Article 6: The Process and the Product--An Introduction

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ARTICLE 6: THE PROCESS AND THE PRODUCT—AN INTRODUCTION

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I.

Despite its small size and limited applicability, nearly every aspect of Article 6 has been the subject of continuing controversy.¹ Lawyers and other commentators have questioned the wisdom of virtually every one of the Article’s provisions, from its scope to its remedial scheme.² Many have questioned whether the Article

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1. Article 6 of the Uniform Commercial Code generally applies to bulk transfers. See U.C.C. § 6-102 (1987) (applicability of Article 6); id. § 6-103 (transfers excepted from the Article). A “bulk transfer” occurs when an enterprise whose principal business is the sale of merchandise from stock transfers a major part of its merchandise, supplies, materials, or other inventory in bulk and not in the ordinary course of business. See id. § 6-102(1), (3); see also infra text accompanying notes 101-07 (comparing the scope of revised Article 6 with that of the original Article). A bulk transfer is ineffective against, and can be avoided by, aggrieved creditors of the transferor unless the transferee, inter alia, gives advance notice of the transfer to the creditors. See U.C.C. §§ 6-104 comment 2, 6-105 (1987).

properly belongs in the Uniform Commercial Code or, indeed, anywhere in the statute books.3

The controversy surrounding Article 6 is not new. Early bulk sales legislation was challenged, sometimes successfully, as being unconstitutional;4 it was attacked as special interest legislation;5 it was belittled as unnecessary.6 The century-long history of bulk sales law has been characterized by strong differences of opinion over basic issues: Is there really a “bulk sales risk” worthy of legislative attention? If so, what is the precise nature of the risk and how serious is it? What is the most effective and appropriate way in which to minimize the risk?7

Mindful of the controversy surrounding Article 6 and of the nearly universal view that the language of Article 6 is in need of improvement, the Code’s sponsors, the National Conference of Commissioners on Uniform State Laws (the “Conference”) and the

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5. See, e.g., R. POUND, INTERPRETATIONS OF LEGAL HISTORY 113 (1946) (“organized pressure from groups having a common economic interest is the sole explanation of many things on the statute book. . . . Credit men’s associations [consisting of representatives of firms’ credit departments] have procured laws against the sale of stocks of goods in bulk.”); Note, The Application of Bulk Sales Statutes, 33 HARV. L. REV. 717, 718 (1920) (thinking it “probable that their passage has been due rather to private enterprise than to public need”)(footnote omitted).

6. “It seems doubtful, then, whether such an evil now exists as to render these statutes an expedient remedy. The real dangers for which such statutes might have been a wholesome remedy were largely removed by the Bankruptcy Act in 1898.” Note, supra note 5, at 718.

7. These differences of opinion help explain why organized efforts to revise “little” Article 6 have spanned about a decade and a half. The efforts began in the American Bar Association in the mid-1970s, see Hawkland, Proposed Revisions to U.C.C. Article 6, 38 BUS. LAW. 1729, 1730 n.5 (1983), and culminated in the approval of a repealer and revised Article 6 by the National Conference of Commissioners on Uniform State Laws in 1988 and the American Law Institute in 1989. Not much more than that amount of time was needed for the entire original Code to be drafted, reviewed, revised, and put into the form in which it was widely enacted. The creation of Article 2A and the revision of Article 2A each took about half as long as the revision of Article 6. See Boss, The History of Article 2A: A Lesson for Practitioner and Scholar Alike, 39 ALA. L. REV. 575, 584-96 (1988) (tracing the history of Article 2A from its beginnings in the American Bar Association in 1980 to the publication of the final text in 1987); Foreword to 1972 OFFICIAL TEXT AND COMMENTS, 1 U.L.A. XXVII-XXVIII (1989)(1966 report from Permanent Editorial Board led to establishment of Article 9 Review Committee, whose work was approved by the Code’s sponsors in 1971).
American Law Institute (the "ALI" or "Institute")\(^8\) set out in 1984 to revise the Article. By the time the dust settled five years later, the sponsors had withdrawn their support for Article 6 and encouraged those states that had enacted the Article to repeal it. For those states that may be disinclined to repeal Article 6, the sponsors promulgated a revised version of the Article, which is designed to afford better protection to creditors while minimizing the impediments to good-faith transactions.\(^9\)

The key provisions of the revised version are explained with care and clarity in two of the articles in this Symposium. Professor Fred Miller, a member of the Permanent Editorial Board for the UCC and vice-president of the Conference, addresses a variety of scope issues that proved difficult for the Drafting Committee to

8. The Conference's purpose is "to promote uniformity in the law among the several states on subjects as to which uniformity is desirable and practicable." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1989-90 REFERENCE BOOK 83 [hereinafter NCCUSL REFERENCE BOOK]. Its membership, which now approximates 300, is comprised of Commissioners, Life Members, and Associate Members. Commissioners are appointed by each state from among the members of the bar of that state. Each state determines the method by which its Commissioners are appointed, the number of Commissioners that will represent the state, and the term each Commissioner serves. Each Commissioner is entitled to a vote. On some issues, including final approval of an act, each state is entitled to one vote. Life Members are elected by the Conference; only those who have served as President of the Conference or who have been a Commissioner for at least twenty years are eligible to be elected. Life Members may participate in floor discussions and may vote; however, they may not participate in votes by the states. The Associate Members are the principal administrative officers of each state legislative reference bureau or comparable state agency. Associate Members may not vote.

In contrast to the Conference, the Institute is a nongovernmental, private body. More than two-thirds of its membership of approximately 3,000 is elected by its Council. In addition, justices of the United States Supreme Court, chief judges of federal circuit courts and state supreme courts, state attorneys general, presidents of state and several national bar associations, and deans of all ABA-approved law schools are members ex officio. The Institute's purpose is "to promote the clarification and simplification of the law and its better adaption to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." CERTIFICATE OF INCORPORATION (Feb 23, 1923) in AMERICAN LAW INSTITUTE, 63rd ANNUAL MEETING AMERICAN LAW INSTITUTE PROCEEDINGS 1986, 649 (1987).

The relationship of the Code's two sponsors with respect to the UCC dates back to the 1940s. During the Article 6 drafting project, the sponsors restated their agreement. See infra note 98.

9. U.C.C. Article 6 prefatory note (1988). As of this writing, only Utah has enacted revised Article 6. 1990 Utah Laws ch. 294. The version it enacted, however, is based upon the penultimate draft and not the official text. Compare id. with AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE, REPEALER OF ARTICLE 6—BULK TRANSFERS AND [REVISED] ARTICLE 6—BULK SALES (STATES TO SELECT ONE ALTERNATIVE), PROPOSED FINAL DRAFT (April 5, 1989) [hereinafter ALI DRAFT].
resolve.\textsuperscript{10} Professor Miller’s service on the Committee affords him particular insight into the thinking that lies behind the definition of “bulk sale” and the exclusion of particular types of transactions from the coverage of the revised Article. Chancellor William Hawkland is a leading expert on bulk transfers, having written extensively on Article 6, chaired the American Bar Association subcommittee whose work led to the establishment of the Drafting Committee, and served with distinction as reporter to the Drafting Committee.\textsuperscript{11} To a considerable extent the revision came from his word processor, and so his contribution to this Symposium—an explanation of the interaction between the compliance requirements of the revised Article and the remedies available in the event of noncompliance—is of special value.\textsuperscript{12}

The revision benefited from the comments and suggestions of a large number of people within the Conference, the Institute, and the ABA. Among them is Professor Douglas Heidenreich, whose correspondence with the reporters led to some important corrections and clarifications near the end of the drafting process. Professor Heidenreich has taken the occasion of this Symposium to reexamine the text of the revised Article, criticize the drafting style, and offer suggestions for further improvements.\textsuperscript{13}

Not surprisingly, the recommendations of the Code’s sponsors have not put an end to the controversy surrounding bulk sales legislation. To the contrary, several of the articles in this Symposium reflect the diversity of views concerning the utility of bulk sales legislation, the nature and extent of the risk posed by bulk sales, and the appropriate legislative response to perceived problems. Drawing from a report of the UCC Committee of the State Bar of California, Professor Bryan Hull presents a brief in support of re-


\textsuperscript{11} Hawkland’s thoughts on Article 6 may be found in the following, among others: Hawkland, Proposed Revisions to U.C.C. Article 6, 38 Bus. Law. 1729 (1983); Hawkland, The Trouble with Article 6: Some Thoughts About Section 6-104, 82 Com. L.J. 361 (1977); Hawkland, The Trouble with Article 6: Some Thoughts About Section 6-103, 82 Com. L.J. 113 (1977); Hawkland, Remedies of Bulk Transfer Creditors Where There Has Been Compliance with Article 6, 74 Com. L.J. 257 (1969).

\textsuperscript{12} See Hawkland, Compliance With Revised Article 6 of the Uniform Commercial Code, 41 Ala. L. Rev. 605 (1990).

Professor Hull is no stranger to Article 6, having participated in the work of the state bar committee, some of whose concerns led to changes in the text and comments of the revised Article.

The arguments for repeal are considered and rejected by Professor Morris Shanker, who sees Article 6 as essential to the proper protection of unsecured creditors. Professor Shanker argues that the recommendation for repeal evidences an "anticreditor" attitude on the part of the Conference, an attitude he has lamented on previous occasions\(^\text{15}\) and thinks carries over into the proposed revision.\(^\text{16}\) Dennis Kayes, who played an active role in the American Bar Association Ad Hoc Committee on Bulk Transfers, agrees with Shanker about the need to regulate bulk sales\(^\text{17}\) and, like Shanker, finds the proposed revision to be seriously deficient. But despite their general agreement, Shanker and Kayes differ over the nature of the bulk sales risk and, consequently, over the statutory reforms necessary to protect creditors adequately. Emphasizing the risk that a seller will sell its entire inventory and abscond with or secrete the proceeds,\(^\text{18}\) Shanker suggests developing a statutory insurance fund or bond against which aggrieved creditors can assert their claims.\(^\text{19}\) Kayes is less concerned about the "rare occasions" on which a seller might abscond.\(^\text{20}\) Rather, he believes that, absent effective notice provisions in Article 6, creditors of an insolvent seller will be deprived of the opportunity to maximize the sale proceeds by participating in negotiations over the terms of


\(^{15}\) See generally Shanker, What Every Lawyer Should Know About the Law of Fraudulent Transfers, 31 Pract. Law. 43, 59-60 (Dec. 1, 1985) (expressing disagreement with section 3(b) of the Uniform Fraudulent Transfer Act); Shanker, A Reply to the Proposed Amendment of UCC Section 2-702(3): Another view of Lien Creditor's Rights vs. Rights of a Seller to an Insolvent, 14 W. Res. L. Rev. 93 (1962) (arguing that judicial liens should take priority over the reclamation rights of unpaid credit sellers).


\(^{17}\) See Kayes, A Practitioner's Point of View: Creditors Need and Deserve an Improved Version of Article 6, 41 Ala. L. Rev. 721 (1990).

\(^{18}\) "One should keep in mind precisely the evil which bulk transfer legislation was trying to correct. The danger was that the transferor might... 'sell his entire inventory ("in bulk") and abscond with [or misappropriate] the proceeds, leaving the creditors unpaid.' " Shanker, supra note 16, at 669 (quoting U.C.C. Article 6 prefatory note (1988)).

\(^{19}\) See Shanker, supra note 16, at 669-71.

\(^{20}\) Kayes supra note 17, at 722.
the bulk sale. Kayes proposes to expand the coverage of Article 6 to all types of assets sold by all kinds of businesses and to require that notice be given to each creditor who is potentially affected by the sale.

Among the articulated reasons for repeal of Article 6 is that the Uniform Fraudulent Transfer Act or other fraudulent conveyance law affords creditors a remedy if their debtor engages in a fraudulent bulk sale. Advocates of repeal heretofore may have failed to consider seriously the ways in which the law of fraudulent transfers may adjust to the repeal of Article 6. In his article, Professor Peter Alces imagines a world in which Article 6 has been repealed. An expert on fraudulent conveyance law, Professor Alces traces the historical relationship between bulk sales law and fraudulent conveyance law and draws a conclusion that is likely to prove less reassuring to proponents of a strong Article 6 than disquieting to opponents of bulk sales legislation: Judges are likely to construe fraudulent transfer law broadly to fill any perceived vacuum created by the repeal of bulk sales legislation. Regarding those jurisdictions that enact revised Article 6, Alces predicts that creditors will rely less on bulk sales law and more on expanded notions of fraudulent conveyance.

Alces's prognostications about the future of fraudulent transfer law may or may not prove correct. But if past history is any guide, one prediction about the future of Article 6 is certain to come true: Notwithstanding that the sponsors have withdrawn their support for the original Article, that Article will continue to be the law of some, perhaps most, jurisdictions for quite some time.

21. Kayes writes:
I do not believe . . . that the main reason such notice [of a bulk sale] is necessary is to avoid the debtor's hiding or fleeing with the proceeds. . . . [T]he primary justification for prior notice arises from the dynamics of the transaction. Simply put, a debtor who knows that his assets cannot be sold for enough to pay all creditors in full with equity left over for the debtor has little or no incentive to maximize the proceeds of such a sale.


22. See Kayes, supra note 17, at 725-27.


to come. Lawyers and judges will still have to construe and apply it to a range of bulk sales problems. Although the revised Article may afford guidance on some issues, it is likely to be of little assistance on others. Among the latter is the interrelationship of original Article 6 to Article 9—a problem to which I have devoted considerable attention and which is the starting point for Professor David Gray Carlson’s contribution to this Symposium. In the course of enlightening the reader about priority disputes that may arise between secured parties and transferees in bulk, Professor Carlson analyzes a host of perplexing issues that may arise independently from bulk sales law. His trenchant studies of three leading but problematic cases are sure to have lasting value.

26. For example, the quantitative test for applicability of the revised Article is more precise than the test in the original Article. Compare U.C.C. § 6-102(1)(c)(i)-(ii) (1988) with U.C.C. § 6-102(1) (1987); see also infra text accompanying notes 101-103 (discussing the test). The revised Article also states explicitly that complete noncompliance does not of itself constitute concealment so as to toll the limitations period, see U.C.C. § 6-110(2) (1988), whereas the cases construing the original Article were not in agreement on this point. See, e.g., Lang v. Graham (In re Borba), 736 F.2d 1317 (9th Cir. 1984) (construing California law) (tolling provision refers to affirmative concealment, not to mere failure to give notice); Seminole Motors, Inc. v. American Nat'l Bank & Trust Co (In re Seminole Motors, Inc.), 86 Bankr. 245 (E.D. Okla. 1987) (failure to give notice constitutes concealment); Columbian Rope Co. v. Rinek Cordage Co., 314 Pa. Super. 585, 461 A.2d 312 (1983) (when circumstances do not reveal to creditors that transfer has occurred, complete failure to give notice is concealment); SVM Invs. v. Mexican Exporters, Inc., 685 S.W.2d 424 (Tex. Ct. App. 1985) (concealment requires affirmative efforts at concealing the transfer and complete and total failure to comply with Article 6 notice provisions).


The original Article addresses the property rights acquired by a noncomplying transferee in bulk, see U.C.C. §§ 6-104, 6-105 (1987) (making a noncomplying transfer “ineffective” against creditors of the transferor), and by a secured party who takes from the noncomplying transferee a security interest in the transferred goods. See id. § 6-110. In contrast, noncompliance with the revised Article neither “impair[s] the buyer’s rights in or title to the assets” nor “render[s] the sale ineffective, void, or voidable.” U.C.C. § 6-107(8)(i)-(ii) (1988).

Consideration of Article 6 is but a part of the sponsors’ ongoing reconsideration of the Code.\textsuperscript{30} Using sources not widely available, including the transcripts of the Conference’s floor debates, Professor Peter Winship examines the process that led to the sponsors’ recommendations and the implications of the process for future commercial law reform.\textsuperscript{31} Expressing concern over the prominent role that politics played in the Conference’s deliberations, Winship raises serious questions about whether the revision process is likely to produce a product of the highest possible quality.

Thus, the articles in this Symposium address bulk sales law from a variety of perspectives. They raise and attempt to answer an array of important questions about the policy choices underlying the recommendation to repeal and those reflected in revised Article 6, the method of reaching these choices, and the quality of the drafting.

Each of the articles in this Symposium addresses a product with which I have been intimately involved. Indeed, bulk sales policy and the process of revising Article 6 were the primary focus of my professional life for several years. Resisting the temptation to respond in detail to each observation and criticism has been difficult. The task I have undertaken, however, is to write an introduction, not a clarification, justification, or rebuttal. Accordingly, what follows is a brief comment on both the product and the process from my perspective. I offer it with the hope of providing the reader with a more complete sense of what happened and why.

II.

My involvement with the revision of Article 6 began in the early 1980s when, as a member of the Uniform Commercial Code Committee of the Section of Corporation, Banking and Business

\textsuperscript{30} Article 2A, governing personal property leases, was added to the Code in 1987. Article 6 received final approval in 1989, as did Article 4A, dealing with wire transfers. Revised Articles 3 and 4 are expected to be approved for enactment this year. The Conference currently is considering the appointment of a drafting committee to revise Article 6. The report of the Article 2 study project, which will be submitted early in 1991, is likely to lead to the formation of a drafting committee, as is the report of the Article 9 study project, which is just getting underway. Changes to Article 1 have accompanied Article 2A and revised Article 6. More changes are likely to accompany revisions to Articles 2 and 9.

\textsuperscript{31} Winship, Lawmaking and Article 6 of the Uniform Commercial Code, 41 Ala. L. Rev. 673 (1990).
Law of the American Bar Association, I reviewed and commented upon various drafts of the proposed report of a subcommittee chaired by William Hawkland and charged with task of considering whether Article 6 ought to be revised. After reviewing for The Business Lawyer a set of articles on proposed revisions to the Article, I was privileged to be appointed in early 1985 as the American Bar Association’s advisor to the Drafting Committee established by the Conference. To enable me to perform my advisory role properly, the Business Law Section of the ABA established an Ad Hoc Committee on Bulk Transfers, which I chaired. When the Drafting Committee’s reporter, Chancellor Hawkland, took ill in mid-1987, I accepted the position of co-reporter. To eliminate any potential conflict of interest, I resigned as ABA advisor and was replaced by Howard Ruda.

From the outset the views of the Drafting Committee’s members reflected the wide range of attitudes about Article 6. Some, who might be termed “abolitionists,” favored repeal; others were “expansionists,” favoring the application of bulk sales law to all kinds of businesses and all kinds of assets; a few started out as “tinkerers,” favoring a limited number of clarifying amendments, along the lines of the ABA subcommittee report. The advisors, too, diverged in their approaches. Successive drafts of proposed revi-

32. The report is reproduced in Hawkland, supra note 7, at 1731-51.
33. These articles are Hawkland, supra note 7 (containing the report of the ABA subcommittee); Rapson, supra note 3; and Baker, Bulk Transfers Act—Patch, Bury, or Renovate?, 38 Bus. Law. 1771 (1983).
34. The Conference’s by-laws require each drafting committee to notify and consult with the appropriate committee or section of the ABA. NCCUSL REFERENCE BOOK, supra note 8, at 97. The Conference has entered into an agreement with the ABA governing the ABA’s participation on drafting committees and the submission of uniform acts to the ABA for approval. Commissioners are appointed to drafting committees by the President of the Conference. Id. at 87. In addition, the Institute is entitled to representation on drafting committees affeacting the UCC. Advisors from organizations other than the ABA, including representatives of the Commercial Law League of America, the National Association of Credit Management, the National Auctioneers Association, and the National Commercial Finance Association, participated in the deliberations of the Article 6 Drafting Committee. See Miller, supra note 10, at 590 n.16.
35. Mr. Ruda also was appointed a chair of the ABA Ad Hoc Committee on Bulk Transfers. I remained as co-chair, to assist him with the logistics of heading an ABA committee. Ruda’s service as ABA advisor was exemplary. He was always open to persuasion, took special pains to solicit the views of all interested parties, and brought to the table a point of view tempered by years of experience in commercial lending.
36. The range of their attitudes may have been a reflection of their divergent experiences in practice.
sions often differed dramatically, sometimes reflecting a shift in the attitude of some Drafting Committee members and sometimes reflecting the presence or absence of a particular member or advisor. Gradually, however, the Drafting Committee came to agreement on most of the crucial points. The developing consensuses were ably reflected in Chancellor Hawkland’s drafts, which, as co-reporter, I was called upon to revise.

That the Drafting Committee, comprised as it was of strong-minded, independent-thinking people having divergent viewpoints, succeeded in reaching agreement is due in no small part to the leadership of its chair, Commissioner Gerald L. Bepko. Those who evaluate uniform legislation and assign credit and blame tend to look either to the “drafters” or to the reporters. They overlook the central role played by the committee chair. The chair is particularly influential when, as in the case of Article 6, a consensus must be forged from opposing viewpoints if the committee’s product is to have any significant likelihood of being approved by the Conference and adopted by the states. Commissioner Bepko performed his role admirably. Ever patient, willing to let people voice (and reiterate; and reiterate) their positions, willing on appropriate occasions to allow previously closed issues to be reopened, and graceful in defeat, Bepko quietly nudged the group forward while providing an atmosphere in which consensus could develop. Although any given participant may have been displeased with a particular decision, no one at the table ever doubted that he had been afforded more than ample opportunity to set forth his views.

Under Bepko’s stewardship, the Drafting Committee and its advisors functioned as a deliberative body. A number of the key conceptual changes in revised Article 6 derive from suggestions first proffered by a Committee member or advisor; they were de-

37. For discussions of the Drafting Committee’s views as of spring 1987, see Harris, The Article 6 Drafting Committee’s New Approach to Asset Acquisitions, 42 Bus. Law. 1261 (1987); Harris & Baker, How the Proposed Revisions to UCC Article 6 Would Affect Creditors, 92 Com. L.J. 123 (1987).

38. A former dean of the Indiana University School of Law, Indianapolis, Mr. Bepko was a Vice-President of Indiana University during most of the Drafting Committee’s life. The Committee held several long and frustrating sessions, and disagreement over fundamental issues sometimes was intense. To their credit, the Committee members never let their disagreements degenerate into harsh words or personal attacks.

39. The Drafting Committee held three or four, two and a half-day meetings a year for three years. Advisors participated fully in the activities of the Committee. See Hawkland, supra note 12, at 608 n.11.
veloped not only by the reporters in their drafts but also by the members and advisors during the Committee meetings. Although I (and, I assume, Chancellor Hawkland) would have wished otherwise, the Committee did not simply rubber-stamp or tinker with the reporters’ drafts. Many is the time that Hawkland or I, or, on rare occasions, both of us, argued vigorously for a point only to find ourselves overruled by the Committee.40

Early in the Drafting Committee’s work, it became clear that tinkering with original Article 6 would not be satisfactory. By the end of the process (and perhaps at the beginning—no poll on this issue was taken until very late in the game), a majority favored repeal. In the interim the Drafting Committee followed its charge from the Conference’s Committee on Scope and Program and developed as good a bulk sales law as it could. Its final draft was a completely rewritten Article 6 that covered bulk sales of nearly all kinds of personal property conducted by all types of businesses. Despite the sentiment for repeal, the Drafting Committee decided to present revision and repeal to the states as choices of equal dignity.41 It proposed telling the states, in effect, that the Conference wasn’t sure whether regulation of bulk sales was a good idea, but it was sure that Article 6 in its original form could be improved upon. Hence it offered a repealer (“Alternative B”) for those who wished to deregulate the area and a revised version (“Alternative A”) for those who wished to improve regulation. Under this view, either repeal or revision was preferable to retention of the original Article and was consistent with the goal of uniformity.42

40. As ABA advisor, in addition to presenting my own views, I made every effort to bring forward various perspectives on each issue under discussion, even if I disagreed with them. I shall leave it to others to assess the success of those efforts. Hawkland is correct when he suggests that I was an active and vocal participant throughout the project, see id., but my influence on the final product should not be overemphasized. The Committee disagreed with me, sometimes overwhelmingly, on a number of issues. As reporter, I followed the Committee’s dictates.

41. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, REVISED UNIFORM COMMERCIAL CODE ARTICLE 6 - BULK SALES (Draft for Approval, July 29 - Aug. 5, 1988) [hereinafter COMMITTEE DRAFT].

42. Bill Hawkland put it to the Conference more emphatically: “Either repeal it completely and don’t have an Article 6, or do it right.” NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1988 PROCEEDINGS, UNIFORM COMMERCIAL CODE ARTICLE 6 - BULK SALES, 10 (July 29, 1988). See also Winship, supra note 31, at 685.

The reporters labelled the repeal option as “B” because, perhaps in jest, some Committee members expressed the fear that the opposite order of presentation might result in no one reading beyond the first alternative.
At its 1988 annual meeting, the Conference disagreed with the Drafting Committee in two substantial ways. First, by a floor vote, it instructed the Committee to conform the scope of the revised Article to that of original Article 6. Upon receiving that instruction, the Drafting Committee was excused from the floor of the Conference and convened in a meeting room to consider how to respond. Had the Drafting Committee wished to save as much of its proposed revision as possible, the Committee could have complied with the Conference's instructions by making only two major changes: (1) amending the definition of "bulk sale" to refer to a sale of inventory rather than to a sale of "assets," which the Committee's draft had defined to include virtually all personal property used for business purposes, and (2) adding a section to limit the applicability of the revised Article to certain types of businesses.

The damage remedy in the Drafting Committee's version was keyed to the net contract price of all the "assets" sold. I was reluctant to change it. To me, the applicability of the statute was one issue, the remedy for noncompliance was another. There is no inconsistency in looking only to inventory to determine whether the revised Article applies, but measuring the damages caused by noncompliance according to the net contract price of all the assets sold. Little did I know that, at the very moment I was in the hallway trying to sell this idea to two Commissioners who were most active in their opposition to expansion, Donald Rapson, the ALI representative to the Drafting Committee, was in the meeting.

43. See U.C.C. § 6-102(1)-(3) (1987) (limiting application of Article 6 to transfers of inventory and related equipment by enterprises whose principal business is the sale of merchandise from stock). For a discussion of scope issues, see Miller, supra note 10. See also infra notes 101-07 and accompanying text.

44. For an observation on how this change might have affected the overall balance of the revised Article, see infra text accompanying note 86.

45. This change is reflected in U.C.C. § 6-102(1)(c) (1988) (definition of "bulk sale"). The definition of "assets" was conformed to the change. Compare id. § 6-102(1)(a) with COMMITTEE DRAFT, supra note 41, § 6-102(1)(a).

46. This change is reflected U.C.C. § 6-103(1)(a) (1988) (applying Article 6 only when the seller's principal business is the sale of inventory from stock). Unlike the original Article, the revised Article does not explicitly include "those who manufacture what they sell." Compare id. with U.C.C. § 6-102(3) (1987). The exclusion of this language should not be read to suggest that the revised Article excludes all manufacturer-sellers. See U.C.C. § 6-103 comment 1 (1988); Miller, supra note 10, at 595. But see Kayes, supra note 17, at 725.

47. Indeed, the applicability of original Article 6 is determined by reference to inventory, see U.C.C. § 6-102(1) (1987) (definition of "bulk transfer"), whereas the remedy relates to both the inventory and equipment transferred. See id. §§ 6-102(2), 6-104(1), 6-105.
room persuading the Drafting Committee to calculate the maximum liability of a noncomplying buyer on the basis of the net contract price of only the inventory and equipment sold. 48

When the Drafting Committee returned to the Conference floor, the Conference undertook its second major initiative, the ranking of alternatives. Pressed by the Conference, the Committee acknowledged that a majority preferred repeal to revision. The Conference agreed with the Committee's preference. The Conference withdrew its support for existing Article 6 and recommended that the Article be repealed. For those states that might wish to continue regulating the area, the Conference approved the revision as amended, which was relegated to Alternative B.

No Conference project is complete until it has gone through the Committee on Style. 49 Many of the Style Committee's suggestions added clarity to the revisions, even though a number of its members had only passing familiarity with the Commercial Code in general and no expertise in Article 6 in particular. Unfortunately, a few suggestions would have created a clash between the language of the revision and that of other Code articles, and a very small number of others would have changed the meaning of the text. During fall, 1988, Chairman Bepko and I negotiated over these changes with the longtime chair of that committee, Judge Eugene A. Burdick, with a view toward preventing any new

48. The final formulation appears in U.C.C. § 6-107(4) (1988). The buyer nevertheless is obliged to disclose all the types of personal property transferred and to indicate what will happen to the net proceeds of those assets. See id. § 6-105(3)(h) (requiring written notice to be accompanied by the schedule of distribution and to indicate the type of assets or describe the assets item by item); id. § 6-106(1) (explanation of schedule of distribution); id. § 6-102(1)(k) (definition of "net contract price").

49. A standing committee of the Conference, the Committee on Style is charged with the duty, among others, to "appropriately revise as to phraseology and style, but without altering the meaning or context," all acts finally approved. NCCUSL REFERENCE BOOK, supra note 8, at 86. Unlike its namesake at the Constitutional Convention, the Conference's Style Committee showed no inclination to overstep its charge.
problems from creeping into the text.\textsuperscript{50} Also during that period, I drafted the official comments.\textsuperscript{51}

Having been approved by the Conference, the repealer and the revised Article were taken up by the ALI. In December, 1988, I appeared before the Council of the Institute,\textsuperscript{52} who asked some probing questions about the Conference’s recommendations and offered some suggestions that resulted in minor revisions. The Council submitted the recommendations to the membership, which approved the package the following May with one official recommendation for change.\textsuperscript{53} This change, along with a few other revisions prompted by oral and written comments from individual members of the Institute, then was sent back to, and approved by,

\textsuperscript{50} One of the Conference’s conventions, with which Professor Heidenreich finds fault, see Heidenreich, \textit{supra} note 13, at 546 n.86, is to separate the definition of a term used in only one subsection from the subsection in which the term appears. For example, the requirements for giving notice of certain excluded transactions originally appeared as part of the subsections to which they apply. \textit{See Committee Draft}, \textit{supra} note 41, \S\ 6-103(3)(f), (g), (h). At the Style Committee’s insistence, they were relocated to subsections (4) and (5) of revised section 6-103. The comments do not always reflect the Style Committee’s work. \textit{See U.C.C.} \S\ 6-103 comment 7 (1988) (referring to the meaning of the term “price,” which the Style Committee relocated from section 6-103(3)(f) to section 6-103(6) of the revised Article). In at least one important instance, Bepko and I were successful in persuading the Style Committee to acquiesce in the Drafting Committee’s practice of including the definitions as part of the subsection in which the defined terms appear. \textit{See U.C.C.} \S\ 6-102(1)(g)(ii) (1988).

\textsuperscript{51} Under Conference rules, comments may accompany an act during its consideration by the Conference. Unlike the official comments, which are addressed to legislatures, courts, and others who have need to construe or apply the act, these comments are largely addressed to the Conference. \textit{See NCCUSL Reference Book, supra} note 8, at 76-77. The Committee Draft of revised Article 6 included extensive explanatory notes. In accordance with Conference rules, the notes were revised into official comments after the Article was approved. \textit{See id.} The official comments were reviewed by the chair, who is responsible for drafting them, \textit{see id.} at 77, Bill Hawkland, and a few members of the Drafting Committee. They were revised periodically in response to suggestions from various quarters.

\textsuperscript{52} The Council of the Institute is composed of approximately 50 members who serve for staggered nine-year terms. Council members are nominated by a committee of the Council and are approved by the membership.

\textsuperscript{53} As approved by the Conference, a noncomplying buyer would be afforded a complete defense if the buyer made a good faith effort to comply with the revised Article, made a good faith effort to exclude the sale from the application of the Article, or held a good faith belief that the Article does not apply to the sale. \textit{See ALI Draft}, \textit{supra} note 9, at \S\ 6-107(3). “Good faith” was defined to mean “honesty in fact.” \textit{See id.} \S\ 6-102(2)(c) & comment 2; \textit{U.C.C.} \S\ 1-201(19) (1987). The ALI membership recommended that no buyer qualify for this defense unless the effort or belief is commercially reasonable. \textit{Cf.} \textit{U.C.C.} \S\ 2-103(1)(b) (1987) (“good faith” in the case of a merchant includes “the observance of reasonable commercial standards of fair dealing in the trade”).
the Executive Committee of the Conference and incorporated into
the official text of revised Article 6.\textsuperscript{54}

III.

As the foregoing, cursory review of the revision process makes
clear, from the outset the Drafting Committee was faced with im-
portant policy decisions: What is the appropriate role, if any, for
bulk sales legislation? What can and should bulk sales law ac-
complish? What mechanisms are likely to maximize the net benefits of
a revised Article 6? As Peter Winship points out, the Committee
resolved these issues primarily on the basis of personal judgment,
informing by experience and anecdotal evidence.\textsuperscript{55}

The task at hand was bulk sales law. I think it fair to say, as
Winship has, that most of those who participated in the Drafting
Committee meetings lacked “an overall vision of what the new
[UCC] should look like.”\textsuperscript{56} The Committee clearly did not un-
take the “comprehensive reevaluation of commercial fraud
principles” that Peter Alces urges.\textsuperscript{57} All that is not to say, however,
that the Committee operated in a vacuum.

The Committee members were mindful not only of the histori-
cal link between bulk sales law and fraudulent conveyance law but
also of the possible desirability of treating the two in a single stat-
ute. The Uniform Fraudulent Transfer Act (UFTA) had been
approved shortly before the Article 6 Drafting Committee began
its work. Three members of the UFTA Drafting Committee partic-
ipated in the Article 6 project: Commissioner Bepko, our chair;
Chancellor Hawkland, our reporter; and Commissioner Neal Ossen,
one of our members. In addition, Professor Frank Kennedy, who
was the UFTA reporter, served as one of our advisors. Notwith-
standing this overlap between the Drafting Committees, the failure

\textsuperscript{54} Revised Article 6 having been approved, any amendment ordinarily would have to
be approved by the entire Conference. However, section 3.3(c) of the Conference’s constitu-
tion permits its Executive Committee to approve an amendment if the Committee
“determines that the amendment is desirable to remove ambiguities, . . . to correct technical
errors, to meet an unanticipated objection from a section, committee, or other group within
the American Bar Association, to conform to a trend of judicial decisions, or to accomplish a
similar objective.” NCCUSL Reference Book, supra note 8, at 85.

\textsuperscript{55} See Winship, supra note 31, at 692-95.
\textsuperscript{56} Id. at 675.
\textsuperscript{57} Alces, supra note 24, at 872.
of the UFTA to address bulk sales was the occasional subject of unfavorable comment at the Article 6 meetings. More important, the availability of actions to avoid fraudulent transfers under the UFTA was a frequent topic of debate. Whereas some used the UFTA as an argument for limiting the scope of bulk sales legislation, others accurately observed that the latter contemplates advance warning of potentially fraudulent dispositions, whereas the former does not.

The Committee members also were acutely aware of the availability of collective creditor remedies. In some states, we were told, compliance with Article 6 is a popular alternative to an assignment for benefit of creditors. Revising or repealing the former would affect the use of the latter. Bankruptcy loomed large in the Committee's discussions. Most obvious to the outside observer is that the definition of "claim" in revised section 6-102(1)(d) derives from section 101(4) of the Bankruptcy Code.58 Also readily apparent is that the rule of Moore v. Bay affected the Committee's decision to separate revised Article 6 from its fraudulent conveyance roots.59 Other bankruptcy effects are less obvious. For example, the Committee defeated a variety of proposals perceived as likely to increase the probability that the seller-debtor would wind up in bankruptcy. On the other hand, the ability of creditors to commence an involuntary bankruptcy against the seller-debtor and the complexities inherent in making bankruptcy distributions contributed to the Drafting Committee's rejecting a requirement


59. See generally U.C.C. § 6-107 comment 2 (1988) (discussing the change from an in rem remedy against the goods to an in personam (damage) remedy against the uncomplying buyer). Under the rule of Moore v. Bay, 284 U.S. 4 (1931), as codified in 11 U.S.C. § 544(b) (1988), when an aggrieved creditor of a transferor has a nonbankruptcy right to avoid any part of a transfer, such as a noncomplying bulk transfer under original Article 6, the transferor's bankruptcy trustee may avoid the entire transfer. Because aggrieved creditors have no avoidance rights under revised Article 6, see U.C.C. § 6-107(8) (1988), the rule of Moore v. Bay should have no applicability to noncomplying bulk sales. A damage remedy has advantages even if the seller does not enter bankruptcy. It can be calibrated to reflect the actual injury suffered by each creditor, and it puts the other creditors of a noncomplying bulk buyer on an equal footing with the aggrieved creditors of the bulk seller. For criticism of the change to an in personam remedy, see Carlson, supra note 28, at 811-12.

for pro rata distribution of proceeds and requiring instead that a schedule of distribution accompany the bulk-sale notice.

I do not recall having sat through a Committee meeting at which first principles were not discussed. Over and over again, the Committee tried to articulate the precise risks that bulk sales might pose to creditors. Over and over again it evaluated the proposed solutions: Would they be manageable? How could they be circumvented? Would they afford relief? If so, at what cost?

In answering these questions, anecdotal evidence was easy to come by; hard data simply were unavailable. The absence of data is understandable. To evaluate the original Article's effectiveness would require not only an understanding of how people operate in a world in which Article 6 is law but also some insight into how they would operate in the absence of a bulk sales law. Deficiencies in one's insight are apt to translate into deficiencies in one's evaluation.

Designing a research project that would aid significantly in determining whether Article 6 increases the return to creditors would be difficult indeed. Following are some of the more obvious problems: First, one would need to develop a theory of how Article 6 is supposed to work. Broadly speaking, the purpose of Article 6 is to increase the net return to creditors of the seller. The Article might accomplish this purpose in more than one way. For example, requiring the buyer in bulk to disclose a planned bulk transfer might provide incentives for a seller-debtor to demand a higher price for the goods sold. Alternatively, or in addition, disclosure might deter a seller who sells at a fair price from removing the sales proceeds from the reach of creditors.

A research design that began with these two explanations would have to find some way in which to take account of fraudulent sales that were deterred, the evidence of which, presumably, appears nowhere in the public record and would be difficult, if not

61. For such a requirement, see U.C.C. § 6-106 (1987).
63. For one person's speculation about the consequences of repeal, see Alces, supra note 24, at 565-67.
64. Bulk sales law also may promote commercial morality. See Shanker, supra note 16, at 657. Measuring its success in this regard would be especially difficult.
65. See Kayes, supra note 17, at 722.
impossible, to unearth. A research design would have to find some way to measure the amount, if any, by which sale prices increased not only as a result of creditor intervention but also in anticipation of intervention. It would have to assess the costs of compliance, including the costs of transactions that were not consummated because of concern over potential bulk-sales liability. And it would have to assess the extent, if any, to which Article 6 enables creditors to reduce the costs of monitoring their debtors and permits credit transactions at the margin to go forward.

The lack of data may not be attributable solely to the difficulty of the task. Most legal scholars are not adept at empirical research. Some who are may believe that research design, data collection, and analysis will be rewarded poorly relative to shorter-term and less time-consuming scholarly activities. Moreover, in choosing among projects, one must consider their relative costs and benefits. The efficacy of bulk sales legislation is an interesting and important question; however, answering it is particularly difficult, and its importance pales before other legal questions—even before other commercial law questions.

Thus the Drafting Committee and the sponsoring organizations had only scattered and anecdotal evidence from which to determine both whether there is a problem and whether any of the proposed cures would be better than the disease. No one pretended otherwise. Virtually everyone acknowledged that we do not know enough even to be reasonably certain whether existing Article 6 (or any of the proposed revisions) does more harm than good.

Ignorance—of both the effects of the current legal regime and the consequences of change—often is a powerful argument in favor of the status quo. Where Article 6 is concerned, however, advocates of the status quo are few and far between.67

In the absence of data, some participants in the Article 6 debates offered general policy justifications for their positions. For example, some abolitionists averted to the primacy of “free alienability of private property” and the traditional protections afforded to “good faith purchasers.” They emphasized that the law typically requires those who extend credit to protect their investment by “monitoring” their debtors. Conversely, expansionists argued that

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67. See Hawkland, supra note 12, at 605 (revised Article was drafted against background of “general dissatisfaction”).
the duty of preventing the risk should fall on the "least cost risk avoider"—whom they thought to be the bulk buyer. Unless the law requires the buyer, who knows of the forthcoming transaction, to disclose this information to creditors, creditors would incur "duplicative monitoring costs," thereby creating "inefficiencies."

Not infrequently, the arguments reduced themselves to an assertion that the other side failed to meet its burden of proof. Abolitionists asserted that the costs of regulation were manifest but that corresponding benefits had not been proven. Expansionists thought the benefits obvious and insisted that no one had shown the costs of regulation to be other than trivial. For a few, allocating the burden of proof led to a middle position. Expansion was objectionable; no one had proven the existence of a bulk sales problem with respect to noninventory types of businesses. Abolition was dangerous; deterrent effects often are not readily detectable, and no one had proven that Article 6 in fact has not reduced the amount of bulk sales fraud. The solution: reduce the burdens and risks imposed upon buyers, increase the protection afforded to creditors, but don’t cover more transactions.

For better or for worse, the repeal/revise debate took up several hours of every Drafting Committee meeting. A majority may well have supported repeal from the outset of the process. Nevertheless, the Committee’s charge—to draft the best possible bulk sales law—did not contemplate a recommendation of repeal. The sentiment for repeal undoubtedly influenced the Committee’s final draft, as Professor Shanker suggests. But, to their credit, even those who spoke out most strongly and consistently in favor of repeal proved willing to compromise—so much so that the final draft enjoyed the support of as staunch an advocate of the interests of unsecured creditors as the late Don L. Baker.

In the end, the Committee decided it could not ignore the substantial sentiment for repeal that had been voiced not only by some of its members but also by members of the bar. It decided to put the matter before the Conference in the form of alternative legislation. The Committee’s final product recommended that each


69. Don Baker’s views on bulk sales appear in Baker, supra note 33. He was a particularly valuable asset to the Drafting Committee, see Hawkland, supra note 12, at 608 n.11, who left behind many friends and admirers, including me.
state be given the option of (A) repeal and replace or (B) repeal.70  
The Drafting Committee did not reach this result casually. Aside from the Committee's charge, the Committee had to consider seriously the effect adoption of its recommendation might have on uniformity.

Uniformity is the raison d'être for the National Conference of Commissioners on Uniform State Laws, as its name implies.71  
Quite obviously, the law governing bulk sales would not be uniform if some states repeal original Article 6 and replace it with a revised Article but other states simply repeal. The Committee ultimately concluded that this type of nonuniformity, although perhaps not ideal, certainly would be tolerable. If every state chose one of the two alternatives, then although some states would have no bulk sales law, the law of the other states would be uniform. With a well-drafted choice of law provision, an attorney could determine with relative ease whether revised Article 6 applied.72

The major decisions dictated from the floor of the Conference—to recommend repeal but offer a revised Article and not to expand the scope of the revised Article beyond the traditional scope of bulk sales legislation—may have been motivated by political considerations. After all, it makes no sense for an institution like the Conference to urge upon states a position (whether it be repeal or revision) that will be opposed overwhelmingly.73  
One might be tempted to condemn the Conference for having taken the easy way out. But in at least one respect the decision to offer an alternative to repeal was courageous. It constitutes a public admission that uniformity cannot always be achieved.74  
Moreover, it is a useful and explicit recognition that, no matter how well drafted the Conference’s acts may be, the ultimate determination of policy rests with the legislatures of each state.

The dispute over bulk-sales policy encompassed not only whether there should be an Article 6 but also what the content of

70. See Committee Draft, supra note 41.
71. See supra note 8.
72. See Miller, supra note 10, at 592.
73. Activity of this kind may be suitable for institutions whose primary role is to increase public awareness and appreciation of their views.
74. See NCCUSL Reference Book, supra note 8, at 83 (Conference's purpose is to promote uniformity "on subjects as to which uniformity is desirable and practicable"); id. at 107-08 (distinguishing between "Model" and "Uniform" Acts on the basis of need for, and ability to achieve, uniformity).
the proposed statute should be. Among those who favored some regulation, opinions varied concerning coverage, compliance, and remedies. One possible response would have been a “Chinese menu” approach, giving alternative scope provisions, alternative means of compliance, alternative remedies, and so on. A legislature then could determine what combination it thought best implemented its own views about bulk sales. With a single exception, the Drafting Committee rejected this approach, primarily because of its implications for uniformity.

One might argue that the goal of uniformity is better promoted by giving legislatures a choice of provisions on each of several controversial topics than by presenting a draft on a “take it or leave it” basis. Under the latter approach, as we have seen, each legislature that rejects some of the final product is likely to design its own solution, thereby giving rise to a large number of nonuniform versions. Admittedly the “Chinese menu” approach would not yield uniform legislation; arguably it would fix the range of potential differences in advance. In addition, each menu item would be drafted in a manner that would be consistent with the remainder of the Article. All the variations would work—or at least would work as well as the Conference’s UCC products usually work, which heretofore has been pretty darn well.

The logical objection to the “Chinese menu” (how can a recommendation that by its terms invites nonuniformity be said to promote uniformity?) is not the only one. Some who are familiar with the legislative process argue that, rather than limit the range

75. Revised Article 6 affords the states an option with respect to the treatment of tax claims. See U.C.C. § 6-102(1)(e)(iii) (1988).

76. “This mix-and-match approach, similar to the child’s game of Mr. Potatohead, is particularly appealing for the current article 6 revision project.” Mooney, Introduction to the Uniform Commercial Code Annual Survey: Some Observations on the Past, Present, and Future of the U.C.C., 41 Bus. Law. 1343, 1357 (1986).


78. “The bulk transfer potato could be fitted with a variety of optional mouths, ears, noses, and hats, each of which might fit nicely into a coordinated and consistent statutory scheme.” Mooney, supra note 76, at 1357.

of nonuniformity, the "Chinese menu" approach is likely to engender even more nonuniformity. When the subject of proposed legislation implicates competing interests of particular groups, a legislator can seek to minimize the disapproval of both groups by supporting proposed uniform legislation sponsored by a neutral body such as the Conference. But when the Conference offers alternative statutory resolutions of disputed issues, legislators are forced to take a stand on the particular issue. Taking a stand may entail potentially adverse political consequences. To minimize those consequences, legislators may attempt to forge a nonuniform compromise, rather than stand behind one of the Conference's suggested alternatives. At the least, this compromise will engender a nonuniform provision on the issue in question, perhaps even a provision that was considered, and found to be unsound, during the drafting process. The compromise also may require specially drafted revisions to other parts of the proposed statute, thereby increasing both nonuniformity and the risk of internal inconsistencies. Alternatively stated, the "Chinese menu" approach is likely to guarantee nonuniformity on the issues on which legislatures are given a choice, but it will do nothing to prevent legislatures (indeed, it may even encourage them) to reopen matters that the sponsors resolved. Thus, the Conference generally has adopted the tactic of "take it or leave it," with the hope that most legislatures will take most of the product.\textsuperscript{80}

There is no denying the Drafting Committee's concern that its labors not go for naught. To arrive at a final product that legislatures would enact requires sensitivity to the political winds. Promoting a strong bulk sales law has been an important agenda item for some interest groups. Any attempt to weaken the protection afforded by original Article 6 could be expected to be met with organized opposition. On the other hand, serious objections to regulation of bulk sales had been raised, and expanding Article 6 without taking those objections into account would have been foolhardy. Given these circumstances, and given that the "right" answer is unknown and probably unknowable, the Drafting Committee set out to draft a revision that, on balance, would be seen as

\textsuperscript{80} But see, e.g., U.C.C. § 6-106 (1987) (optional section concerning application of proceeds of bulk transfer).
an improvement over its predecessor by as wide a range of interested people and groups as possible.

Thus, as Chancellor Hawkland points out, the Drafting Committee strived to provide the maximum protection to creditors consistent with imposing manageable burdens on buyers. From their own experience and the representations of the advisors, the Committee members concluded that the most serious risk inherent in a bulk sale is that the seller will abscond with the proceeds. As Fred Miller explains, the provisions defining the scope of the revised article—both the definition of "bulk sale" and the exceptions to the article's applicability—were tailored to cover only those transactions believed to pose the greatest risk to creditors.

Relatively early in its deliberations, the Drafting Committee took the view that, given the availability of involuntary bankruptcy and the difficulty for a buyer to determine the relative rights of creditors, revised Article 6 would not create a collective debt-collection proceeding. Instead, the most appropriate form of bulk sales legislation was thought to be a disclosure statute, one that would afford adequate notice to creditors of potential bulk sales. Having been given notice, creditors would be free to engage in whatever debt-collection activity federal and other state law provides. As Hawkland details, revised Article 6 contains provisions designed to maximize the effectiveness of the notice to creditors. Of particular importance is that the notice must disclose not only the pendency of the transaction but also the proposed distribution of the proceeds.

Finally, the Drafting Committee took pains to develop a remedy that was neither so large as to be unrelated to the injury caused by noncompliance nor so small as to encourage noncompliance. The Committee's solution entailed replacing the old in rem remedy against the property transferred with an in personam remedy for damages against the noncomplying buyer.

The balance struck by the Drafting Committee may have been upset by the Conference's decision to limit the scope of the revised

Article to that of its predecessor. The Committee had little enough time to determine what amendments would be necessary to incorporate the Conference’s instructions into the revised Article. It had no time whatsoever to evaluate the effect those changes might have on the desirability of other provisions that were not directly implicated. Consider, for example, the decision to immunize from liability noncomplying buyers who make a good faith effort to comply with, or exclude the transaction from the scope of, the Article, or who act under a good faith, but mistaken, belief that the Article does not apply to the particular transaction. The need for this controversial provision may have been greater when the applicability of the statute turned on the value of virtually all the seller’s personal property, rather than just the value of inventory, and when the liability for noncompliance approached twice the net contract price of all the assets sold rather than twice the net contract price of only the inventory and equipment.

If the essays in this Symposium are any indication, the final recommendations have something for everyone to like and something for everyone to disapprove. Activity now shifts to the legislative arena, where the acceptability of the Conference’s recommendation to repeal and the strength of the compromises embodied in the revised Article both will be tested.

IV.

The process of revising Article 6 not only shaped the substance of the revised Article but also to some extent determined its form. For the first two years during which it met, the Drafting Committee did not have a clear idea of what its product would look like. Bill Hawkland dutifully prepared draft after draft, often finding that the Committee at one meeting rejected a particular policy or some statutory language it had insisted upon previously. But even though the approach and substance of a draft may have changed dramatically from that of its predecessor, the drafts were not written on a blank slate. Each draft evolved from what came

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86. This was the view of Don L. Baker, who supported the Committee’s draft but not the revised Article.
87. The Institute’s recommendation to add commercial reasonableness to the good faith requirement of revised section 6-107(3), see supra note 53, can be seen as an effort to readjust the balance.
before. And like an organic being, the Committee's final draft, submitted to the Conference for approval in 1988, contains vestiges of its predecessors.\textsuperscript{88} Although in retrospect the outlines of the ultimate product appear to have taken form at an earlier date, only in the final year of work did the Committee gain enough certainty about which ideas would survive and which were merely transitory to be able to focus seriously on details. The Drafting Committee worked at refining the proposed revision until the very last minute. There was no opportunity for the reporters and the Committee to distance themselves from their product before reevaluating what they had done.

The approved revision that emerged from the 1988 annual meeting differed in important respects from the draft that the Drafting Committee submitted.\textsuperscript{89} Proper implementation of the Conference's decisions to limit the scope of the proposed revisions and the noncomplying seller's maximum liability would have required a careful review of the entire proposal and preparation of a number of conforming amendments. The time simply was not available to do it right. The Conference seeks to complete each drafting project in two years. By 1988, Article 6 already had taken three. Given the size and relative importance of the Article, a fourth year would not have been forthcoming under any circumstances.\textsuperscript{90} To enable the Conference to complete its consideration of Article 6 at the 1988 meeting, the amendments had to be prepared immediately. I drafted them in haste, late into the night. Although drafting that is done "under the gun" may be inspired, it is likely to contain imperfections that go unnoticed—as well as some that are noticed but go untreated—in the rush toward final approval.

One example will suffice (I hope there are not too many others). Among the new material was an amendment to section 6-107, containing a formula for allocating the net contract price to the inventory and equipment sold.\textsuperscript{91} Before the Conference had ap-

\textsuperscript{88} One might think of these drafts as having been written on an imperfect palimpsest.

\textsuperscript{89} See supra text accompanying notes 43-48.

\textsuperscript{90} Indeed, the Conference leadership exerted strong pressure on the Drafting Committee to finish its work in time for the 1987 annual meeting. When the members, advisors, reporter, and chair unanimously objected to presenting the then-current product to the Conference for final approval, the leadership acquiesced.

\textsuperscript{91} This formula appears as the last sentence of U.C.C. § 6-107(5) (1988).
proved that amendment, Hawkland proposed to the Drafting Committee language that would have stated the calculation in a much simpler and more readily comprehensible way. Nevertheless, because my rather cumbersome language already had been distributed to the Commissioners, it became part of the revisions.

Perhaps in an ideal world, the reporters would have regrouped after the annual meeting, taken a fresh look at the final product, and taken pains to eliminate every vestigial word and phrase. People more removed from the drafting process would have been encouraged to pore over the revised Article, find shortcomings, and recommend better ways to articulate the statutory rules. Committees of the American Bar Association and the California State Bar performed these valuable services during the drafting process, but they were shooting at a moving target. Once the Conference approved the revision at its annual meeting, the target became stationary. Unfortunately, approval signified the end of the process as far as the Conference was concerned. Unless they revealed some egregious flaw, suggestions from interested parties came too late for the Conference to consider. As a practical matter, exception was made only for the Code's co-sponsor, the ALI.

92. Both formulations are designed to determine the "portion of a part of the net contract price paid to or applied for the benefit of the seller or a creditor that is 'allocable to inventory or equipment'" (X). U.C.C. § 6-107(5) (1988). Where the part of the net contract price paid to or applied for the benefit of the seller or a creditor (NCPBC), net value of inventory and equipment (NVIE), and net value of all the assets (NA) are known, my language suggests solving the following equation for X:

\[
\frac{X}{NCPBC} = \frac{NVIE}{NA}
\]

Hawkland's formulation was as follows:

\[
X = (NCPBC) \frac{NVIE}{NA}
\]

93. Thus, revised Article 6 became part of the 1988 official text of the Code, even though the ALI did not consider the revision until May 1989.

94. I do not mean to imply that the ABA had no say in the drafting process, only that it was not positioned effectively to address specific shortcomings of the revised Article at the time under discussion. Throughout the process, the ABA advisor met regularly with interested ABA members and passed along their views to the Drafting Committee and to the Conference. But the Conference's approval of the revised Article in summer 1988 essentially ended the Conference's process and, with it, the advisor's role with respect to the process.

Beginning in early 1986, the ABA advisor reported regularly to the Council of the ABA Business Law Section. The Council was not asked to take an official position on the Article.
In another Symposium appearing in this journal, Homer Kripke lamented the limited role afforded to the ALI in the consideration of Article 2A. A similar, but less strenuous, objection might be raised about the Institute’s role in Article 6. The Institute was not ignored, as some think it was in the Article 2A process. But with the exception of the industry and vigor displayed by Donald Rapson, its representative to the Drafting Committee, its participation in revision of Article 6 hardly could be described as active. The Members Consultative Group never met with the reporters. Discussion at the annual meeting was conducted in the shadow of a finished product. Indeed, the cover and title page of the ALI draft indicated that the Conference had “approved and recommended [revised Article 6] for enactment in all the States.” This may have discouraged some members from reviewing the proposals with care and others from reviewing them at all.

Despite its limitations, the Institute’s review was beneficial. Some last-minute improvements in the text and comments are attributable directly to suggestions made at both the Council and membership (annual) meeting. Truth be told, some of those improvements originated outside the Institute. The proponents were informed that, given the workings of the Conference, the only hope for incorporating the changes into the Code was to have an ALI member raise the issue from the floor. This process, although cumbersome, would be somewhat less objectionable if everyone realized

6 recommendations until summer 1989, by which time the recommendations had been approved by both the Institute and the Conference. Under those circumstances, the Council could not have been expected to raise any but the most major problems.


97. ALI DRAFT, supra note 9.
that the path to change lies in the ALI and if the floor of the Institute were accessible to everyone who wished to be heard.

Those who would criticize the Institute should be aware of the actions that have been taken to improve the quality of its participation in the UCC revision process. Under its current Director, Professor Geoffrey Hazard, the Institute's involvement in UCC revision has grown continuously. 98 For example, the Members Consultative Group for Articles 3, 4, and 4A has been activated and has met with the reporters to discuss the drafts. The Council formed an ad hoc subcommittee to consider proposed revisions to Articles 3 and 4 before submitting them to the membership. Deliberations on final UCC revisions, which in 1987 (Article 2A) and 1989 (Article 6) were scheduled for the final session on a Friday afternoon, are scheduled for all day Friday in 1990 (Articles 3 and 4). This should encourage greater attendance and more extensive discussion. The Institute also has played a major role in the establishment of study committees for Articles 2 and 9.

In assessing the revision process, one also must recognize that every drafting project must, at some point, come to an end. Every product of human labor, including a uniform statute, is imperfect. There is always room for improvement. But a statute is of little value unless it is enacted; an imperfect statute often is better than no statute at all. And every change—even an apparently small change, designed to clarify—carries with it the potential for unintended consequences. If discovered, the unintended consequences lead to more changes. If not, one imperfection will have been traded for another.

The foregoing discussion of the prevailing institutional relationships and the time constraints inherent in the revision process provides an explanation, albeit incomplete, for why that process not only failed to eliminate all the slips, glitches, solecisms, ambiguities, inconsistencies, and just plain mistakes that escaped the notice of the Drafting Committee and its reporters but also may have contributed some shortcomings of its own. I turn now to two other factors that determined the character of the revised Article's

98. The Director of the ALI serves as chair of the PEB. See Agreement Describing the Relationship of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the Permanent Editorial Board with Respect to the Uniform Commercial Code (July 31, 1986), in AMERICAN LAW INSTITUTE, 64TH ANNUAL MEETING AMERICAN LAW INSTITUTE PROCEEDINGS 1987, 769 (1988).
prose: A concern for certainty and a recognition that the statute must be flexible enough to accomplish its ameliorative purposes.

Article 6 is, at bottom, a regulatory statute. It imposes duties upon buyers in certain asset acquisitions. Failure to comply may result in liability. Asset buyers want to know whether the duty arises. For them, "maybe" is not an acceptable answer. What must be done to fulfill that duty? Explaining what "probably" will suffice is not good enough. What are the risks of noncompliance? No statute can eliminate risk; a well-drafted statute can indicate clearly the potential liability a person faces for breaching a duty. Assuring certainty in a regulatory statute is a laudable goal, one that informed the Drafting Committee's deliberations and, at times, dominated its discussions.99

One of the recurring complaints about original Article 6 is that it left too many questions unanswered.100 In answering these questions, the Drafting Committee increased the complexity of bulk sales law. For example, original Article 6 defines "bulk transfer" to include certain transfers of a "major part of the [transferor's] materials, supplies, merchandise or other inventory."101 The meaning of "major part" has been tested in several reported cases.102 The Drafting Committee restated the concept with greater precision and, hence, greater complexity.103 New section 6-102(1)(c) not only tells the reader what quantity ("more than half")104, it also indicates how the quantity is to be measured ("by value,"105 which is defined to mean "fair market value") and when ("on the date

99. Bulk sales law also is designed to regulate the seller's conduct. In this regard, certainty may not be so desirable. See discussion infra at text following note 133.
100. See, e.g., Brines, supra note 2.
102. See, e.g., Wikeland Wholesale Co. v. Tile World Factory Tile Warehouse, 57 Ill. App. 3d 269, 372 N.E.2d 1022 (1978). Although there appears to be a general consensus that the term means more than half the inventory, as measured by value, some have advised "transferees . . . not [to] rely on the fifty percent of value test of 'major part.' " J. White & R. Summers, Uniform Commercial Code 893 (3d ed. 1988).
103. The new definition reduced complexity by replacing the phrase "materials, supplies, merchandise or other inventory" with the word "inventory." Compare U.C.C. § 6-102(1) (1987) with U.C.C. § 6-102(1)(c)(i)-(ii) (1988). See also id. § 6-102(2)(c) (cross-reference to definition of "inventory" in Article 9).
105. Id.
106. Id. § 6-102(1)(o).
of the bulk-sale agreement”107). Of course, the answer to one question may raise questions of its own. For example, the definition of the “date of the bulk-sale agreement” may carry its own complexities.108

Consider another example. Original Article 6 makes noncomplying transfers “ineffective against any creditor of the transferor.”109 Notwithstanding section 1-201(12), which explains what the term “creditor” includes,110 and original section 6-109(1), which explains which creditors are the ones “mentioned in this Article,”111 many courts have been called upon to construe the term.112 The revised Article distinguishes among different types of creditors for different purposes. To do so required, inter alia, a complex definition113 and more complex notice and liability provisions.114 I have no doubt that revised Article 6 could have been made easier to read. But when the ideas are complex and unfamiliar, they are likely to be difficult to grasp no matter how clear the language expressing them.

Having rejected the approach of the tinkerers, the Drafting Committee necessarily did not limit its work to amending original Article 6. Instead, it designed a new statutory scheme, related to, but in many significant ways different from, its predecessor. In the course of remaking bulk sales law, the Committee considered and reconsidered how its proposals would affect transactions and how

107. Id. § 6-102(1)(c)(i)-(ii). “Date of the bulk-sale agreement” is defined in id. § 6-102(1)(b).
108. See infra note 132.
110. “‘Creditor’ includes a general creditor, a secured creditor, a lien creditor and any representative of creditors . . . .” Id. § 1-201(12).
111. Id. § 6-109(1).
114. See, e.g., id. § 6-105(2) (notice by filing); id. § 6-107(1) (liability for noncompliance).
they would be interpreted by lawyers and judges. Committee members often asked, “What if . . .” when examining the potential effects of particular provisions.

The Drafting Committee concluded that not every “what if” question would be answered in the statute. Determining which to answer required a bit of prognostication: Was the question likely to arise with any frequency? Was it likely to be of concern to the practicing bar? Were lawyers and courts likely to divine the “correct” answer from the then-current draft? The Committee also took into account the difficulty of agreeing upon and drafting a satisfactory statutory solution and the desirability of keeping the statute as readable as possible.

Grant Gilmore explained an apparent lacuna in the 1962 official text of Article 9 by observing that “the draftsmen were more anxious to hunt down the existing beasts than to bother with hypothetical dragons.”115 The beasts lurking in original Article 6 were well known to the Drafting Committee; the trick was to catch them. Despite the difficulty of this task, the Committee also spent considerable time hunting down hypothetical dragons.

Three factors may explain why the Drafting Committee may have ventured into hypothetical worlds to a greater extent than often is the case, even in the drafting of a regulatory statute, where certainty is particularly essential. First, experience shows that people go out of their way to exclude their transactions from bulk sales law. Several members of the Drafting Committee spent considerable energy devising ways in which devious parties might circumvent the provisions of each successive draft. When the Committee perceived a substantial risk, the reporters were instructed to close the loophole and the statute became more complex. Second, all of us grew up under a legal regime in which the penalty for noncompliance with Article 6 might be greatly disproportionate to any resulting injury to creditors. Even though we decided early on to correct this problem, the precise solution kept changing. Consequently, the Committee tended to structure the revised Article with the old risks in mind. Thus the precision with which it attempted to define certain terms and prescribe the duties of a bulk buyer may prove, in the end, to have been excessive.

115. 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 12.8, at 392 (1965).
Third, the Drafting Committee’s decisions whether to address a particular problem in the statute, in the comments, or not at all reflect the members’ attitudes about the capacity of the judiciary to “get it right.” The Drafting Committee received innumerable suggestions for clarification. Many of these were accompanied by the proponent’s acknowledgement that the statute states the right answer clearly, and his articulated fear that judges would misread or wilfully refuse to apply it unless it was amplified or reiterated. A few of these suggestions were taken to heart and resulted in changes to the text; of those, some met their demise at the hands of the Style Committee, which eliminated them as surplusage.

As Douglas Heidenreich suggests, revised Article 6 may well answer questions that may never arise;\(^{118}\) to that extent it is needlessly complex. On the other hand, the Drafting Committee may have increased uncertainty by its failure to consider certain other problems that may arise\(^{117}\) or by its judgment that some problems that might arise are not deserving of a solution in the statute\(^ {118}\) or, in some cases, even in the comments.\(^ {119}\)

Determining what to include and what not to include calls for the exercise of judgment. Consider the definition of “net contract price.”\(^ {120}\) Roughly speaking, the term denotes the portion of the price of the property sold that would be within the reach of unsecured creditors. To calculate the “net contract price,” one must distinguish between portions of the price that go to pay off secured debt and those that do not. Calculation of the extent to which property is subject to a security interest may be complicated when the debt is secured both by collateral that is sold and by collateral that is not. When the secured party is oversecured, the collateral must be allocated to the debt. The Drafting Committee was of the view, reflected in the draft approved by the Conference, that courts could be relied upon to make the allocation.\(^ {121}\)

\(^{116}\) See Heidenreich, supra note 13, at 649-51.

\(^{117}\) See, e.g., id. at 637-40. But see supra note 107.

\(^{118}\) See, e.g., Heidenreich, supra note 13, at 640 n.52.

\(^{119}\) For example, the Drafting Committee decided not to address the treatment of a “self-liquidation” consisting of a series of sales made by the seller. See generally Miller, supra note 10, at 597 n.50 (discussing probable application of revised Article 6 to this scenario).

\(^{120}\) U.C.C. § 6-102(1)(k) (1988).

\(^{121}\) The issue was raised late in the drafting process. The lateness of the hour, along with the availability of the good faith defenses in section 6-107(3), probably contributed to
tee instructed the reporters to prepare an official comment to the effect that a pro rata allocation would be appropriate.\footnote{122}

The UCC Committee of the State Bar of California, among others, disagreed with the Drafting Committee's approach. At the request of one of its members, the issue was raised at the ALI annual meeting, and a formula for allocation was introduced into the official text of section 6-102(1)(k)(ii). While those who prefer simple statutes might object to the ultimate formulation of "net contract price" as unnecessarily cluttering up the statute—or even as "complex to the point of impracticability"\footnote{123}—they would be opposed by those, like the members of the State Bar committee, who gladly would trade increased complexity for increased certainty.

Another example of the certainty/complexity trade-off arises from the inclusion of section 6-106(6). The revised Article imposes upon the bulk buyer the duty to prepare and disclose a schedule of distribution, setting forth what will happen to the net contract price.\footnote{124} For example, the schedule might require the buyer to make specified distributions to the seller, who in turn might undertake to use the proceeds to pay creditors specified amounts. The revised Article imposes liability upon buyers who fail to perform their undertakings under the schedule.\footnote{125} It also imposes liability upon certain persons in control of the seller who cause the seller to

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\footnote{122}{See § 6-102 comment 1(k) in ALI DRAFT, supra note 9, at 18.}

\footnote{123}{See Heidenreich, supra note 13, at 642. Professor Heidenreich observes that "the calculations would be almost impossible for a buyer who was without benefit of experienced counsel." Id. Elsewhere, he writes that determining the applicability of the Article may be "virtually impossible for a layman." Id. at 636. Unlike Article 4, which for the most part governs routine transactions performed by professionals, Article 6 governs unusual transactions as to which the parties usually are nonprofessionals. Thus, unlike the drafters of Article 4, who used banking terms with a view to making the Article accessible to bank operations people, the drafters of revised Article 6 made no effort to render the statute comprehensible to buyers and sellers. Instead, they drafted with a view toward making the statute comprehensible to the attorneys who will be called upon to advise the parties and to negotiate and document the terms of the transactions. Throughout its deliberations, the Drafting Committee was guided by the belief that, more often than not, those attorneys will be unfamiliar with bulk sales law.}

\footnote{124}{See U.C.C. §§ 6-104(1)(c), 6-106(1) (1988).}

\footnote{125}{See id. § 6-107(1)(a).}
fail to perform the seller’s undertakings.126 The Committee recognized that external events, such as the filing of a bankruptcy petition, might interfere with the buyer’s ability to pay the seller or the seller’s ability to pay creditors in accordance with the schedule. Accordingly, it added two provisions to section 6-106 that excuse noncompliance under certain circumstances. Subsection (4) affords an excuse to buyers, and subsection (6) affords an excuse to persons in control of the seller.

The Committee also thought that circumstances might arise under which a buyer might be damaged by the failure of the seller or one of its controlling persons to fulfill a promise to comply with the schedule. The Committee concluded that the provisions of section 6-106(6) should excuse the seller and its controlling persons from liability under any agreement with the buyer. As a consequence, revised section 6-106(6) excuses “the seller and any person in control of the seller . . . from any obligation arising under this Article or under any agreement with the buyer to distribute the net contract price.”127 Of course, as several people observed during the drafting process, any obligation the seller may have under the revised Article with respect to the net contract price ordinarily duplicates the obligation already owed to the creditor. Perhaps the Committee delved too deeply into hypothetical worlds. Section 6-106(6) may prove to be “totally useless,” or even dangerous.128 If so, it will serve as an example of the costs of the quest for certainty.

The Drafting Committee’s concern for certainty may have had other costs as well. It prompted the decision to utilize language from other articles of the Code at certain junctures. For example, the “location of the buyer” was borrowed from Article 9, as was the definition of “United States.”129 It may be, as Heidenreich suggests, that we simply compounded the felony.130 We thought,

126. See id. § 6-107(11).
127. Id. § 6-106(6).
128. See Heidenreich, supra note 13, at 651.
130. See Heidenreich, supra note 13, at 632-33, 642-43. The reporters did not slavishly follow the prevailing style of the Code. Among other things, we did not eschew the use of commas, and we tried to break down long sentences into separately denominated subparts. The drafters of Article 2A faced the problem to a much greater extent, particularly since
however, that by following Article 9, we had a pretty good idea of the baggage these couriers were carrying and that we would thereby minimize the risk of introducing unanticipated problems into revised Article 6. We also may have succeeded in marginally easing the burden on lawyers handling an Article 6 problem.

To be sure, there were factors that militated against certainty. One was the desire to avoid unnecessary complexity. For example, the “date of the bulk-sale agreement” is defined as “the date on which a bulk-sale agreement becomes enforceable between the buyer and seller.” 131 Rather than create separate rules for enforceability of bulk-sale agreements, the Committee opted to govern them by the rules in section 2-201 applicable to other contracts for the sale of goods. These rules are complex and, to some extent, uncertain. 132 But, in an effort to keep the revised Article (relatively) free from complexity, the Committee refrained from attempting a solution to Statute of Frauds problems.

Concern for complexity was not the only factor that moved the Drafting Committee away from more complete certainty. The Committee also took into account the role bulk sales law plays in contemporary asset acquisitions. Article 6 is not a typical commercial regulatory statute. The participants in bulk sales often have strong incentives to structure the transaction so as to fall outside the statute or to disregard the statute even when it is known to apply. Bulk buyers usually wish to avoid incurring the risks of non-compliance. One way is to comply; however, if that cannot be done at what is perceived to be a reasonable cost, buyers may choose not to incur the costs of compliance but to reduce the risks in other

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132. See Heidenreich, supra note 13, at 637-40. Many of these problems can be eliminated by a gentle reading of the “Statute of Frauds” provision found at U.C.C. § 2-201 (1987). Like section 6-102(1)(h), that section uses language of enforceability. Id. (with certain exceptions, “a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is” a sufficient writing). See also id. § 2A-201 (enforceability of lease contract); id. § 2A-307(2), (4) (referring to time that a lease contract “becomes enforceable”).

The Committee did not define the term “bulk-sale agreement.” Indeed, I do not recall that the issue ever was raised at a meeting. Had it been, I suppose we would have derived a definition from section 9-105(1)(d), which defines “security agreement.” I doubt whether the absence of a definition will prove to be a problem.
ways.\textsuperscript{133} For reasons both good and bad, sellers may prefer that their creditors not be informed of a forthcoming sale and may provide incentives to induce buyers not to comply.

It should come as no surprise, then, that some lack of certainty in the revised Article is the result of a deliberate decision of the Drafting Committee to increase the statute's prophylactic effect. Rules often are clear and simple only because they are over- or underinclusive. The Committee deliberated the scope of the revised Article at great length. Whereas those who were more sympathetic to unsecured creditors preferred to err on the side of overinclusiveness, those who identified more closely with buyers balked at the attendant burdens the buyers would shoulder.\textsuperscript{134} The result is an interesting mix of bright-line rules and general standards.

Compare, for example, the relative precision of the nonordinary course and quantity tests with the relative vagueness of the reasonable inquiry and continuation in business tests.\textsuperscript{135} The phrase "the seller will not continue to operate the same or a similar kind of business after the sale" undeniably is imprecise.\textsuperscript{136} It tries to capture the idea that certain sales are not sufficiently likely to pose a substantial risk to creditors. Those sales are ones in which the seller remains in business after the sale and the remaining business bears a close enough resemblance to the business to which the creditors extended credit so that costs of compliance

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\textsuperscript{133} For example, some escrow part or all of the purchase price until the statute of limitations runs. Others take indemnity. See, e.g., Mercantile Fin. Corp. v. P & F Indus., 63 A.D.2d 1014, 1014, 406 N.Y.S.2d 357, 358 (1978) (characterizing an agreement by a selling corporation's parent to indemnify the transferee as "the result of a standard business practice to provide financial savings and business security").

\textsuperscript{134} For example, the definition of "bulk sale" refers to facts as to which a buyer would have notice had the buyer conducted a "reasonable inquiry." U.C.C. § 6-102(1)(c)(ii) (1988). Whereas buyers would have preferred a safe harbor, e.g., receipt of an affidavit from the seller, some creditors might believe that the test creates too great a gap in coverage. The same can be said for the "continue to operate the same or a similar kind of business" test. Id.

\textsuperscript{135} A sale that is "in the ordinary course of the seller's business" cannot be a "bulk sale." See id. § 6-102(1)(c)(i)-(ii) (1988). The former term is defined. Id. § 6-102(1)(m). For a discussion of the quantity test, see supra text accompanying notes 104-08.

A sale is not a "bulk sale" unless "the buyer has notice, or after reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business." U.C.C. § 6-102(1)(c)(ii) (1988). See also id. § 6-102(1)(c)(i) (similar requirement for sales conducted by auction or by a liquidator).

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with Article 6 probably would not be justified. Another way of expressing this idea is that some types of changes in the asset base of a business can be considered a normal risk to creditors of extending credit. Capturing this idea in more specific terms proved to be beyond the abilities of the reporters.

Another factor, aside from the fact-specific nature of the concept, prevented the text from being more precise in this regard—the Drafting Committee itself did not always agree on the proper resolution of some difficult, but not uncommon, cases that might require a court to characterize the post-sale business. We can expect the same thing to happen when the statute is implemented by lawyers and construed by judges. Presented with extreme cases, nearly all will agree about whether the test is met. In the middle, reasonable and informed people will disagree. An alternative drafting technique might have been to list some factors for the court to take into account. But that approach, too, would have resulted in far less than complete certainty.

V.

This Article identifies some ways in which the process of addressing UCC Article 6 affected both bulk sales policy and the text of revised Article 6. Those who analyze statutes prize clarity, cohesiveness, sound legal rules, and internal (sometimes even foolish) consistency. The Article 6 drafting process was informed not only by these values but also by a desire to promulgate a statute that had a reasonable chance of being enacted. The shortcomings of the product are attributable not only to imperfections in the process but also to the fallability of the participants. An examination of the Article 6 process may be sobering to those who hold an idealized view of law reform, but the strengths of the process and the quality of its product should prove encouraging to those who hold more realistic expectations.