions,²¹ and with the expressed intent of one of the Code’s draftsmen.²²

¹⁷ Article 1 contains the only general definition of creditor. See note 15 *supra*. The Code’s purpose in defining a term in Article 1 is to provide a standard meaning for the term for use throughout all ten Articles. This meaning applies unless some other definition is given for a particular section or Article. Because the definition is intended for general use throughout the Code, and because the only other definition of creditor is found in Article 6, a new meaning must be sought for a proper application of the term as defined in that Article.

¹⁸ *Guaranty Trust Co. v. Galveston City Ry.*, 107 F. 311, 317 (5th Cir. 1901).

¹⁹ If the draftsmen intended to change the meaning of creditor in Article 6 only by adding a time element to the Article 1 definition, a reasonable Article 6 definition of creditor would read: The creditors of the transferor mentioned in this Article are creditors who become such before the bulk transfer. This definition would delete the § 6-109(1) addition of “claims based on transactions or events.” Such deletion would require reference to Article 1 for the complete meaning of creditor. The only change made by § 6-109(1) would then be an addition of a time element. However, the draftsmen did add this language, and rules of statutory construction require that the new phraseology be given substantive meaning.

²⁰ Uniform Fraudulent Conveyance Act § 1 states in pertinent part:

“Creditor” is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

²¹ *Hanna v. Hurley*, 162 Mich. 601, 127 N.W. 710 (1910). In this case a contingent creditor was permitted to attack a non-complying bulk transfer.

²² One of the original Code draftsmen has made clear the general intent to include

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The Code specifically states that the "Act shall be liberally construed and applied to promote its underlying purposes and policies."²³ Although the underlying policy of Article 6 is stated to be the prevention of commercial fraud,²⁴ the inclusion of unliquidated and non-commercial claims²⁵ indicates a broader purpose, that an owner of a subject enterprise should not transfer his business in bulk without first assuring payment, at least in part, for all of his creditors.²⁶ In order to effectuate this policy of expanded protection the term "creditor" must be liberally construed so that the contingent claimant is also able to assert a claim under Article 6.²⁷

contingent claimants in the Article 6 definition of creditor. In an appearance before the New York Law Revision Commission, Professor Bunn stated that "the definition of creditors does include contingent claims, etc.—that was deliberate, I think, because no one could quite see any reason for excluding the person who was hit by the company's truck any more than the person who had sold goods on credit to the [transferor] before the transfer." 1 New York Law Revision Commission Report, Study of the Uniform Commercial Code, 655 (1954). It would seem that this interpretation permits any involuntary creditor, such as the accident victim, to be included in the Code definition. W. Willier & F. Hart, *supra* note 4, ¶ 61.05; Billig, Article 6—Order Out of Chaos; A Bulk Transfers Article Emerges, 1952 Wis. L. Rev. 312, 330. A holding that involuntary creditors are within the class of persons protected by bulk sales legislation would be a significant departure from pre-Code law in some jurisdictions where it had been held that a tort claimant was not protected by the bulk sales law if the claim was not reduced to judgment prior to the transfer. See, e.g., *Hart v. Evans*, 330 Ill. App. 385, 71 N.E.2d 546 (1947). However, this is not a general reversal of existing law. A significant number of courts have held unliquidated tort claimants (whose claims are contingent) to be within the bulk sales law meaning of creditor. See, e.g., *Malaquias v. Novo*, 59 Cal. App. 2d 225, 138 P.2d 729 (1943). See also Annot., 85 A.L.R.2d 1211, 1229-32 (1962).

²³ U.C.C. § 1-102(1).

²⁴ U.C.C. § 6-101, Comment 4.

²⁵ As used here, the term non-commercial claim refers to any claim held by a creditor which is not for merchandise furnished to the vendor in conducting the business which was sold and which is not based on an extension of credit to the business transferred. See, e.g., *Malaquias v. Novo*, 59 Cal. App. 2d 225, 138 P.2d 729 (1943). See also Annot., 85 A.L.R.2d 1211, 1232-36 (1962).

²⁶ The provisions of Article 6, except where optional § 6-106 has been enacted, are not concerned with a pro rata distribution of the new consideration paid by the transferee. The transferor is at liberty to prefer one creditor over another unless the state has some other statutory prohibition against preferential treatment of creditors.

The Code seeks to assure protection of creditors not by directing payments to them (except where optional § 6-106 has been enacted) but by requiring notice. It is then up to the creditor to act to protect himself.

²⁷ It has previously been noted that involuntary creditors may be included within the Article 6 definition. See note 22 *supra*. The original bulk sales laws centered around the protection of the merchant creditor of the transferor. Such a creditor was one who extended credit in reliance on the debtor's assets. Comparing the merchant creditor with the involuntary creditor, it is apparent that the primary protection must still be for the merchant creditor, the party most frequently affected by the bulk transfer. A surety, a contingent creditor, falls within the voluntary merchant creditor classification. Such a person is likely to have entered the suretyship transaction on the supposition that if he subsequently became liable on the debt of the bulk transferor, he would have recourse against the transferor's assets. Clearly this reliance on a merchant's assets as a source from which a debt may be satisfied is the type of reliance which the Code seeks to promote by protection of a fund to satisfy the loss which flowed therefrom.

II. SUBSTANTIVE RIGHTS ESTABLISHED BY NON-COMPLIANCE
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A. *Where Optional Section 6-106 Has Not Been Enacted*

Procedures and substantive rights varied from jurisdiction to jurisdiction under the pre-Code bulk sales laws. However, these laws generally fit one of two principal patterns, depending on the rights and duties conferred. These patterns have been termed the "New York form" and the "Pennsylvania form."²⁸ Basically these forms were the same: a sale of stock or merchandise out of the ordinary course of business was void as to the creditors of the seller unless the parties (1) prepared a detailed inventory of the goods to be transferred, (2) prepared a verified list of the seller's creditors and (3) notified the listed creditors of the price and terms of the impending sale.²⁹ If there is compliance with the bulk sales law, the two forms are distinguished by their positions regarding control over the proceeds of the sale.³⁰ Under the "New York form" there was no control over the transferee's disposition of the proceeds. The draftsmen of the "Pennsylvania form" apparently decided that some control over disposition of the proceeds was an essential part of an effective bulk sales law. They supplemented the "New York form" by imposing an affirmative duty on the transferee to apply the purchase money to the bona fide claims of creditors appearing on the verified list.³¹ Both forms of legislation are mirrored in Article 6. Sections 6-104 and 6-105, the "New York form," make a non-complying transfer "ineffective" against any creditor of the transferor. The transferee is treated as a receiver of these assets and is liable for their value if he converts them. The optional section 6-106, the "Pennsylvania form," makes a transferee *personally* liable to certain creditors (to the extent of new consideration) if he fails to apply the proceeds properly.

Where section 6-106 has not been enacted, sections 6-104 and 6-105 establish a transferee's liability for non-compliance by providing that a non-complying transfer shall be "ineffective against any creditor of the transferor."³² Earlier bulk sales laws stated that a non-complying transfer would "be void"³³ or "shall be fraudulent and void"³⁴ or "shall be presumed to be

²⁸ Weintraub and Levin, *Bulk Sales Law and Adequate Protection of Creditors*, 65 Harv. L. Rev. 418, 420 (1951). The New York form was adopted in thirty-eight states, Hawaii, the District of Columbia and Puerto Rico. *Id.* at 420, n.7. The Pennsylvania form was adopted in ten states. *Id.* at 420, n.10.

²⁹ See, e.g., N.Y. Pers. Prop. Law § 44 (repealed 1964). Pa. Stat. Ann. tit. 69, §§ 521-23 (repealed 1953).

³⁰ Article 6 does not define the term "proceeds." However, the word is used in the title to optional § 6-106 and clearly means new consideration which, by reason of the transfer, becomes payable by the transferee to the transferor. See U.C.C. § 6-106, Comment 1.

³¹ Pa. Stat. Ann. tit. 69, § 523 (repealed 1953).

If the purchaser for any reason doubted the completeness of the list or could not determine the proper priority of claims, or for any other reason was unable to make a proper distribution, he could pay the proceeds into the court of the county in which the seller's business was located.

³² U.C.C. §§ 6-104(1), 6-105.

³³ See, e.g., Colo. Stat. Ann. ch. 27, § 1 (repealed 1966).

³⁴ See, e.g., Mont. Rev. Code Ann. tit. 18, ch. 2, § 202 (repealed 1965).

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fraudulent and void."³⁵ A variety of constructions have been given these phrases.³⁶ The Code draftsmen sought to avoid variation in construction by introducing a new word of art, "ineffective."³⁷

In order to understand fully the meaning of "ineffective" it is essential to appreciate the proper distinction between void and voidable. "Ineffective" does not mean void as non-complying transfers were held to be under some pre-Code bulk sales laws.³⁸ "Ineffective" does mean voidable at the instance of a creditor of the transferor. A bulk transferee may transfer the property free of title defect to "a purchaser for value in good faith and without . . . notice."³⁹ The power to transfer property free of title defect is a traditional characteristic of voidable title. Were an executory contract void for non-compliance, the seller would not be bound to proceed with the transfer, nor could the buyer obtain damages. If the transfer were void, creditors of the transferee could gain no interest in the assets. In *Macy v. Oswald*,⁴⁰ the only Code case considering whether non-compliance would permit a contracting party to avoid an executed contract, the agreement was held enforceable between the parties.

The power to transfer title free of defect, authority such as the *Macy* decision and the transferor's creditor's right to disregard the transfer and to levy on the goods,⁴¹ compel the conclusion that "ineffective" means voidable. Furthermore, Comment 2 to section 6-104 makes clear the Code position that only creditors of the transferor, as defined in section 6-109(1), may take advantage of any non-compliance.

The aggrieved creditor of the transferor has the right to treat the non-complying transfer as ineffective and therefore as voidable. It remains to be considered how this right may be exercised and to what extent it will provide satisfaction of a claim.

Article 6 does not provide any specific means to enforce the substantive rights established when there has been a non-complying transfer. This absence of specific remedial provisions may cause confusion concerning the meaning

³⁵ See, e.g., Ala. Code Ann. tit. 20, § 10 (repealed 1967).

³⁶ *Johnston Bros. Co. v. Washburn*, 12 Ala. App. 311, 77 So. 461 (1917). (Violation of bulk sales law creates a rebuttable presumption of fraud.) *Mach v. Baum*, 98 Misc. 607, 163 N.Y.S. 145 (Sup. Ct. 1917). (Sale in violation of bulk sales law is *ipso facto* null and void.)

³⁷ This term appears only in §§ 6-104, 6-105.

³⁸ See note 35 supra, and accompanying text.

³⁹ U.C.C. § 6-110(2).

⁴⁰ 198 Pa. Super. 436 (1962). The case concerned an executed contract for the sale of a service station. The controversy arose when the buyer attempted to open judgment on a note that he had given the seller as consideration for the transfer and on which a judgment had been entered. Non-compliance was not a sufficient ground to have the judgment set aside. The case is correct on its merits, but may have gone too far in dicta which stated that compliance with the bulk sales law must be a condition precedent in the sales agreement for a buyer to be able to avoid the transfer. Between the parties, under Article 6, the contract would be enforceable. However, if the contract is still executory and the seller refuses to supply the necessary list of creditors, he would be disregarding a statutory obligation and thus acting in bad faith. Such bad faith is a violation of the duty to perform all contracts in good faith. See U.C.C. § 1-203. In such a case, the buyer should be able to avoid the contract.

⁴¹ See U.C.C. § 6-104, Comment 2.

of the rights conferred, particularly regarding the extent to which these rights may be exercised to satisfy a claim.⁴² The Code states that a creditor may levy on the goods, but does *not* say that this action must be for the benefit of all creditors. It appears that a creditor who moves fast and attaches first will be able to obtain *full satisfaction* of his claim, at least up to the value of the assets transferred, while the slower creditor may receive little or nothing.⁴³ This construction follows the Uniform Fraudulent Conveyance Act, which granted an individual creditor the right to set aside a conveyance to the extent necessary to satisfy his claim.⁴⁴

To date, no Code cases have arisen examining only the question of the extent of recovery that may be had by the first of several creditors to attack a non-complying transfer. However, in *Bomanzi of Lexington, Inc. v. Tafel*⁴⁵ the Kentucky Court of Appeals did consider the extent of liability of a bulk

⁴² Where pre-Code bulk sales laws did not provide for remedial action, the courts found no difficulty in resorting to statutes which provided for general equitable relief. See, e.g., *Settegast v. Second Nat'l Bank*, 126 Tex. 330, 87 S.W.2d 1070 (1935). Comment 2 to U.C.C. § 6-104 implies that equity jurisdiction for the appointment of a receiver should be continued, or established if not previously existing in the jurisdiction. This Comment states that a creditor may disregard the transfer and levy on the goods as still belonging to the transferor, "*or a receiver representing them can take by whatever procedure the local law provides.*" (Emphasis added.) This Comment has been the basis for the appointment of a receiver to take charge of property allegedly transferred in violation of Article 6. *Belber v. H.S.F., Inc.*, 26 Pa. D. & C.2d 796 (Montgomery County Ct. 1960). In so deciding the court dismissed preliminary objections which contended that the plaintiff-creditor had an adequate remedy at law which would prevent the use of a court's equity powers.

⁴³ *Lazar v. Towne House Restaurant Corp.*, 5 App. Div. 2d 794, 171 N.Y.S.2d 334 (Sup. Ct. 1958), *aff'd* 6 N.Y.2d 923, 161 N.E.2d 211 (1959). In an action to set aside a conveyance as fraudulent, the trial court granted judgment to the creditor as an individual but not as a representative of the entire class.

In an action for conversion where a bulk transferee had disposed of the goods, and where one creditor sued but other creditors were not made party to the action, it was held that the diligent creditor could have full recovery so long as the debt did not exceed the fair market value of the stock of merchandise transferred. *Peter's Branch Int'l Shoe Co. v. Gunn*, 121 Miss. 679, 83 So. 742 (1920).

⁴⁴ Uniform Fraudulent Conveyance Act § 9(a) states:

Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of purchase, or one who has derived title immediately or mediately from such a purchaser, (a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim. . . .

A matured claim, as used in § 9(a), is one which entitles the claimant to a present recovery.

Section 10 of the same Act states:

Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,

- (a) Restrain the defendant from disposing of his property,
- (b) Appoint a receiver to take charge of the property,
- (c) Set aside the conveyance or annul the obligation, or
- (d) Make any order which the circumstances of the case may require.

As used in this section, a claim which is not matured is contingent.

⁴⁵ 415 S.W.2d 627 (Ky. Ct. App. 1967).

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transferee where there has been non-compliance with Article 6. The case also raised the question of the extent of recovery that may be had by a single attacking creditor. The plaintiff was a creditor and shareholder in the transferor-corporation. The transferor was heavily indebted to its shareholders as well as to other creditors. One of its major non-shareholder creditors offered to invest a substantial sum of money in a new corporation in exchange for a transfer of all the indebted corporation's assets. The transferee was to assume all debts of the transferor except those owed to shareholders. All shareholders except the plaintiff surrendered their debts and the transfer was made. Plaintiff protested and brought suit alleging, *inter alia*, that a bulk sale had been made without compliance with Article 6.⁴⁶ The court did not find it necessary to consider the effect of non-compliance, but based its decision on one of the plaintiff's other counts, a preferential transfer in contemplation of insolvency.⁴⁷ Although Kentucky has enacted Article 6, including optional section 6-106, the court of appeals reversed the trial court's judgment against the transferee for the full amount of the plaintiff's claim. Relying on cases decided under an earlier bulk sales act, the court held that the buyer was a receiver and had only to make a proper accounting. The plaintiff's recovery was limited to the pro rata share which she would have received had the transferor been liquidated and all creditors who did not waive their debts been satisfied according to any priorities.⁴⁸ The decision appears patently erroneous because, under sections 6-104 and 6-105, the plaintiff did have a right to treat the transfer as ineffective and to have her entire claim satisfied.⁴⁹ The Code has adopted the questionable policy of preferring the creditor who is quick to assert his rights.⁵⁰ The application of this policy will cause inequi-

⁴⁶ *Id.* at 629.

⁴⁷ Such a transfer is a violation of Ky. Rev. Stat. Ann. § 378.060(1963), which states: Any sale, mortgage or assignment made by a debtor and any judgment suffered by a defendant, or any act or device done or resorted to by a debtor, in contemplation of insolvency and with the design to prefer one or more creditors to the exclusion, in whole or in part, of others, shall operate as an assignment and transfer of all the property of the debtor, and shall inure to the benefit of all his creditors, . . . in proportion to the amount of their respective demands including those which are future and contingent. . . .

⁴⁸ 415 S.W.2d at 631.

⁴⁹ The statute on which the *Bomansi* court relied, Ky. Rev. Stat. Ann. § 378.060 (1963), *supra* note 47, presents a conflict with U.C.C. §§ 6-104 and 6-105 insofar as their respective remedial provisions are concerned. If a seller transfers his property to a creditor in satisfaction of an antecedent debt and the transfer is in contemplation of insolvency and with the design to prefer the transferee creditor over other creditors, there is a violation of § 378.060. There may also be non-compliance with Article 6. Under § 378.060, the transfer inures to the benefit of all creditors of the seller. However, if one creditor levies on the property before the others, Article 6 gives him full recovery. Section 378.060 and U.C.C. §§ 6-104 and 6-105 are thus in conflict in the given situation. It is submitted that U.C.C. § 10-103 repeals that part of § 378.060 which provides that the transfer inures to the benefit of all creditors of the transferor. This conflict exists only if there is non-compliance with Article 6. The Code does not provide any new substantive rights when there has been compliance. The best resolution of the conflict seems to be the application of § 378.060 where there has been compliance, but that statute should not be applied where Article 6 has not been complied with.

⁵⁰ The same policy was adopted in the Uniform Fraudulent Conveyance Act in 1918. See §§ 9(a) and 10 of the Act at note 44 *supra*.

table results and thus it is not unlikely that courts will avoid a proper interpretation of the remedial provisions of Article 6 or will not apply those provisions at all.

B. *Where Optional Section 6-106 Has Been Enacted*

Where the New York form, sections 6-104 and 6-105, has been supplemented by the enactment of optional section 6-106, the so-called Pennsylvania form, a new duty and *personal* liability are placed on the transferee.⁵¹ The liability, however, is not so broad as that imposed by the original Pennsylvania statute upon which it is based.⁵² That statute made a vendee personally liable for non-compliance to the extent of the fair value of all property bought or sold.⁵³ The Code imposes personal liability only up to the amount of the new consideration, regardless of what relationship this consideration bears to the fair value of the property transferred.⁵⁴ The Pennsylvania form rendered the vendee liable to *all* of the vendor's creditors. Article 6 strictly limits liability to those creditors either appearing on the list of creditors prepared pursuant to section 6-104 or responding to notice given pursuant to section 6-107.⁵⁵ Section 6-106(1) does state that the liability of the transferee runs to all holders of such debts, but the phrase *such debts* refers only to debts owed creditors appearing on the creditor list or responding to notice.⁵⁶ Any

There is some authority for the position that the "New York form" does not favor the diligent creditor, but rather is a legislative attempt to put all creditors on an equal footing. *Middle Tenn. Mills v. Rocky River Coal & Lumber Co.*, 177 Tenn. 31, 145 S.W.2d 787 (1940). In this case, the court treated the transferred assets as a trust fund for the benefit of all creditors. Though the result may seem desirable, it does not follow the majority rule under the New York form.

⁵¹ The new duty imposed on the transferee by optional § 6-106 concerns the disposition of the proceeds of the sale. Where this section has been enacted it is the duty of the transferee to assure that the new consideration is applied to pay the debts of the transferor which are either shown on the list furnished by the transferor or are filed in writing pursuant to the notice required by § 6-107. This duty may be fulfilled by direct payment to the transferor's creditors or, if optional subsection (4) has been enacted, by paying the consideration into the court of the county where the transferor has his principal place of business. If the transferee pays the proceeds into the court, he must do so within ten days of taking possession of the goods and he must notify those to whom his duty runs that this action has been taken.

It has been stated that under the New York form a transferee does not have personal liability, but that he is a mere receiver. The statement is correct but incomplete. The non-complying transferee is personally liable for conversion under the New York form if he disposes of the subject matter of the transfer. *Settegast v. Second Nat'l Bank*, 126 Tex. 330, 87 S.W.2d 1070 (1935).

⁵² See Pa. Stat. Ann. tit. 69, § 523 (repealed 1953).

⁵³ *Wolfe v. Millers Garage, Inc.*, 89 Pa. D. & C. 199 (Cumberland County Ct. 1954).

⁵⁴ If the transfer is not for a fair consideration it will be subject to attack as fraudulent under the Uniform Fraudulent Conveyance Act.

⁵⁵ U.C.C. § 6-106, Comment 3 states in part:

[N]otice 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).

The reference to creditors who may be identified under subsection (1) is to creditors who appear on the list furnished pursuant to § 6-104 or who file in writing in the place stated in the notice. See U.C.C. § 6-104(1).

⁵⁶ *W. Willier & F. Hart*, supra note 4, ¶ 61.06[3].

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single creditor can enforce this liability, but unlike the recovery available under sections 6-104 and 6-105, any action under section 6-106 must be for the benefit of *all* the listed or responding creditors and may not be for the individual's benefit.⁵⁷ The personal liability imposed by section 6-106 is only operative where there has been at least partial compliance with sections 6-104 and 6-107.⁵⁸ When there is compliance⁵⁹ with these sections, the transfer will be effective⁶⁰ against all creditors and liability will be limited to that imposed by section 6-106. The maximum liability is the amount of new consideration paid by the transferee. However, under section 6-109(2), the transferee is entitled to credit for sums paid in good faith to particular creditors of the transferor. The good faith requirement is an honest belief, at the time such payments were made, that they were properly payable. The total of such payments is deducted from the new consideration to determine the final amount of personal liability.

The Code does not state whether all creditors must be joined when a single creditor brings an action under section 6-106. It has been suggested that joining all similarly situated creditors should not be required, and that a judgment should be drawn broad enough to allow all creditors to recover.⁶¹ The same commentators have suggested that compulsory joinder would result in extreme difficulty. It is submitted that compulsory joinder would not result in extreme difficulty, particularly where only liquidated claims are concerned.⁶² The attacking creditor will, by definition,⁶³ have access to the

⁵⁷ The last sentence of § 6-106(1) states, in effect:

[The] duty of the transferee [to pay the debts of the transferor] runs to all [creditors shown on the list furnished by the transferor who respond to notice sent pursuant to section 6-107], and [this duty] may be enforced by any [of said creditors] for the benefit of *all*. (Emphasis added.)

⁵⁸ The duty to distribute new consideration properly runs only to creditors listed under § 6-104 or responding to notice given pursuant to § 6-107. See notes 55 and 57 *supra*. Failure to observe this duty results in personal liability. However, there can be no such liability if no list is drawn up or no notice is published, because there would be no creditors with standing to enforce the duty.

The class of creditors protected under § 6-106(1) should be the same as that class protected under §§ 6-104 and 6-105 because the list prepared pursuant to § 6-104 is the basis for § 6-106(1) liability. For this reason, it may be expected that a court will hold the failure to prepare such list to be a breach of a duty imposed by § 6-106(1). The basis for such a decision would be that one cannot avoid a personal liability through his own refusal to comply with the statute. In such a case, it would be logical to impose personal liability to all creditors up to the amount of new consideration.

⁵⁹ The notice outlined in § 6-107 must be given ten days before the transferee pays for the goods or takes possession of them, whichever happens first. See U.C.C. § 6-105. This interval is essential for the notice to be valid and for the transfer to be effective.

⁶⁰ U.C.C. § 6-106 does not state that a transfer is effective if all other sections are complied with but the new consideration is misapplied. The validity of the sale is clear because of the common law right to alienate property. If there is no clear derogation of this right, there is no basis for denying the effectiveness of its exercise. See W. Willier & F. Hart, *supra* note 4, ¶ 61.06[3].

⁶¹ *Id.*

⁶² A liquidated claim is one in which the total liability has been fixed by agreement, by operation of law or may be ascertained by application of arithmetic principles. Such claim is not a product of admitted liability, but only of its extent if liability does in fact exist. This type of claim usually arises *ex contractu* and not *ex delicto*.

names and addresses of all creditors within the protected class. It would be very easy to notify and compel joinder of these parties, forcing them to prove their claims.⁶⁴ Since in any event all attacking creditors in this class must act within six months,⁶⁵ it is submitted that in actions under section 6-106 courts should require the joinder of all creditors. The pro rata distribution required by section 6-106(3) could then be effectuated more quickly.⁶⁶

III. RIGHTS OF THE CREDITOR OMITTED FROM THE SECTION 6-104 LIST

If the transferee attempts to comply with Article 6 but the transferor gives him an incomplete or an erroneous list of creditors, the transfer is *effective* unless it can be shown that the transferee had knowledge of the error or omission.⁶⁷ This protection given the transferee is based on early constitutional decisions restricting the application of bulk sales laws. The general view was that a purchase of a stock of goods was an act innocent in itself and that for this reason the fraud of the vendor could not reasonably detract from the title transferred to an innocent buyer. To permit less than full title to pass would be an unreasonable exercise of police power.⁶⁸ Thus, a creditor who has been omitted from the list and who, for constitutional reasons, may not treat the transfer as ineffective, is restricted to an action against the transferor. The vendor, by omission of one of his creditors from the verified list, renders himself liable to criminal prosecution for false swearing.⁶⁹

There are two cases in which the transferee may be liable both for the assets transferred *and* for the new consideration. The first case will occur when there is non-compliance with section 6-105 because the notice required by section 6-107 was not sent ten days before the transferee took possession or paid for the goods. Therefore, the transfer will be ineffective, and section 6-106 liability is incurred if the new consideration is not properly distributed. In the second case, if the transferee knows of an inaccuracy (*e.g.*, an attempt to defraud one creditor) in the list prepared pursuant to section 6-104, the transfer is rendered ineffective by section 6-104(3), and again section 6-106

⁶³ The attacking creditor either will be listed on the § 6-104 list of creditors or will have responded to notice sent pursuant to § 6-107. These groups of creditors are the only ones who can benefit from an action under § 6-106. See note 58 *supra*. The names and addresses of these creditors must be kept available to all creditors for six months. U.C.C. § 6-104(1)(c).

⁶⁴ Such procedure would enable a court to determine the transferee's total liability in one action. Furthermore, the statute speaks in terms of one creditor "enforcing" the transferee's duty for the benefit of all creditors. Because there is no common basis for the claims against the transferor, it is difficult to understand how one creditor can determine what liability can be enforced without joining all creditors.

⁶⁵ See U.C.C. § 6-111.

⁶⁶ If disputed or contingent claims are asserted it may be necessary to form a decree directing that the total amount of these claims be held in escrow until liability is determined. In the event that such claims are large enough to deny those holding liquidated claims full recovery, a decree may be drawn to permit access to the assets after the posting of bond up to the total of the disputed contingent claims.

⁶⁷ U.C.C. § 6-104(3). The knowledge spoken of in this section is actual knowledge and does not include notice or reason to know. See U.C.C. § 1-201(25).

⁶⁸ See, *e.g.*, *Coach v. Gage*, 70 Ore. 182, 138 P. 847 (1914).

⁶⁹ See U.C.C. § 6-104, Comment 3.

liability is incurred if the new consideration is not properly distributed. In the latter case the Code penalizes heavily what may amount to actual fraud, but the former case imposes double liability because of a simple timing error on the part of the transferee.⁷⁰ The Code does not refer to these possibilities of double liability and the question never appears to have arisen under either Article 6 or earlier bulk sales laws.⁷¹ It is submitted that the Code should be construed to avoid multiple liability in cases of good faith timing errors. Where a good faith attempt has been made to comply with section 6-105, the only liability should be for any misapplication of the new consideration. However, in cases of actual fraud the courts may impose multiple liability. Here, there is little reason to excuse the transferee. More importantly, the imposition of multiple liability may have a preventive effect which will promote the Code policy of protecting the transferor's creditors. In any event, multiple liability should be imposed only when necessary to satisfy the just claims of the creditor of the transferor. Such liability should not be used for punitive reasons to give the protected creditors more than their actual damage.

IV. INTERESTS SUPERIOR TO THOSE OF A TRANSFEROR'S CREDITOR

A. Creditors of the Transferee

A recent case, *Automatic Canteen Co. v. Wharton*,⁷² has considered what is essentially the problem of priority of rights in transferred property when creditors of the transferee levy before creditors of the transferor. In this case an insolvent subsidiary corporation attempted to dissolve and become a department within its parent. The transaction involved a bulk transfer, but there was no compliance with the statute.⁷³ The parent corporation was sub-

⁷⁰ The timing error may stem from poor draftsmanship. U.C.C. § 6-105 requires that notice be given at least ten days before the transferor takes possession of the goods or pays for them. The date by which notice must be sent therefore is calculated from the date of payment or transfer of possession, whichever occurs first. Although Comment 1 to § 6-105 states that "[t]his section is the heart of the Article," nowhere does this important section define what constitutes payment, nor do there appear to be any clear guidelines. Whether earnest money, the payment of a part of the price of goods sold for the purpose of binding the contract, or part payment will cause the statute to come into play is unclear. Two states, Connecticut and Wisconsin, have adopted non-uniform sections dealing with this problem. The Connecticut statute requires a deposit of more than ten percent of the purchase price, and Wisconsin requires "the major part of the purchase price" to be paid before the notice section is to apply. Also, in Connecticut an escrow arrangement will not require notice. The Permanent Editorial Board has stated that these variations are unnecessary, but the Board has not acted to resolve the unanswered question. Because it may be commercially reasonable to make a deposit prior to obtaining a list of creditors, it is submitted that a proper construction of payment would not include earnest money. It is suggested that since § 6-105 appears to speak in terms of a transfer of possession, the contemplated meaning of payment is final payment, or at least some substantial transfer of more than earnest money where the price is to be paid over a period of time. See R. Duesenberg & L. King, *Sales and Bulk Transfers Under the Uniform Commercial Code* § 15.04(3) (1966).

⁷¹ It is not surprising that the question of double liability was never considered under pre-Code law. No earlier bulk sales act combined the New York form with the Pennsylvania form of liability.

⁷² 358 F.2d 587 (2d Cir. 1966).

⁷³ Ind. Ann. Stat. § 33-201 (repealed 1964). The statute has been held to treat a non-

sequently put into involuntary bankruptcy under Chapter X of the Bankruptcy Act. In an action by a creditor of the transferor to impress a constructive trust on the proceeds from the sale of the transferor assets, it was held that he had a right to the proceeds superior to that of the transferee's trustee. The court concluded that the insolvent transferee corporation's directors held the assets in trust for the transferor's creditors as a class. Because the bankrupt transferee held the assets in constructive trust for the creditors of the transferor, and because the trustee had no greater right to the assets than did the bankrupt or any creditor of the bankrupt, the transferee's trustee also held the assets and their proceeds in trust for the creditors of the transferor. However, the decision to create a constructive trust was based primarily on policy grounds and not on a violation of the bulk sales act, as the court explicitly rejected this theory of the transferor's creditor.⁷⁴ However, the court apparently conceded that had the transferor's creditors acted before the trustee's lien arose (the date of bankruptcy) they could have prevailed on a theory of non-compliance with the bulk sales act, as well as on the constructive trust theory by which they did prevail.⁷⁵ In essence the court held that *the transfer was voidable but could not be avoided after the trustee's lien arose.*⁷⁶ If no bankruptcy in fact occurs, and if the transferor's creditor levies on the property prior to a levy by the transferee's creditor, the transferor's creditor will have a superior right to the property. Conversely, if the transferee's creditor acts first, his levy will establish a right to the assets superior to that of the transferor's creditors. The theory is that the transfer is voidable, and if the transferor's creditor acts first, the transfer is voided to the extent of his claim. When the transferee's creditor subsequently attempts to attach the assets, the transferee's rights are no longer existent and nothing remains for his creditor to attach. Under *Wharton*, if the transferee's creditor acts first, the transferee will still have rights in the goods and these will inure to the benefit of the transferee's creditors. The transferee's rights in the assets can be defeated by the transferor's creditors, but the transferee's creditor's rights, once established by levy, cannot be so defeated. Thus the creditors of the transferee have greater rights in the assets than does the transferee himself. This is consistent with the Article 6 policy of favoring the diligent creditor. The principle that first in time is first in right reigns supreme.⁷⁷

complying transfer as voidable at the instance of a seller's creditor. See, e.g., *Rothchild v. State*, 200 Ind. 501, 505, 165 N.E. 60, 61 (1929).

⁷⁴ 358 F.2d 587, 589 (2d Cir. 1966).

⁷⁵ *Id.*

⁷⁶ This is the heart of the decision regarding priority of rights. Under § 70(c) of the Bankruptcy Act, 11 U.S.C. § 110(c) (1964), the trustee has the rights of actual and hypothetical lien creditors of the bankrupt. When the court stated that the trustee could not prevail if the transferor's creditors levied first, it was saying in effect that the transferee's creditor's rights are subordinate to the transferor's creditors' rights when the latter act first. The most diligent creditor may be satisfied to the exclusion of all others. Cf. *In re Dee's, Inc.*, 311 F.2d 619 (3d Cir. 1962).

⁷⁷ Giving the transferor's creditors' rights to transferred property superior to the rights of a transferee's creditors would comport with the Code's only explicit protection of persons with a defective title to transferred assets. Under § 6-110(2) a purchaser for value in good faith and without notice takes free of any defect in title arising from non-

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It is submitted that the emphasis on favoring the diligent creditor conflicts with another Code policy, and with the primary purpose of Article 6, the prevention of commercial fraud. Without the fictional trust, the *Wharton* court could not protect the transferor's creditors as Article 6 is designed to do. A dishonest seller could transfer his assets to a friendly, insolvent buyer who proceeds into bankruptcy. The seller then disappears leaving his creditors unpaid. Perhaps this is the result which the *Wharton* court sought to prevent when it created a constructive trust for the benefit of the transferor's creditors. The decision gives an equitable result and attains the goals of Article 6 by protecting the transferor's creditors. The same result could have been reached in accord with the Code and without the use of the trust fiction. The transfer being ineffective against the creditors of the transferor, it should also be voidable against the lien creditors of the transferee. These creditors would have no more rights in the assets than the transferee. The policy and logic of the Code demand that a transferor's creditors have rights to transferred assets superior to any right of an attacking creditor of the transferee. Furthermore, such rights can be conclusively established by the refusal to give the transferee's creditors greater rights in the transferred assets than the Code gives the transferee.

B. *The Transferee's Trustee in Bankruptcy*

In two instances the rights of a transferor's creditors may be in conflict with and subordinate to the rights of a transferee's trustee in bankruptcy. Section 67(a)(1) of the Bankruptcy Act renders null and void any judicial lien against the bankrupt's property, whether obtained by attachment, judgment or levy, if at the time the lien was created the transferee was insolvent and if within four months of the creation of the lien a petition in bankruptcy is filed.⁷⁸ Thus if a transferor's creditor levies on transferred assets while the transferee is insolvent and within four months of the levy a petition is filed for or against the transferee, the levy of the transferor's creditor may be avoided by the trustee. The third-party rights of the transferor's creditors do not survive the bankruptcy. In the second instance of conflicting rights, if the

compliance. No creditor could qualify for the protection of § 6-110(2) because a creditor who attaches does not gain an interest in an asset by a voluntary transaction, and he thus cannot be a purchaser. See U.C.C. § 1-201(33); *National Shawmut Bank v. Vera*, 352 Mass. 11, 14-15, 223 N.E.2d 515, 517 (1967). The transferee's creditors cannot qualify for the only explicitly protected class in Article 6, and no court should create a new class of protected parties. Pre-Code authority standing for the proposition that an execution creditor is a bona fide purchaser for fair consideration should not now be followed. See *City of New York v. Johnson*, 137 F.2d 163 (2d Cir. 1943).

⁷⁸ Bankruptcy Act § 67(a)(1), 11 U.S.C. § 107(a)(1) (1964) states:

Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent. . . .

The section refers to *every* lien, and not only to liens held by creditors of the bankrupt. Therefore the liens which the transferor's creditors attempt to establish fall within the scope of this section, and are void if all other conditions are met. The principle that first in time is first in right is overridden by § 67 of the Bankruptcy Act. See *In re Vanity Fair Shoe Corp.*, 84 F. Supp. 533 (S.D.N.Y. 1949).

lien is created within one year of the filing of the petition, it is fraudulent under section 67(d)(2) where the debtor is or will be thereby rendered insolvent.⁷⁹ In this situation the transfer can be avoided by the trustee under section 70(e).⁸⁰

Therefore, the substantive rights established by a non-complying transfer do not survive the transferee's bankruptcy under the given circumstances and Article 6 is of no avail to the transferor's creditors when there is a conflict with the transferee's trustee in bankruptcy.⁸¹

V. SALES AT AUCTION

Section 6-108 brings auction sales within the scope of Article 6, but does not impose any liability on the auctioneer⁸² unless he has *actual knowledge*⁸³ that the transfer is in bulk. If the auctioneer has such knowledge and fails to comply with the requirements of section 6-108, he is *personally* liable to the

⁷⁹ Bankruptcy Act § 67(d)(2), 11 U.S.C. § 107(d)(2) (1964) states:

Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent. . . .

The term transfer used in § 67(d)(2) is defined in § 1(30) and includes an *involuntary* disposition of property. Therefore an attachment or levy against the transferor's property is a transfer and falls within the scope of § 67(d)(2). There is no fair consideration for an attachment by a transferor's creditor.

⁸⁰ There seem to be few instances in which a preferential transfer would occur because such a transfer must be to or for the benefit of a *creditor of the bankrupt*. See § 60(a)(1) of the Bankruptcy Act, 11 U.S.C. § 96(a)(1) (1964), quoted at note 9 supra. The transferor's creditor is not a creditor of the bankrupt unless the bankrupt owed a debt to him at the time of the transfer. See 3 W. Collier, Bankruptcy ¶ 60.16 n.3 (14th ed. 1968). Creditor, as used in § 60(a)(1), is defined in § 1(11) and includes anyone who owes a debt, demand or claim provable in bankruptcy. Debts provable in bankruptcy are defined in § 63. It does not appear that the claim of a transferor's creditor will be within any of the approved list of debts found in § 63.

In at least one instance a transferor's creditor will have a claim provable in bankruptcy. Where the transferee assumes the transferor's debts, the claims are provable in bankruptcy. In *re Johnson-Hart Co.*, 34 F.2d 183 (D. Minn. 1929). If the transferee assumes the debts owed to all of the transferor's creditors, the transfer will be excluded from the operation of Article 6. U.C.C. § 6-103(6), (7).

⁸¹ The decision in *Wharton* cannot be expected to provide relief from the general rule that the transferor's creditor's rights do not survive the petition in bankruptcy. The constructive trust, or trust fund theory, relied upon by the *Wharton* court has not been followed by that or any other court since the decision was handed down.

⁸² U.C.C. § 6-108(3) defines an auctioneer as "[t]he person or persons other than the transferor who direct, control or are responsible for the auction. . . ."

⁸³ The requirement that the auctioneer have actual knowledge that the transfer is in bulk places a heavy burden of proof on the attacking creditor. He must show that the auctioneer knew both the facts and the law surrounding the bulk transfer. The language of the statute requires that the auctioneer know the facts and the law so that he may make a legal determination that a bulk transfer will take place. This decision must be made at least ten days before the auction so notice may be sent to creditors. The auctioneer will either have to learn Article 6 and its application, or will simply ignore it thereby never having the requisite knowledge to incur liability. Comment 2 to U.C.C. § 6-108 therefore is misleading in its assumption that in most cases the auctioneer will be aware that a bulk sale is to take place.

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transferor's creditors as a class. The clear language of the section indicates that the individual creditor cannot have recovery against the auctioneer, but rather that a class action must be brought.⁸⁴ The auctioneer's liability is limited to the net proceeds of the auction.⁸⁵

VI. RIGHTS WHERE THERE HAS BEEN COMPLIANCE WITH ARTICLE 6

Article 6 nowhere requires the transferee to pay a fair consideration for the merchandise he receives. Thus, without violating the Code a vendor may sell his assets for an inadequate price and receive proceeds insufficient to pay his creditors. Furthermore, where optional section 6-106 has not been enacted, the seller may honestly dissipate the proceeds without heeding the claims of existing creditors.

The Code provides a ten-day notice period prior to the bulk transferee's paying of the proceeds or taking possession.⁸⁶ The Article further provides for the preservation of the list of creditors and property schedule for six months.⁸⁷ During this time the creditors may inspect the property list to determine whether or not a fair consideration is being paid. When the consideration is inadequate⁸⁸ the transfer will be a violation of the Uniform Fraudulent Conveyance Act if the vendor is or will thereby be rendered insolvent.⁸⁹ The

⁸⁴ It is submitted that the argument at pp. 291-92 *supra*, regarding joinder of all creditors for an action under U.C.C. § 6-106, applies equally to an action brought under U.C.C. § 6-108.

⁸⁵ See U.C.C. § 6-108(4).

It is to be noted that this subsection assures good title to one who purchases at auction. Creditors of the transferor have no action against such purchasers, even if they have knowledge that there has been non-compliance with Article 6. However, U.C.C. § 1-203 requires that all contracts be performed in good faith. It is at least arguable that one who buys at auction with actual knowledge that Article 6 has not been complied with is not acting in good faith. Because the Code is silent regarding the liability which may follow transactions performed in bad faith, a court might infer that the breach of the duty to act in good faith results in a defective title. The protection given by U.C.C. § 6-108(4) to purchasers at auction may then be given only to good faith purchasers, those purchasing without knowledge of non-compliance. It is submitted that such a construction would amount to the imposition of a liability which the Code draftsmen did not intend, as is evident from their selection of the term purchaser rather than the phrase good faith purchaser. However, the protection given under U.C.C. § 6-108(4) should not be permitted to allow a sham transaction in which the purchaser buys at bargain prices or with secreted funds of the transferor with the intent to transfer the assets back to the transferor. Such a bad faith transaction should render the buyer's title voidable and make him liable to the transferor's creditors for conversion if he disposes of the goods.

⁸⁶ See U.C.C. § 6-105, quoted at note 6 *supra*.

⁸⁷ See U.C.C. § 6-104(1)(c).

⁸⁸ U.F.C.A. § 3 states:

Fair consideration is given for property, or obligation,

(a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

(b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

⁸⁹ U.F.C.A. § 4 states:

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard

creditors may then act under Section 9 of the U.F.C.A. to avoid the transfer. The creditor wishing to attack a transfer as fraudulent under the U.F.C.A. should not await the end of the six-month statute of limitations found in Section 6-111 of the Code. Although that section applies only to Article 6, because the U.F.C.A. does not contain its own statute of limitations there is a substantial likelihood that a court will hold that the creditor who waits longer than six months to assert his claim has waived his rights or may be estopped from asserting them.

A transfer for inadequate consideration which renders a debtor insolvent will be fraudulent and voidable under Section 70(e) of the Bankruptcy Act.⁹⁰ If bankruptcy proceedings are instituted against the transferor, the transfer may be avoided and the trustee will have available the machinery necessary to assure a fair distribution of the proceeds among the various creditors according to their priorities.

If a transfer is made to a creditor on account of an antecedent debt and the transferor is insolvent at the time of the transfer, and a petition in bankruptcy is filed for or against the transferor within four months of the transfer, and the effect of the transfer is to enable the transferee creditor to obtain a greater percentage of his debt than some other creditor of his class, the transfer will constitute a preference under Section 60(a) of the Bankruptcy Act and may be avoided by the trustee.⁹¹ This result holds even where there is compliance with Article 6 and the outstanding debt was greater than the value of the assets transferred. Thus, the petition in bankruptcy is a remedy available to the transferor's creditors where there has been compliance with Article 6. A creditor should act quickly on receipt of the section 6-105 notice because a proceeding under section 60(a) must be initiated within four months of the alleged preference. The six-month statute of limitations in section 6-111 is of no avail when the action is brought under the Bankruptcy Act.⁹²

Where optional section 6-106 has not been enacted and the seller is not rendered insolvent or no bankruptcy proceedings are set in motion, it seems that the creditor has no remedy except to seek the proceeds in the hands of

to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

⁹⁰ Bankruptcy Act § 70(e)(1), 11 U.S.C. § 110(e)(1) (1964) states:

A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this title which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this title, shall be null and void as against the trustee of such debtor.

The trustee is given the rights which any actual creditor of the bankrupt may have under state law. If any creditor could attack the transfer as a violation of § 4 of the U.F.C.A., the trustee could do likewise.

⁹¹ See note 9 *supra*.

⁹² It does not appear that a creditor will suffer substantially if he waits for the expiration of the four-month period in hopes of satisfying his claim in full during the remaining two months by showing some non-compliance. Such planning is ill-advised. Other creditors, seeing what has happened, will file a petition in bankruptcy and the levy will be voidable under § 67 of the Act. All the creditor will have achieved is a delay in receiving his share of the assets. Furthermore, it is likely that during the delay more debts will be incurred, thus reducing the percentage of recovery which the delaying creditor will receive.

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the seller. There is no guarantee that these proceeds will not be dissipated before the creditors act, nor is there any guarantee that the transferor will still be in the jurisdiction.⁹³

CONCLUSION

The rights of a transferor's aggrieved creditors under Article 6 are imperfectly defined. Where uncertainties exist, the Code should be construed to provide rights and remedies which will best prevent commercial fraud. In the following areas the Permanent Editorial Board should promulgate Code amendments to clarify creditor's rights and to assure uniformity:

1. The Article 6 definition of creditor should be drawn with reference to liquidated, unliquidated, absolute, fixed, contingent and involuntary claims.

2. Recognizing that in any event a creditor must act within six months of a non-complying transfer, and recognizing the inequity which may result when a single creditor is permitted full satisfaction of his claim, the Code should be amended to require any attacking creditor to join all other creditors so that each may receive some satisfaction from the available assets. The adoption of this suggested amendment would achieve the equality that is now available under the Bankruptcy Act, where all creditors share proportionately in available assets.

3. The principle of first in time, first in right should be abandoned where there is a conflict between creditors of the transferor and of the transferee. All creditors of the transferor who act within six months of the non-complying transfer should have a right to the assets superior to that of the creditors of the transferee. This proposed amendment, combined with the compulsory joinder which has been suggested, would assure the protection of the transferor's creditors and would greatly aid in the elimination of the commercial fraud which Article 6 is designed to prevent.⁹⁴

4. A definition of payment should be promulgated and adopted by all states so that prospective transferees can accurately determine the date from which the section 6-105 notice period must be measured. If notice is not sent ten days before payment or transfer of possession the transfer will be ineffective. It would be manifestly unreasonable to impose the sanction of an ineffective transfer on a transferee who was unable to determine accurately the proper notice period because the draftsmen failed to define the term payment.

5. Some positive duty of inquiry should be placed on auctioneers so they will feel constrained to comply with Article 6.

⁹³ As this discussion assumes compliance with Article 6, the transferor's creditors will have been sent notice at least ten days before the transfer or payment of the price. To avoid the possibility of dissipated proceeds or an absent debtor, upon receipt of the proceeds a creditor should act immediately to obtain a lien on the proceeds.

⁹⁴ Admittedly, the proposed change would permit fraud on the buyer's creditors. The buyer pays for the goods, the seller absconds with the proceeds which he receives, the seller's creditors will have a superior right to the assets, and the buyer's creditors are defrauded. The best solution to this problem appears to be to require that notice be sent to the buyer's creditors as well as the seller's. If the buyer's creditors recognize that the transfer will render the buyer incapable of meeting his debts as they mature, these creditors should be permitted to enjoy the transfer until their claims are satisfied.

"Ineffective," the new word of art adopted by the draftsmen to describe the voidability of non-complying transfers, is sufficiently clear to be uniformly understood and construed.

All states should be vigorously encouraged to adopt optional section 6-106 to insure control over the distribution of the proceeds of a transfer.

Those states which have not enacted the Uniform Fraudulent Conveyance Act should do so in order that transfers which comply with the Code but which render a seller insolvent may be set aside even if no bankruptcy proceedings are begun.

The tightness of the control suggested may cause complaint and delay, but this control over the transferor's dealings with his assets is fully warranted, for the transferor's first duty should be to those who have extended credit based on these assets.

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