

1990

The Confluence of Bulk Transfer and Fraudulent Disposition Law

Peter A. Alces

William & Mary Law School, paalce@wm.edu

Repository Citation

Alces, Peter A., "The Confluence of Bulk Transfer and Fraudulent Disposition Law" (1990). *Faculty Publications*. 297.
<https://scholarship.law.wm.edu/facpubs/297>

Copyright c 1990 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

THE CONFLUENCE OF BULK TRANSFER AND FRAUDULENT DISPOSITION LAW

*Peter A. Alces**

TABLE OF CONTENTS

I.	INTRODUCTION	822
II.	THE PROBLEM PRESENTED	825
	A. <i>The "Bulk Sales Risk"</i>	826
	B. <i>Early Nonuniform Responses</i>	831
	C. <i>Affinity Between Fraudulent Disposition Law and Bulk Sales Law</i>	836
	1. <i>Prejudice to Unsecured Creditors</i>	837
	2. <i>Conceptions of Fairness</i>	839
	D. <i>The Incongruities</i>	843
	1. <i>Personal Property Security</i>	845
	a. <i>Secured Transactions Excepted from the Scope of Article 6</i>	848
	b. <i>Judicial Hostility Toward Exceptions</i> .	849
	2. <i>Leveraged Business Acquisitions</i>	852
	a. <i>Contract Bargain Model</i>	853
	b. <i>Property Model</i>	855
	c. <i>Tort Model</i>	857
	3. <i>Constructive and Actual Fraud Distinguished</i>	859
	a. <i>The Distinction Blurred: UFTA</i>	860
	b. <i>United States v. Tabor Court Realty Corp.</i>	861
	c. <i>Characterization of the Bulk Sale: LBO Parallels</i>	863
III.	THE BRAVE NEW WORLD	864
	A. <i>A World Without Uniform Bulk Sales Law</i> ...	865

* Professor of Law and John S. Stone Faculty Fellow, University of Alabama School of Law.

B. A World With Revised Article 6	867
IV. CONCLUSION AND RECOMMENDATION	871

I. INTRODUCTION

Fraud law, as nature, abhors a vacuum. Where gaps in the statutory or common law admit inequity, pervasive fraud principles intervene to redress the imbalance. The two bulk sales alternatives promulgated by the American Law Institute¹ (ALI) and the National Conference of Commissioners on Uniform State Laws² (NCCUSL) provoke rethinking of the balance of equities vouchsafed by commercial fraud law in the bulk sales context. In light of the fact that the initiatives follow so closely upon the Uniform Fraudulent Transfer Act (UFTA),³ also promulgated by the NCCUSL,⁴ it is appropriate to appraise the fit between the UFTA and bulk sales law that would result from enactment of either of the alternatives.

Just as for every action there is an equal and opposite reaction, for every enactment that impacts the application of fraud principles in commercial law, the existing statutory and common law responds. In the more colloquial language of the lawyer, hard cases will make bad law no matter how good the law may otherwise be. The challenge, then, is to anticipate the consequences of enacting a law, albeit a better law, and to take those consequences into account when formulating the contours of the new enactment.

1. The American Law Institute began in 1921 as a project proposed by the Association of American Law Schools. The ALI was envisioned as a "juristic centre for the betterment of the law," and "its first major undertaking should be to prepare a 'Restatement of the Law.'" W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 273-74 (1973). See generally Goodrich, *The Story of the American Law Institute*, 1951 Wash. U.L.Q. 283; Lewis, *History of the American Law Institute and the First Restatement of the Law*, RESTATEMENT IN THE COURTS 1 (perm. ed. 1945).

In 1985, the ALI and the National Conference of Commissioners on Uniform State Laws appointed a drafting committee to revise Article 6. The ALI approved the final draft of revised Article 6 in May 1989.

2. The NCCUSL was formed in 1892 and is comprised of unpaid commissioners appointed by state governors. It primarily prepares acts in commercial law for possible adoption by state legislatures. W. TWINING, *supra* note 1, at 272. See also Durhan, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233 (1965).

3. UNIF. FRAUDULENT TRANSFER ACT (UFTA), 7A U.L.A. 639 (1984).

4. The UFTA was approved by the NCCUSL in 1984.

To the extent that the alternatives endeavor to limit or wholly abrogate offensive commercial law fraud theories, plaintiffs' counsel will likely seek other ways to realize the results now assured through successful prosecution of a bulk transfer action under original Article 6. Old habits, particularly those that prove lucrative, die hard. The viability of the alternatives must be appraised not only through consideration of the changes they occasion but also through consideration of the least anticipated and perhaps even least "commercial" ramifications. While we can hope for the best, it is not an unhealthy state of mind at this juncture to anticipate the worst.

There are, however, difficulties that attend such an evaluation. To a degree it is the problem of hitting not one but two targets of indeterminate scope. First, perhaps the most troubling shortcoming of original Article 6 is that its provisions lend themselves to inconsistent and often incongruous constructions of fundamental matters. For example, the most litigated issues under Article 6 concern the scope of the law.⁵ Equally troublesome is the Article's failure to establish sanctions for noncompliance with its provisions,⁶ and its incomplete delineation of proper plaintiffs and defendants.⁷ While case law has responded to the dearth of guid-

5. Chancellor Hawkland has observed that:

[o]f sixty reported cases arising under Article 6, thirty-two involve Section 6-102. The fact that more than one-half of all the bulk transfer cases are concerned with this section is . . . not surprising, because where there has been no compliance with the requirements of the bulk transfer law the transferee often will argue that the law does not govern the transaction at hand because it is not a "bulk transfer" within the definition of section 6-102.

Hawkland, *The Trouble with Article 6 of the U.C.C.: Some Thoughts About Section 6-102*, 81 COM. L.J. 83, 83-84 (1976).

6. See J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 907-09 (3d ed. 1988) (discussing confusion over meaning of Article 6 term "ineffective"); See generally P. ALCES, *THE LAW OF FRAUDULENT TRANSACTIONS* ¶ 4.04[4] (1989).

7. For cases considering proper plaintiff issues, see *United States v. Vertac Chem. Corp.*, 671 F. Supp. 595 (E.D. Ark. 1987), *vacated*, 855 F.2d 856 (8th Cir. 1988) (state and federal agencies with environmental liens are entitled to protections of Article 6); *Chemical Bank v. Society Brand Indus., Inc.*, 624 F. Supp. 979 (S.D.N.Y. 1985) (bank, as tort creditor, was entitled to notice of bulk transfer and its failure to receive notice gave it standing to attack transfer as ineffective); *Brown v. Superior Pontiac-GMC*, 352 So. 2d 576 (Fla. Dist. Ct. App. 1977) (Article 6 was not promulgated to protect interests of stockholder dissenting from sale of corporation's assets and having a claim for redemption, but only those of trade creditors).

For cases evidencing the confusion over the liability of a defendant-transferee, compare *Get It Kwik of Am., Inc. v. First Ala. Bank*, 361 So. 2d 568 (Ala. Civ. App. 1978) (legislature

ance, ad hoc resolution of recurring and crucial issues is inimical to the commercial law's interest in certainty, predictability, and stability.⁸ Second, we do not, as yet, know how revised Article 6 will resolve troublesome issues as they arise in real controversies.⁹ Finally, fraud principles are necessarily amorphous.¹⁰ Fraud is easy to interpose and often more difficult to disprove than to prove. The drafters of bulk sales law, a species of fraud law, must come to

did not intend to impose personal liability on transferee) and *American Express Co. v. Bomar Shoe Co.*, 125 Ga. App. 408, 187 S.E.2d 922 (1972) (Article 6 was not intended to impose personal liability on transferee) with *McKesson Robbins v. Bruno's, Inc.*, 368 So. 2d 1 (Ala. 1979) (transferor's creditors may proceed against transferee) and *Johnson v. Vincent Brass & Aluminum Co.*, 244 Ga. 412, 260 S.E.2d 325 (1979) (omitted creditor of whom transferee had knowledge could proceed against transferee).

8. See generally Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. REV. 291. Hawkland asserts that "the commercial law grew along lines which produced gaps and uncertainties in spite of volumes of cases. Indeed, gaps and uncertainties seem to have been generated in direct proportion to the number of published opinions." *Id.* at 296. As a result, "[t]he commercial community has made a modest demand on the law to give it rules which will operate evenly and with a fair degree of predictability." *Id.* at 320.

See also U.C.C. § 1-102 (1987):

(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this Act are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

9. For that matter, it is not even clear how the revision would resolve the perceived fundamental incongruity under the current law. The prefatory note to revised Article 6 observes that:

Article 6 (1987 Official Text) is remarkable in that it obligates buyers in bulk to incur costs to protect the interests of the seller's creditors, with whom they usually have no relationship. . . . The Article thereby impedes normal business transactions, many of which can be expected to benefit the seller's creditors. For this reason, Article 6 has been subjected to serious criticism.

U.C.C. Article 6 prefatory note (1988) (citing Rapson, *U.C.C. Article 6: Should It Be Revised or "Deep-Sixed"?* 38 BUS. LAW. 1753 (1983)).

10. An early commentator noted that:

[a]s to relief against frauds no invariable rules can be established. Fraud is infinite; and were a Court of Equity once to lay down rules how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive.

Letter from Lord Hardwicke to Lord Kaimes (June 30, 1759) (quoted in 1 J. STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA* § 186 (1836)).

terms with both the body of fraud principles generally and the particular place that bulk sales law occupies in commercial fraud law.

This Article endeavors to describe the status quo, offer a construction of the proposed alternatives, and posit a frame of reference to inform enactment and application of the new law. The discussion first treats the development of the bulk sales problem, traces both the uniform and nonuniform responses to it, and analyzes the relationship between bulk sales law and other aspects of commercial fraud jurisprudence. A perspective is then advanced that juxtaposes the results intended by enactment of the alternatives and the anticipated reality.

II. THE PROBLEM PRESENTED

To understand the current bulk sales enactment and to establish the role of bulk sales law in the commercial fraud landscape, it is necessary to track the development of commercial fraud rules generally and in the bulk sales setting particularly. This section will review the evolution of commercial fraud and bulk sales principles, stressing the affinity between the fraud concepts that drive uniform fraudulent disposition law (*i.e.*, those formulated in the UFTA),¹¹ sections 547¹² and 548¹³ of the Bankruptcy Reform Act of 1978,¹⁴ and bulk sales law. The incongruities among the various commercial fraud enactments will then appear in sufficient relief to support reliable conclusions regarding deficiencies in the proposed alternatives.

11. See generally Alces & Dorr, *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. ILL. L. REV. 527; Kennedy, *The Uniform Fraudulent Transfer Act*, 18 U.C.C. L.J. 195 (1986).

12. 11 U.S.C. § 547(b) (1988 & Supp. 1989). This is the preference provision of the Bankruptcy Code.

13. 11 U.S.C. § 548 (1988 & Supp. 1989). One of the considerations in drafting the UFTA was to bring state law into accord with section 548 of the Bankruptcy Code. U.F.T.A. prefatory note, 7A U.L.A. 639 (1984). For a discussion of the similarities and differences between the UFTA and section 548, see P. ALCES, *supra* note 6 at ¶ 5.02[3]; Kennedy, *supra* note 11 at 208-09.

14. 11 U.S.C. §§ 101-1330 (1988 & Supp. 1989).

A. *The "Bulk Sales Risk"*

One of the earliest bulk sales statutes was enacted in Louisiana in the late nineteenth century. It was a part of the state's criminal law and proscribed the purchase of "goods, wares, merchandise, or other commodity" under circumstances that would effect a fraud on the seller.¹⁵ That statute, and others like it promulgated around the time of the "Great Depression," were utilized by creditors of sellers who sold all of their stock in merchandise and absconded with the proceeds to parts unknown, or at least parts beyond the jurisdictional reach of the state's courts.¹⁶

In the absence of bulk sales legislation, creditors of the transferor could only reach assets in the hands of the transferee-bulk buyer by utilizing statutory fraudulent conveyance law, or common-law fraudulent conveyance principles based on the Statute of 13 Elizabeth.¹⁷ In order to avoid the transfer to the buyer and expose the transferred assets to the claims of the seller's creditors, a court had to find that the buyer in some way had been party to the fraud effected by the seller. The insidious state of mind of a buyer who paid sufficient value for the assets was difficult to establish.¹⁸

15. 1894 La. Acts 166. Section 1 of the Louisiana Act provided that whoever purchased "goods, wares, merchandise or other commodity under an assumed or fictitious name and with intent to cheat or defraud the seller or vendor" was guilty of a misdemeanor. Section 2 provided that whoever purchased "goods, merchandise, wares or other commodity on credit and shall sell, hypothecate, or dispose of the same out of the usual course of business and with the intent to cheat or defraud the seller or vendor, shall be deemed guilty of a misdemeanor." Section 3 of the Act provided that "whosoever shall purchase any goods, wares, or merchandise, or other commodity on credit and shall secrete himself, or abscond from the State for the purpose, and with the intent, of cheating or defrauding the seller or vendor, shall be deemed guilty of a misdemeanor."

16. A 1928 law review article described a typical bulk sale as follows:

Joseph Johnson operates a men's clothing store in a rented storeroom along Market Street in the town of X. He has a stock of goods valued in his property statement at \$3,000. Harry Jackson, credit manager for the T supply house, extends Johnson credit and fills his orders up to \$1,000. Ten days after these goods have been delivered, Jackson learns that Johnson has sold out his business "lock, stock, and barrel" to Fred Brown for \$2,000, has invested the money in an automobile, and has left in the car for an undisclosed destination. An investigation reveals that Johnson has no other assets than the automobile, and that, at the time of the transfer of the stock of goods, Johnson gave Brown positive assurance that the business was free from debt. Billig, *Bulk Sales Laws: A Study in Economic Adjustment*, 77 U. PA. L. REV. 72, 72 (1928).

17. 13 Eliz., ch. 5 (1571).

18. Courts construing pre-statutory fraudulent transfer law went to some lengths to find insidious intent on the part of the buyer of the assets. See, e.g., *Manwaring v. O'Brien*,

Of course, if the buyer paid an insufficient consideration, the transfer was avoidable on that basis as a gift.¹⁹

Twyne's Case,²⁰ the (in)famous decision establishing the requisite "badges of fraud," was the starting point for any fraudulent conveyance action, and that would also have been true in the case of a bulk sale attacked as a fraudulent conveyance. The case identified six such badges:

1st. That this gift had the signs and marks of fraud, because the gift is general, without exception of his apparel, or any thing of necessity; for it is commonly said, *quod dolus versatur in generalibus*.

2nd. The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3rd. It was made in secret, *et dona clandestina sunt semper suspiciosa*.

4th. It was made pending the writ.

5th. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is a cover of fraud.

6th. The deed contains, that the gift was made honestly, truly and *bona fide*; *et clausae inconsuet' semper inducunt suspicionem*.²¹

If the prototypical bulk sale is examined in terms of those badges of fraud, the similarities and differences between bulk sales and fraudulent conveyance law become clear.

First, a bulk sale is not a "gift"; the seller receives a reasonably equivalent value in exchange for the transfer of assets. So the language of the first badge initially appears inapposite. However,

75 Minn. 542, 545, 78 N.W. 1, 2 (1899) ("Where the vendee has knowledge of such facts as would lead the ordinarily prudent man, using ordinary caution, to make inquiries, whereby the fraudulent intent would have been discovered, he cannot be deemed a bona fide purchaser of property."); *St. Louis Brewing Ass'n v. Steimke*, 68 Mo. App. 52, 56 (1896) ("Facts which might be considered by . . . the jury as badges of fraud [include] undue and unusual haste in the transaction of purchase; . . . the purchase of the contents of a store in lump without . . . any satisfactory explanation why the goods were neither inventoried nor appraised [and] gross inadequacy in price."); *Beels v. Flynn*, 28 Neb. 574, 581, 44 N.W. 732, 733 (1890) ("Purchaser cannot close his eyes to the circumstances under which a debtor sells his goods . . . [and if] he buys at a considerable discount, and the effect of the proposed means of payment must be to hinder and delay, if not defraud creditors of the seller, the purchaser will buy at his peril."). See generally, Billig, *supra* note 16 at 76-81.

19. 1 G. GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES §§ 268-69 (rev. ed. 1940).

20. 3 Coke Rep. 80b, 76 Eng. Rep. 809 (Star Chamber 1601).

21. *Twyne's Case*, 3 Coke Rep. at 80b-81a, 76 Eng. Rep. at 812-14 (footnotes omitted).

even though it is not gratuitous, it is "general." That is, it divests the seller of all or at least a majority of the seller's merchandise, the assets which bulk sales law monitors. So far as the seller's creditors are concerned, a transfer of a majority of the seller's assets gives rise to the same risk as that identified by the first badge of fraud.

With regard to the second badge, in a bulk sale the seller does not remain in possession of the goods transferred in bulk. The Article 6 statute of limitations does not begin to run until the transferee has come *into possession* of the goods transferred in bulk.²² The revised Article 6 would include a definition of "date of the bulk sale" that would clarify timing issues in order to avoid any ostensible ownership problems.²³ But for the most part, this ostensible ownership badge of fraud lost currency with the promulgation of Article 9 of the UCC, and predecessor personal property security enactments. The bulk sales law is, of course, just as incongruous in contemporary commercial practice given the advent of Article 9 and the resulting statutory abrogation of the *Benedict v. Ratner*²⁴ rule. This will be discussed at some length later.²⁵

The third badge of fraud alerts courts to clandestine transactions, and implicates the kinds of concerns that generate substantial debate among those interested in bulk sales law. The original Article 6 statute of limitations section provides that "[i]f the transfer has been *concealed*, actions may be brought or levies

22. Original Article 6 provides that "[n]o action under this Article shall be brought nor levy made more than six months after the date on which the transferee took possession of the goods unless the transfer has been concealed." U.C.C. § 6-111 (1987).

23. U.C.C. § 6-102 (1988) states that:

(g)(i) 'Date of the bulk sale' means:

...

(B) in all other cases, the later of the date on which:

(I) more than ten percent of the net contract price is paid to or for the benefit of the seller; or (II) more than ten percent of the assets, as measured by value, are transferred to the buyer.

Id. §§ 6-102(1)(g)(i)(B)(I) & (II).

The comment to this section further states that:

[t]he connection between the time of transfer and the buyer's rights under the bulk-sale agreement appears only for purposes of sales to which this Article applies. Subsection (i)(g) does not purport to affect the rights of creditors of a seller of property for other purposes or under other circumstances.

Id. § 6-102 comment 1(g).

24. 268 U.S. 353 (1925). *See also* U.C.C. § 9-205 comments 1-4 (1987).

25. *See infra* text accompanying notes 88-90.

made within six months after its discovery.”²⁶ That provision has spawned some litigation concerning what constitutes “concealment.”²⁷ The issue is treated below with regard to the broader fraud issue.²⁸ Revised Article 6 rejects decisions which conclude that failure to comply with the Act constitutes concealment and absolutely insulates even noncomplying transactions which are not avoided within one year of the “alleged violation.”²⁹ For present purposes, it is sufficient to note that the clandestine transfer, the transfer that prejudices the rights of those who are kept ignorant of it, is suspect in commercial fraud jurisprudence.

The fourth badge of fraud, the fact that the transfer was made “pending the writ,” addresses transfers accomplished at a time when the financial condition of the transferor is precarious. Indeed, that is the time when the bulk transfer risk may be greatest, when the transferor can protect its own interests at the expense of its creditors by liquidating merchandise and departing with the cash. A transfer made “pending the writ” occurs when the transferor concludes that its business can no longer operate for the benefit of both the business and its creditors. That could be because a large judgment or bankruptcy is on the horizon, or because the owners of the business have decided that their money and efforts are better invested elsewhere. In any event, the “pending the writ” badge of fraud finds its bulk transfer parallel when the bulk sale takes place as the transferor’s business is about to be terminated. Only then would a sale of a majority of the transferor’s merchandise take place out of the ordinary course of business.³⁰

26. U.C.C. § 6-111 (1987) (emphasis added).

27. See, e.g., *Columbian Rope Co. v. Rinek Cordage Co.*, 314 Pa. Super. 585, 461 A.2d 312 (1983) ; *E.J. Trum, Inc. v. Blanchard Parfums, Inc.* 33 A.D.2d. 689, 306 N.Y.S.2d 316 (1969) (total noncompliance with Article 6 constitutes concealment); but see *Lang v. Graham (In re Borba)*, 736 F.2d 1317 (9th Cir. 1984); *Chartered Bank v. Diamant (In re Del Norte Depot, Inc.)*, 716 F.2d 557 (9th Cir. 1983); *SVM Inv. v. Mexican Exporters, Inc.*, 685 S.W.2d 424 (Tex. Ct. App. 1985); *Aerolineas Argentinas v. Hansen & Yorke Co.*, 12 U.C.C. Rep. Serv. (Callaghan) 329 (N.Y. Civ. Ct. 1973) (mere noncompliance does not constitute concealment; concealment requires some affirmative act).

28. See *infra* text accompanying note 150.

29. U.C.C. § 6-110(3) (1988). The comment to this section states that “[c]ases decided under the 1987 official text of Article 6 disagree over whether the complete failure to comply with the requirements of that Article constitutes a concealment that tolls the limitation. This Article adopts the view that noncompliance does not of itself constitute concealment.” *Id.* comment 2; see also *id.* comment 3.

30. See *Ross v. Rodolpho (In re Villa Roel, Inc.)*, 57 Bankr. 835 (Bankr. D.D.C. 1985) (“major part” means a majority of the transferor’s inventory); *Murdock v. Plymouth Enter.*,

The trust badge of fraud, for contemporary purposes, parallels the second badge of fraud, seller retaining possession of the assets. The bulk sales law does not implicate trust devices in a way that emphasizes a parallel between fraudulent conveyance law and either original or revised Article 6.

The sixth and final badge of fraud, concerning protestations of bona fides, is of limited contemporary pertinence,³¹ and will have no more application in the bulk sales context than it would in any other contemporary fraudulent conveyance.

The *Twyne's Case* badges of fraud were designed to bridge the gap between actual and constructive fraud. They were first and foremost evidentiary tools, presumptions to aid the victims of a fraudulent conveyance in overcoming the difficulties of establishing an actual intent to defraud.³² But it is best to distill both fraudulent conveyance and bulk sales laws down to their constituent elements, with respect to generic fraud law, so that the interests served by bulk sales legislation may be better understood. Consider a bulk sale in terms of misrepresentation. By accepting delivery of goods or rendition of services at a time when a business maintains a stock of goods worth an amount in excess of the claims against the business, the business is constructively representing to its creditor that the stock of goods will be available to satisfy the obligations of the business. At least that is the fundamental fiction

Inc. (*In re Curtina Int'l, Inc.*), 23 Bankr. 969, 977 (Bankr. S.D.N.Y. 1982) ("[o]rdinary course" means 1. the transfer was typical in the transferor's industry; 2. the transferor routinely liquidated inventory by means of closeout sales, and 3. the transfer did not result in the discontinuance of any line of the transferor's business) (citing *Sternberg v. Rubenstein*, 305 N.Y. 237, 112 N.E.2d 210 (1953)); *Bergen, Johnson & Olson v. Verco Mfg. Co.*, 690 S.W.2d 115 (Tex. Ct. App. 1985) (same); *National Bank v. Frydlewicz*, 67 Mich. App. 417, 241 N.W.2d 471 (1976) ("out of the ordinary course" means an extraordinary transaction); *First Nat'l Bank v. Crone*, 157 Ind. App. 665, 301 N.E.2d 378 (1973) (same).

Revised Article 6 defines a sale as "in the ordinary course of the seller's business, if the sale comports with usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices." U.C.C. § 6-102(1)(m) (1988).

31. U.F.T.A. § 4 comment 5, 7A U.L.A. 654 (1984) ("recitals of 'good faith' can no longer be regarded as significant evidence of a fraudulent intent"). But see P. ALCES, *supra* note 6, at ¶ 5.02[1][f]:

To the extent that this badge of fraud might still retain some currency, however, it is manifested in the courts' suspicion of recitals in documents evidencing the conveyance of property. For instance, it has been considered a badge of fraud to misstate the consideration attending the conveyance. Also, the courts have recognized that the mere recital of consideration above should not be given great probative effect.

(footnotes omitted).

32. P. ALCES, *supra* note 6 at ¶ 5.03[2].

upon which the bulk sales law is premised.³³ Of course, the business never expressly made such a representation; the creditor infers fiscal well-being and intent to satisfy debts from the fact that the business maintains a stock of merchandise. Given problems of ostensible ownership,³⁴ a creditor of a business draws that inference at its substantial peril. That peril is, of course, enhanced by the proliferation of secured credit. Nonetheless, the notion of constructive misrepresentation is the foundation of bulk sales law and any criticism of its incarnation must confront that fundamental incongruity.

B. Early Nonuniform Responses

The first bulk sales statutes were limited in scope to the particular enterprises and transactions that initially gave rise to the bulk sales risk. Perhaps the primary evil identified by the drafters of early acts was the clandestine transfer of assets. The fact that the bulk transferor sold its merchandise in secret evidenced the fraudulent nature of the sale.

In a series of articles written as part of a study of pre-Uniform Commercial Code bulk sales legislation, Professor Frank Miller surveyed the early enactments and delineated their common and recurring characteristics. Miller divided his study by reference to

33. See *Elliott Grocer Co. v. Field's Pure Food Mkt., Inc.*, 286 Mich. 112, 281 N.W. 557 (1938). In that case, the defendants purchased fixtures from a corporation without giving notice, which the plaintiff claimed violated the bulk sales law. The Michigan Supreme Court held that the bulk sales law was designed to prevent the sale out of the regular course of business of the "visible assets" of a business which possesses and uses merchandise and fixtures. The court determined that sales of fixtures in bulk, even though not in conjunction with the sale of merchandise, were prohibited by the bulk sales statute. *Elliott*, 281 N.W. at 558.

34. Professor Baird and Dean Jackson have argued that the ostensible ownership problem that occurs "whenever there is a separation of ownership and possession" can be easily cured by the development of public filing systems to put the commercial world on constructive notice of multiple claims to the same property. Baird & Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175, 186 (1983). However, Professor Mooney has suggested that ostensible ownership may not in fact confound commercial expectations in the ways envisioned by Baird and Jackson. "The issue is, like most matters of public policy, a complex one which demands an investigation and analysis of numerous factual, behavior[al], and economic considerations." Mooney, *The Mystery and Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases*, 39 ALA. L. REV. 683, 687-88 (1988).

the enterprises subject to bulk sales legislation,³⁵ the nature of the property transfers covered,³⁶ and the nature of the transactions falling within the scope of the pre-UCC acts.³⁷ He ordered the enterprises by reference to the frequency with which they were included within the scope of the nonuniform statutes: first came retail mercantile businesses,³⁸ then wholesale mercantile businesses,³⁹ followed, in order, by manufacturing businesses,⁴⁰ repair shops,⁴¹ restaurants,⁴² farmers,⁴³ businesses in which only services were sold,⁴⁴ and, finally, a miscellaneous category.⁴⁵ While the stat-

35. Miller, *Bulk Sales Laws: Businesses Included*, 1954 WASH. U.L.Q. 1.

36. Miller, *Bulk Sales Laws: Property Included*, 1954 WASH. U.L.Q. 132.

37. Miller, *Bulk Sales Laws: Meaning to Be Attached to the Quantitative and Qualitative Requirements Phrases of the Statutes*, 1954 WASH. U.L.Q. 283.

38. See Miller, *supra* note 35, at 9-13 (citing *Jubas v. Sampsell*, 185 F.2d 333 (9th Cir. 1950) (conveyance by owner of bankrupt retail shoe business of 25% of inventory and 15% of value of its stock, without proper notice to creditors, violated California bulk sales law); *Sproul v. Gambone*, 43 F. Supp. 575 (W.D. Pa. 1942) (bulk sale of cigarette vending machines by owner of bankrupt wholesale tobacco and candy business violated Pennsylvania bulk sales act); *Langharn v. Zimmelman*, 28 F. Supp. 348 (S.D. Cal. 1939) (bulk sale law violated when owner of bankrupt jewelry store sold substantial portion of stock without proper notice to creditors)).

39. *Id.* at 14-15 (citing *North Am. Provision Co. v. Fischer Lime & Cement Co.*, 168 Ark. 106, 269 S.W. 993 (1925) (finding wholesale mercantile business within scope of the pre-UCC bulk sales statute though business had no manufacturing capacity)).

40. *Id.* at 16-25 (citing *In re Laureate Co.*, 294 F. 668 (2d Cir. 1923) (stock of calendars and pictures which manufacturer was in process of attaching together characterized as merchandise rather than raw materials and therefore proper subject of New York statute); *Gretzinger v. Wynne Wholesale Grocery Co.*, 183 Ark. 303, 35 S.W.2d 604 (1931) (sale of bakery within scope of Arkansas statute)).

41. *Id.* at 26-28 (citing *Yeager v. Powell*, 219 Ark. 713, 244 S.W.2d 141 (1951) (bulk mortgage of all parts and accessories of combination sales agency, repair shop, and supply department within scope of Arkansas statute)). *But see* *Wellston Radio Corp. v. Culberson*, 175 Ark. 921, 300 S.W. 443 (1927) (sale of electric repair shop not sale of "merchandise business" within bulk sales law); *Fisk Rubber Co. v. Hinson Auto Co.*, 168 Ark. 418, 270 S.W. 605 (1925) (sale of automobile repair shop, in which various accessories were kept for purpose of repairing cars, did not violate bulk sales laws); *Swanson v. De Vine*, 49 Utah 1, 160 P. 872 (1916) (sale of cobbler shop not within bulk sales laws, even though cobbler displayed shoelaces, polish, and brushes for sale).

42. *Id.* at 28-37 (citing *Calvert Bldg. & Constr. Co. v. Winakur*, 154 Md. 519, 141 A. 355 (1928) (applying Maryland statute to sale of restaurant); *Plass v. Morgan*, 36 Wash. 160, 78 P. 784 (1904) (sale of restaurant and boarding house within scope of Washington statute)).

43. *Id.* at 37-41; *see also* *Samuelson v. Goldberg*, 13 N.J. Misc. 204, 177 A. 260 (1935) (farmer's sale of livestock not within bulk sales act). *But see* *Coon v. Doss*, 361 Ill. 515, 198 N.E. 341 (1935) (farmer's sale of major portion of stock violated bulk sales laws).

44. *Id.* at 38-41. Miller observed that a majority of courts concluded that bulk sales legislation did not apply to service businesses. *Id.* at 39 (citing *St. Matthews Motor Co. v. Schnepf*, 306 Ky. 823, 209 S.W.2d 481 (1948); *Flushing Nat'l Bank v. Abrams*, 270 A.D. 911,

utes were increasingly less likely to include enterprises that were further removed from the retail mercantile business, the context in which the bulk sales risk was first identified, it is not at all clear that the fraud risk is any less in bulk sales of the assets of other enterprises. Indeed, that has remained a conundrum under original Article 6,⁴⁶ and perhaps will remain so under the revised version as well.⁴⁷

Another of the Miller survey articles concerned the nature of the property interests within the scope of the early enactments, specifically whether sales of assets other than merchandise were covered. Certainly many bulk sales of a retail mercantile business's inventory would be accompanied by its fixtures and equipment as well. Several of the early statutes included sales of fixtures within their scope.⁴⁸ Inclusion of fixtures is rational insofar as the focus of bulk sales legislation should be on transactions that convert a fixed corpus of assets into a form sufficiently liquid to accommodate its swift removal from the reach of the seller's creditors. Equipment and fixtures are in the nature of assets that creditors rely upon in extending unsecured credit, and should be as much of a concern in bulk sales law as the merchandise sold by such businesses, though merchandise is arguably more liquid. It is likely that early statutes excluded equipment and fixtures from their scope because it was believed that the seller would have difficulty disposing of such assets surreptitiously. That does not provide a sound rationale for excluding transfers of such assets, however, after facts indicate

61 N.Y.S.2d 609 (1946), *aff'd mem.*, 296 N.Y. 1009, 73 N.E.2d 582 (1947); *Item Co. v. National Dyers & Cleaners*, 15 La. App. 108, 130 So. 879 (1930); *La Salle Opera House Co. v. La Salle Amusement Co.*, 289 Ill. 194, 124 N.E. 454 (1919)).

45. *Id.* at 41-45. Typically, these businesses engaged primarily in the sale of services. *Id.* (citing *Wright v. Aaron*, 214 Ark. 254, 215 S.W.2d 725 (1948); *Meier Elec. & Mach. Co. v. Dixon*, 81 Ind. App. 400, 143 N.E. 363 (1924); *Northrop v. P.W. Finn Constr. Co.*, 260 Pa. 15, 103 A. 544 (1918) (contracting); *Ferrat v. Adamson*, 53 Mont. 172, 163 P. 112 (1917) (poolrooms); *Stewart v. Sulger*, 174 A.D. 828, 161 N.Y.S. 489 (1916) (hotels); *People's Sav. Bank v. Van Allsburg*, 165 Mich. 534, 131 N.W. 101 (1911) (funeral parlors)).

46. U.C.C. § 6-102(3) (1987) provides that the "enterprises subject to this Article are all those whose principal business is the sale of merchandise from stock, including those who manufacture what they sell." See also W. HAWKLAND, *UNIFORM COMMERCIAL CODE SERIES* § 6-102.05 at 19-24 (1984) (describing efforts to adjust scope of bulk sales law to include service establishments).

47. U.C.C. § 6-103(1)(a) (1988) provides that "this Article applies to a bulk sale if: (a) the seller's principal business is the sale of inventory from stock."

48. For a list of these statutes see Miller, *supra* note 36, at 149 n.91.

that the seller was indeed able to sell equipment or fixtures out from under its unsecured creditors.

The scope of the nonuniform legislation was further limited by the requirement that for a sale to be proscribed it had to be "in bulk,"⁴⁹ though the meaning of that proviso was not always clear. The purpose was to identify transfers of substantial assets out of the ordinary course of the seller's business. In that way, the legislation would protect the creditors of the transferor from the risk of sales that the creditors would not anticipate in the ordinary course of commercial events. It would be inappropriate to protect the seller's creditors from those dispositions of assets that the creditors should have been able to anticipate. The term "in bulk," then, was construed to contemplate sales of a majority of a seller's merchandise. It is not obvious, however, what commends that construction of the term other than some sense of convenience. The adverse consequences of a bulk sale could certainly be visited upon the seller's creditors even if an amount of assets comprising far less than a majority were sold in a manner that prejudiced the creditors' interests.⁵⁰

Efforts to limit the scope of bulk sales legislation were probably a function of the concern that such legislation was an unwarranted imposition on commercial transactions. Early cases reasoned that bulk sales laws should be strictly construed because they were in derogation of the common law of sales.⁵¹ By the time the UCC was promulgated, the opposing camps were formed: The larger commercial interests that financed retail mercantile businesses as well as those who might purchase goods in bulk were in opposition to the creditmen's associations that developed the nonuniform bulk sales legislation. However, with the advent of secured personal property financing, there was less reason for the

49. P. ALCES, *supra* note 6, ¶ 4.03(3)[a].

50. California has adopted a nonuniform amendment to section 6-102(1) which replaces "major part" with "substantial part." See CAL. COM. CODE § 6102(1) (West 1964 & Supp. 1990) ("Where the amount of the transfer . . . is sufficient to prejudice the interests of creditors to a substantial degree . . . a sale in the vicinity of 5 percent of the total inventory is a transfer of a 'substantial part of the inventory' and is subject to the bulk transfer provisions."). See *Reed v. Anglo Scandinavian Corp.*, 298 F. Supp. 310 (E.D. Cal. 1969), *aff'd*, 9 U.C.C. Rep. Serv. (Callaghan) 102 (9th Cir. 1971).

51. See *Miller*, *supra* note 35, at 6 (citing *Meier Elec. & Mach. Co. v. Dixon*, 81 Ind. App. 400, 143 N.E. 363 (1924); *United States Promotion Co. v. Anderson*, 100 Ohio St. 58, 125 N.E. 106 (1919)).

lenders to be concerned with bulk sales legislation. The same results accomplished by a bulk sale could be accomplished by a "bulk mortgage." As long as the lenders did not have to comply with Article 6 when executing an Article 9 secured transaction, there was no great reason to stand in firm opposition to any bulk sales legislation. And though bulk mortgages were subject to regulation in some states,⁵² UCC Article 9 and the exceptions contained in section 6-103 operate to assuage the fears of large commercial finance interests. This will be explored in more detail below.⁵³

Finally, the language of some of the early statutes is worth noting to demonstrate further the affinity between bulk sales law and general commercial fraud law. Several states adopted the Pennsylvania form bulk sales statute, which provided that a non-complying bulk sale (one not made sufficiently notorious) was "fraudulent and void as against the transferor's creditors."⁵⁴ The Pennsylvania form was designed to invoke the general fraudulent conveyance law in order to provide the transferor's creditors with a means to recover the assets transferred in bulk.⁵⁵ The story of nonuniform bulk sales law in Ohio is particularly interesting with regard to fraudulent conveyance parallels. Ohio's bulk sales legislation, providing that a sale not in compliance with the statute was "fraudulent and void," was held unconstitutional under the Ohio State Constitution.⁵⁶ The Ohio legislature responded by rewriting the law to provide that a sale not in compliance with the legisla-

52. See Billig & Smith, *Bulk Sales Laws: Transactions Covered by These Statutes*, 39 W. VA. L.Q. 323, 326-327 & nn. 14-17 (1933) (stating that "[t]he [pre-UCC] bulk sales laws of Arkansas, California, Louisiana, and Oklahoma, contain[ed] express provisions covering chattel mortgages"). With respect to instances where courts were called upon to determine whether bulk mortgages were within the scope of the statutes. Billig and Smith observed:

The difference between the cases that hold that the [bulk sales law] applies to chattel mortgages and those that hold that it does not apply appears to rest upon the question as to whether or not title passes to the goods conveyed under the mortgage or trust. In the cases holding that title remains in the mortgagor, it has been generally held that a chattel mortgage is not a 'sale, transfer or assignment.' In those states in which it has been held that title does pass by the deed of trust or mortgage, the [bulk sales law] has been held to apply.

Id. at 329 (quoting *United States v. Lankford*, 3 F.2d 52, 54 (E.D. Va. 1924)).

53. See *infra* text accompanying notes 94-95.

54. Billig, *supra* note 16, at 74. Eleven jurisdictions adopted the Pennsylvania form bulk sales statute. See *id.* at 73 n.3 (statutes listed).

55. *Id.* at 76-77 n.19 (citing *Escalle v. Mark*, 43 Nev. 172, 177, 183 Pa. 387, 389 (1919); *Wright v. Hart*, 182 N.Y. 330, 336, 75 N.E. 404, 406 (1905)).

56. See *id.* at 97 (citing *Miller v. Crawford*, 70 Ohio St. 207, 71 N.E. 631 (1904)).

tion was "presumed to be made with the intent to hinder, delay or defraud creditors" of the seller.⁵⁷ That formulation was also struck down as unconstitutional and the Ohio legislature finally had to amend the State Constitution in order to accommodate bulk sales legislation.⁵⁸ What is clear from the Pennsylvania and Ohio legislation, however, is that bulk sales law was originally fraudulent conveyance law. That observation is also supported by consideration of contemporary fraudulent disposition law.

C. Affinity Between Fraudulent Disposition Law and Bulk Sales Law

This Article maintains that bulk sales law is but one particular form of the general fraudulent disposition law. And, properly understood, general fraudulent disposition law includes fraudulent conveyance law under the Statute of 13 Elizabeth,⁵⁹ the Uniform Fraudulent Conveyance Act,⁶⁰ its statutory successor, the Uniform Fraudulent Transfer Act,⁶¹ section 548 of the Bankruptcy Reform

57. OHIO REV. STAT. §§ 6343, 6344 (Page 1908).

58. Billig, *supra* note 16, at 97-99 (citing *Williams & Thomas Co. v. Preslo*, 84 Ohio St. 328, 95 N.E. 900 (1911)). The amended Ohio Constitution provided that "[l]aws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company, or individual." OHIO CONST. art. XIII § 2 (1912). The subsequent bulk sales law provided that:

The sale, transfer, or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conducting of said business, or the sale, transfer or assignment in bulk of the fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, transferor, or assignor, is void as against the creditors of the seller, transferor, assignor, unless the purchaser, transferee, or assignee demands and receives from the seller, transferor, or assignor a written list of names and addresses of the creditors of the seller, transferor and assignor with the amount of the indebtedness due or owing to each and certified by the seller, transferor and assignor, under oath, to be a full, accurate, and complete list of his creditors and of his indebtedness; and unless the purchaser, transferee, or assignee shall, at least five days before taking possession of such merchandise, fixtures, or merchandise and fixtures, or paying therefor, notifies personally, or by registered mail, every creditor whose name and address appears in said list, or of which he has knowledge, of the proposed sale and of the price, terms, and conditions thereof.

OHIO REV. CODE § 1313.54 (Anderson 1953).

59. 13 Eliz., ch. 5 (1571) (applying to conveyances made with intent "to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts").

60. UNIF. FRAUDULENT CONVEYANCE ACT (U.F.C.A.), 7A U.L.A. 427 (1918).

61. U.F.T.A., 7A U.L.A. 639 (1984). In updating the UFCA with the UFTA, the Conference cited the following considerations:

Act of 1978,⁶² and perhaps also the preference law formulated in section 547 of the Bankruptcy Code.⁶³ But once the commercial fraud foundations of bulk sales law are appreciated, the affinity between fraudulent disposition law and bulk sales law may be understood in terms that will have some consequences for states that adopt the revision of Article 6 as well as for states that opt for the repealer alternative. That affinity is revealed by focusing on the important commercial principles served by both fraudulent disposition law and bulk sales law, and by recognizing the common factual predicates that support application of both bodies of commercial fraud law.

1. *Prejudice to Unsecured Creditors.*—Comment 2 to section 3 of the UFTA, defining “value,” explains that in determining whether the value given by the buyer is sufficient to insulate the

(1) The Bankruptcy Reform Act of 1978 has made numerous changes in the section of that Act dealing with fraudulent transfers and obligations, thereby substantially reducing the correspondence of the provisions of the federal bankruptcy law on fraudulent transfers with the Uniform Act.

(2) The Committee on Corporate Laws of the Section of Corporations, Banking & Business Law of the American Bar Association, engaged in revising the Model Corporation Act, suggested that the Conference review provisions of the Uniform Act with a view to determining whether the Acts are consistent in respect to the treatment of dividend distributions.

(3) The Uniform Commercial Code, enacted at least in part by all 50 states, had substantially modified related rules of law regulating transfers of personal property, notably by facilitating the making and perfection of security transfers against attack by unsecured creditors.

(4) Debtors and trustees in a number of cases have avoided foreclosure of security interests by invoking the fraudulent transfer section of the Bankruptcy Reform Act.

(5) The Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, forbid a lawyer to counsel or to assist a client in conduct that the lawyer knows is fraudulent.

Id. (prefatory note).

62. 11 U.S.C. § 548 (1988).

63. *Id.* § 547. The UFCA requires that consideration must be given in good faith in order for the consideration to be deemed fair. U.F.C.A. § 3, 7A U.L.A. 427, 448-49 (1918). One reason for this good faith test may be the avoidance of preferential transfers to insiders. *See, e.g., Kennedy, supra* note 11, at 204-05. *See also* U.F.T.A. § 5(b), 7A U.L.A. 639, 657 (1984):

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

transaction from avoidance, the inquiry should focus on the value as "determined in light of the purpose of the Act to protect a debtor's estate from being depleted *to the prejudice of the debtor's unsecured creditors*."⁶⁴ So, the object of the fraudulent disposition law is to vindicate the interests of an unsecured creditor in the estate of its debtor. Actions by the debtor that compromise that interest may implicate commercial fraud principles and provide the basis for a reviewing court to avoid a challenged disposition.

Once the debtor's unsecured creditors are perceived as having an interest in the assets of the debtor, the commercial fraud calculus is complicated. What is the nature and extent of that interest? May it be divested by an adjustment of expectations effected by changing the commercial law? How may the interest be alienated or abandoned altogether? Does the interest arise as a matter of contract, tort, or property law principles and how might that matter? Confronting the contours of the enacted and proposed commercial fraud law with regard to such issues reveals the balance that should inform resolution of recurring "trouble cases."⁶⁵

In appreciating that balance and the nature of the junior unsecured creditors' interest that commercial fraud law is designed to vindicate, it is useful to analyze first the relationship between the debtor and its unsecured creditors. Upon liquidation of the debtor's business, the unsecured creditors will stand ahead of the owners and shareholders of the debtor-firm, but behind secured creditors to the extent of the secured creditors' collateral interests in particular (even if not specific)⁶⁶ property in which the debtor has rights. The unsecured creditors' interests may be diluted or frustrated altogether in several different ways. The debtor may run the business into the ground, impairing even the claims of secured

64. U.F.T.A. § 3 comment 2, 7A U.L.A. 639, 650-51 (1984) (emphasis added).

65. See W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 160 (1973). Twining observed:

The "trouble case method" consists of examining in detail the processes involved in settling actual disputes. What happened, what each participant did in relation to the dispute, what steps were taken by what other persons, the final outcome, the reasoning of the deciders, the effects of the decision on the parties themselves, on future trouble cases and on the general life of the group are to be considered in depth.

Id.

66. See U.C.C. § 9-204 (1987) (concerning after-acquired property).

creditors. Or the assets delivered to the debtor by an unsecured trade creditor may be subject to the after-acquired property interest of an inventory financier. In that event, while the debtor retains the inventory, it is subject to the claims of the financier. Subsequently, when the inventory is sold, the financier will have a collateral interest in the accounts receivable generated by the sales as proceeds of the inventory collateral. Alternatively, the debtor may increase the salaries of its officers, thereby depleting the profits realized from the sale of the as yet unpaid for inventory. The officers could also declare a dividend and pay the debtor's shareholders with the proceeds of the inventory sold rather than paying the supplier-unsecured trade creditor the amount of the outstanding invoice for the inventory.⁶⁷ The debtor could also execute a fraudulent or preferential transfer of the inventory. Finally, the debtor could sell the inventory in bulk and leave the jurisdiction, or otherwise impair the creditors' ability to recover on their claims.

Clearly, debtors have the power to compromise the interests of their unsecured creditors. Which transactions should be policed by commercial fraud law and the manner in which they should be policed are considerations crucial to an understanding of the place bulk sales legislation occupies in the commercial fraud regime. The work of Dean Robert Clark, treated in the next section of this Article, provides a frame of reference.

2. *Conceptions of Fairness.*—In a thoughtful and important article written over a decade ago, Dean Robert Clark investigated the normative foundations of fraudulent conveyance law and the consistent moral imperatives underlying the commercial law principles that determine the duties a corporate debtor owes to its creditors.⁶⁸ He distilled the substance of commercial fraud law into four constituent concerns: Truth; Respect; Evenhandedness; and Nonhindrance.⁶⁹ Application of these norms to the bulk transfer

67. One of the reasons offered by the drafters of the UFTA for rewriting the fraudulent disposition law was to effect consistency between the fraudulent transfer law and the Revised Model Business Corporations Act's treatment of dividend distributions; see also P. ALCES, *supra* note 6, at ¶ 5.01[4][e][iii].

68. Clark, *The Duties of the Corporate Debtor to its Creditors*, 90 HARV. L. REV. 505 (1977).

69. *Id.* at 509-13.

context furthers an appreciation of the affinity between bulk sales and fraudulent disposition law.

Clark describes the "Truth" norm as follows: "Truth: in connection with transfers of property rights to others, a debtor is forbidden to tell lies to his creditors that will lead to the nonsatisfaction of their claims."⁷⁰ The debtor who transfers his assets to a purchaser for even a reasonably equivalent value may, in generic fraud law, be guilty of a misrepresentation. Recall the misrepresentation foundation of the bulk sales law: the debtor who is indebted to unsecured trade creditors is deemed to be representing to them that the debtor's assets will be available for repayment of the debtor's outstanding obligations. Though we might question the reasonableness of a creditor's reliance on that kind of representation, there is no denying that bulk sales law is founded on just such a premise. Further, it is clear that misrepresentation liability may be premised on a failure to disclose when there is a duty to disclose. Bulk sales legislation provides such a duty to disclose, but it may be that it exists notwithstanding the enacted legislation if Clark is correct in identifying truthfulness as a normative imperative in general fraudulent disposition law.

Clark states, with regard to "Respect," that "[t]he debtor has a moral duty in transferring his property to give *primacy* to so-called legal obligations, which are usually the legitimate, conventional claims of standard contract and tort creditors, as opposed to the interests of self, family, friends, shareholders, and shrewder or more powerful bargaining parties."⁷¹ The debtor who transfers his assets in bulk puts his own interests ahead of those of his contract and tort creditors. Those creditors are left with perhaps uncollectible claims while the debtor receives cash. Here, too, there is a coincidence of normative foundation between bulk sales law and fraudulent disposition law.

Clark describes the bifurcated nature of his third norm, "Evenhandedness":

Whenever a debtor is or is about to become insolvent and thus unable to satisfy all his creditors in full, the debtor should refrain from preferring one creditor over another. Similarly, in such cases creditors should refrain from seeking such a preference. In either

70. *Id.* at 509.

71. *Id.* at 510-11 (emphasis in original) (footnotes omitted).

instance, transfers resulting in better than equal treatment on the eve of liquidation proceedings should be undone—and may actually be undone in bankruptcy proceedings as voidable preferential transfers.⁷²

Clark's description of the evenhandedness norm discloses the symbiotic relationship between fraudulent disposition law and preference law and the ultimate affinity between fraudulent disposition and bulk sales laws. The bulk sales legislation requires that the debtor give notice to all of his creditors so that each may pursue whatever options are available to best position himself in light of the impending sale.⁷³ The debtor who fails to give notice (as well as the transferee who conspires in that object) violates the evenhandedness norm in much the same way as the noncomplying bulk sale violates the respect norm.

Clark recognized that the evenhandedness norm provides a basis for imposing sanctions on the transferee who has obtained a preferential disposition. That, of course, is not an idea that has been embraced by bankruptcy law. While a preferential transferee may be required to disgorge the fruits of the transfer, there is no further liability imposed on the transferee.⁷⁴ Therefore, attorneys may have no qualms (other than moral ones) about advising their clients to accept or even seek a preferential transfer. Professor Douglas Baird recognized this incongruity in materials he published for a conference marking the tenth anniversary of the Bankruptcy Reform Act of 1978:

The damage remedy in tort law tries (to the extent money can do it) to restore things to the way they were before the injury took place. The defendant ends up having to pay an amount of money exactly equal to the damage done. At the end of the day, it bears all the costs of its conduct and the amount of money the parties are fighting over is equal to the harm done. This analogy reveals a peculiarity of the existing remedy for preference law. The size of the preference is not in fact the same as the damage that the preferential transfer causes. In considering the problem of the voidable preference in bankruptcy, we should consider both the amount that is transferred and the damage that the transfer itself causes, just as

72. *Id.* at 512.

73. See U.C.C. § 6-105 (1987).

74. See 11 U.S.C. § 548 (1988); Baird, *Avoiding Powers Under the Bankruptcy Code*, 1988 ALI-ABA WILLIAMSBURG CONFERENCE ON BANKRUPTCY 328.

in antitrust in devising the optimum penalty we must consider both the monopoly profits the defendant received [and] also the welfare loss that accompanied them.⁷⁵

Just as the transferee's return of the preferentially transferred assets to the debtor or its creditors may not compensate the creditors to the full extent of their loss, creditor-victims of a bulk sale may have reason to conclude that the remedial regime fixed by bulk sales law will be inadequate to compensate them for the loss suffered as a consequence of the bulk sale.

It is in the similarity between the remedial gaps in preference and bulk sales law that the affinity between fraudulent disposition law and the bulk sales law in terms of the evenhandedness norm is most apparent. The creditors prejudiced by a preferential transfer are in much the same position as are the creditors of a bulk transferor who does not comply with the notice provision of bulk sales legislation. But what is crucial for the thesis of this Article is that Clark posited the fundamental normative affinity between fraudulent conveyance law and preference law. Moreover, Clark supported that observation with a discussion of *Twyne's Case*, the crucial fraudulent conveyance decision, as a *preference* action.⁷⁶

Clark's final norm, "Nonhindrance," also conclusively supports the argument that fraudulent disposition law and bulk sales law share a common normative foundation. A debtor hinders its creditors when it arranges its affairs so as to frustrate or confound its creditors' collection efforts.⁷⁷ It is the conversion of inventory into a more liquid form out of the ordinary course of business that hinders the creditors' collection efforts. So construed, every bulk sale is a transfer that results in hindrance of creditors. But only transfers effected with an intent to hinder, delay, or defraud are actionable under the "actual intent" branch of fraudulent disposition law. So the distinction, or lack of one, between actual and constructive fraud must be treated before the circle is complete.

75. Baird, *supra* note 74.

76. Clark, *supra* note 68, at 513-14.

77. *Id.* at 512-13. Clark describes the nonhindrance norm as the general norm in which the three norms of truth, respect and evenhandedness are subsumed. There may be transactions in which the norms of truth, respect and evenhandedness are not offended and yet the conveyance is considered fraudulent because it violates the general norm of nonhindrance. *Id.*

That inquiry is pursued subsequently,⁷⁸ but it is first necessary to introduce that inquiry by identifying certain commercial incongruities that cloud the formulation of a viable theory of bulk sales law.

D. The Incongruities

The prefatory note to revised Article 6 acknowledges the economic and legal adjustments that have deprived bulk sales legislation of a good measure of logical and moral force over the course of the last thirty-five years or so. Because it provides the foundation of much of the discussion that follows, pertinent portions of the prefatory note bear reproduction here:

In the legal context in which Article 6 . . . and its nonuniform predecessors were enacted, the benefits to creditors appeared to justify the costs of interfering with good faith transactions. Today, however, creditors are better able than ever to make informed decisions about whether to extend credit. Changes in technology have enabled credit reporting services to provide fast, accurate, and more complete credit histories at relatively little cost. A search of the public real estate and personal property records will disclose most encumbrances on a debtor's property with little inconvenience.

In addition, changes in the law now afford creditors greater opportunities to collect their debts. The development of minimum contacts with the forum state as a basis for *in personam* jurisdiction and the universal promulgation of state long-arm statutes and rules have greatly improved the possibility of obtaining personal jurisdiction over a debtor who flees to another state. Widespread enactment of the Uniform Enforcement of Foreign Judgments Act has facilitated nation-wide collection of judgments. And to the extent that a bulk sale is fraudulent and the buyer is a party to fraud, aggrieved creditors have a remedy under the Uniform Fraudulent Transfer Act. Moreover, creditors of a merchant no longer face the choice of extending unsecured credit or no credit at all. Retaining an interest in inventory to secure its price has become relatively simple and inexpensive under Article 9.⁷⁹

Each of the points in the foregoing excerpt is well taken. But the Reporter glosses over some considerations that bear on the viability of bulk sales law. Though it may well be that credit reporting

78. See *infra* text accompanying notes 135-148.

79. U.C.C. Article 6 prefatory note (1988).

services have become increasingly sophisticated and accessible to a broader group of consumers, at least two things remain unclear: (1) the extent to which trade creditors take advantage of these services, and (2) the extent to which a business's credit history matters when the time is right for the business to liquidate its assets in bulk. After all, a bulk sale, by definition, is supposed to be a once-in-a-business-lifetime occurrence for the debtor. The debtor no longer has anything to lose when it executes the bulk sale.

The Reporter also suggests that the unsecured trade creditor concerned with the bulk sales risk could take a purchase money security interest (PMSI) in the goods that it delivers to the debtor.⁸⁰ First, as a practical matter, probably few suppliers have the sophistication or foresight to take advantage of the Article 9 purchase money security interest protections. Though it could be argued that commercial law should discourage rather than reward ignorance or carelessness, it would still be true that suppliers of services would not have a means to avoid the bulk sales risk by taking a PMSI because they would be providing neither inventory nor equipment.

Further, it is not clear why the disclosure of encumbrances in public real and personal property records matters with regard to the bulk sales calculus. Insofar as grants of collateral interest are excepted from the scope of bulk sales law in its Uniform Commercial Code forms, both past and present, an unsecured creditor with the foresight to search the public records would find nothing that would enable it to recover amounts already outstanding. However, the creditor might discover that it is time to close the barn door, though perhaps too late to do any good. The Reporter does hit upon something here that bears further treatment in the next subsection of this Article: the uneasy tension between Articles 6 and 9.

In turning to that tension, it is worthwhile to note that the Reporter's prefatory remarks do recognize the potential nexus be-

80. See U.C.C. § 9-107 (1987). That section provides:

A Security interest is a "purchase money security interest" to the extent that it is

(a) taken or retained by the seller of the collateral to secure all or part of its price; or

(b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

See also U.C.C. § 9-312(3) (1987).

tween bulk sales law and fraudulent disposition law—so long as the transferee is a party to the fraud.

1. *Personal Property Security*.—Collateral interests in personal property are, as noted by the Reporter, commonplace. That is due largely to efforts of the drafters of the UCC who, in the promulgation of Article 9, made coherent a body of law that had long been a morass. There had been early efforts to distill the divergent personal property security devices down to their common constituent elements.⁸¹ For reasons largely attributable to the immaturity of commercial jurisprudence (relative to the present interstate economy), the differences among state laws overwhelmed the commonalities and were a source of resistance to comprehensive and preemptive uniform law. According to Professor Grant Gilmore, what happened between the early abortive comprehensive codification efforts and the promulgation of Article 9 was attributable largely to adjustments in business expectations and the expansion of interstate commerce:

Retrospectively, we are in a position to say that the Chattel Mortgage Act [1927] came too soon: the underground process of unification had not gone far enough; the diversity still had deep roots; the tangle could not yet be cut away. Article 9 came at the right time and has had a success as spectacular as the earlier [Chattel Mortgage] Act's failure.⁸²

Professor Gilmore saw Article 9 as the inevitable product of its time, the product of the deliberate adjustment of fundamental conceptions. But in 1927, when the Chattel Mortgage Act was promulgated, the time for Article 9 was not yet ripe; commercial expectations and understanding could not be conformed to the comprehensive codification of personal property security interests. It is not merely coincidental that bulk sales legislation was enacted universally in the early twentieth century. Both of those circumstances, the proliferation of uniform bulk sales legislation and the failure of the Chattel Mortgage Act to be adopted anywhere, were the product of the same commercial law mind set. The uneasy tension between secured credit and bulk sales fraud existed then and, as this section of the Article will demonstrate, exists today. And it

81. See Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461, 465 n.6 (1967) (citing 1 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 4.3 (1965)).

82. *Id.* at 474.

is that tension that reveals the incongruity of the current as well as the proposed bulk sales legislation. Further, as subsequent sections of the Article will demonstrate, the elimination of bulk sales law altogether is inconsistent with the pervasive enactment and application of fraudulent disposition law today.

Professor Richard Sabella, in an article concerning the treatment of secured transactions under the UFCA and UFTA, described the early personal property security law in terms that reveal the Article 9/Article 6 paradox.⁸³ In its definition of "fair consideration," the UFCA provides that "fair consideration is given for property, or obligation . . . (b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained."⁸⁴ In contrast, the UFTA does not distinguish in its "reasonably equivalent value" concept (the statutory successor to "fair consideration") between outright transfers and collateral transfers. The drafters of the UFTA explained their reasons for departing from the UFCA distinction: "Under this Act . . . a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt secured, since the amount of the debt is the measure of the value of the interest in the asset that is transferred."⁸⁵ It seems then, that between the UFCA and the UFTA something fundamental about the relationship between personal property security law and commercial fraud law changed.

Sabella suggests that there was good reason for the UFCA's "not disproportionately small" alternative definition of "fair consideration."⁸⁶ At the time the UFCA was drafted, personal property security interests operated much the same way as did real property security interests. The grant of a collateral interest in assets often effected a transfer of title to the grantee rather than merely the creation of a lien against the interest of the debtor.⁸⁷ The personal property security system in the early twentieth cen-

83. See Sabella, *When Enough is Too Much: Overcollateralization as a Fraudulent Conveyance*, 9 CARDOZO L. REV. 773 (1987).

84. U.F.C.A. § 3(b), 7A U.L.A. 449 (1918).

85. U.F.T.A. § 3 comment 3, 7A U.L.A. 650 (1984).

86. Sabella, *supra* note 83, at 782.

87. *Id.*

tury, the heyday of bulk sales legislation, was vastly different from the current regime, and the scope of that difference is manifest in two vital respects. First, the rule of *Benedict v. Ratner*⁸⁸ deemed fraudulent the debtor's continued possession of collateral: "[h]ypothecations (liens where the debtor retained possession) generally were thought to be per se fraudulent conveyances."⁸⁹ In fact, Sabella reports that the rationale underlying that rule was that the debtor's creditor "had the right to rely on its debtor's appearance of wealth."⁹⁰ That clearly evidences the fundamental affinity between the bulk sales law and fraudulent disposition law. Because the debtor's continued possession was deemed a badge of fraud, there was a substantial impediment to the personal property security regime that exists under Article 9.

Further, Sabella points out that insofar as many states considered a chattel mortgage an absolute conveyance of legal title in the collateral to the creditor-secured party, the other creditors of the debtor-transferor would find it extremely difficult if not impossible to reach the debtor's equity in the personalty.⁹¹ Therefore, the claims of those other creditors could be more easily frustrated by a debtor and its transferee who sought to put the debtor's personalty beyond the reach of the debtor's general creditors.

Recognize, then, that in that personal property security system, bulk sales law and chattel mortgage statutes could peacefully coexist. The bulk sales legislation would have reinforced the presumption that a debtor's possession of assets gave rise to his creditors' justifiable reliance on such possession. Moreover, the fraudulent conveyance law's policing of such hypothecations of assets was consistent with affording general creditors the means to avoid an outright sale of the assets. This was because, as Sabella

88. 268 U.S. 353 (1925).

89. Sabella, *supra* note 83, at 781.

90. *Id.* at n.35. Sabella noted that "[t]he vitality of this doctrine continued well into the twentieth century." *Id.* (citing McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 406 n.9 (1933)).

91. *Id.* at 781 (citing 2 J. COBBEY, A PRACTICAL TREATISE ON THE LAW OF CHATTEL MORTGAGES AS ADMINISTERED BY THE COURTS OF THE UNITED STATES §§ 679-717 (1893)). As of 1910, seven states (Arkansas, Maryland, Missouri, Nebraska, New Jersey, South Carolina, and Tennessee) had statutes which did not permit attachment of the mortgagor's equity of redemption. *Id.* at 782 n.41. Nine states (California, Idaho, Maine, Massachusetts, Montana, New Hampshire, North Dakota, South Dakota, and Utah) permitted attachment, but only where the senior creditor was paid in full before the junior creditor foreclosed on the collateral. *Id.* at n.42.

noted, the grant of a collateral interest in many states was an absolute conveyance of title and, so far as general creditors would be concerned, indistinguishable from a bulk sale.⁹² Add to that the fact that some early bulk sales enactments governed bulk mortgages, and the differences in the commercial landscape between the early part and the end of the twentieth century become glaring.

The advent of Article 9 changed commercial lending dramatically. No longer are there disparate personal property security statutes ordering the rights between borrower and lender by reference to often antiquated real property conceptions. Article 9 provides a unitary concept: the Article 9 security interest. Concepts of title and lien that proved a drag on commerce were replaced with provisions that accommodated equitable recognition of the rights of all parties affected by the secured transaction. It may not be necessary, in light of Article 9, to include in fraudulent disposition legislation a provision that protects the rights of a junior unsecured creditor whose debtor granted a comprehensive collateral interest to a senior all-assets lender. Indeed, the omission of a separate "reasonably equivalent value" definition for the secured transaction supports that conclusion.⁹³

Further, bulk sales law, in both its old and new forms, excepts secured transactions from its scope. The two sections that follow describe the treatment of secured transactions under original Article 6 and the courts' reaction to the secured transaction exceptions.

a. Secured Transactions Excepted from the Scope of Article 6.—While section 6-102 establishes the scope of Article 6, section 6-103 carves the exceptions from the general rule. Specifically, for purposes of this discussion, subsections 6-103(1) and (3) treat the interrelation of Articles 6 and 9. Those subsections provide:

The following transfers are not subject to this Article:

(1) Those made to give security for the performance of an obligation;

....

(3) Transfers in settlement or realization of a lien or other security interests[.]⁹⁴

92. *Id.*

93. U.F.T.A. § 3 comment 3, 7A U.L.A. 651 (1984).

94. U.C.C. §§ 6-103(1), (3) (1987).

The design is to exclude so-called "bulk mortgages" as well as foreclosure sales. Those exclusions were made in response to the banking lobby, which feared that if Article 6 applied to Article 9 security interests, the efficiency of secured financing would be compromised.⁹⁵ While Article 6 would not necessarily void the grant of a collateral interest, it would encumber the efficient execution of secured transactions by requiring notice procedures unnecessarily duplicative of the Article 9 financing statement.

While the exception of Article 9 transactions from the scope of Article 6 may be consistent with the commercial policies underlying Article 9, it is incongruous to retain bulk sales law once secured transactions are excepted from its scope. It is, as I have argued elsewhere,⁹⁶ more sensible to abandon bulk sales legislation altogether. That conclusion is clear once the consequences of a bulk sale, from the perspective of a creditor of the debtor-transferor, are compared with the consequences of the grant of an all-assets collateral interest from the same perspective. In either case, the assets of the debtor are put beyond the reach of the junior unsecured creditor. It simply makes no difference whether the debtor has transferred the assets outright or encumbered them with a blanket security interest. In either event, those assets are not available to the junior creditor. Therefore, because the Article 9 secured transaction is a foundation of commercial jurisprudence and of our economy, it might be better to repeal Article 6 altogether than to maintain the incongruous tension between bulk sales and secured transaction law.

b. Judicial Hostility Toward Exceptions.—Three decisions exemplify the courts' impatience with the conjunction of secured

95. According to one commentator:

[i]t was the strongly expressed opinion of [the bank lawyers] present that the Article 6 coverage of security transfers is objectionable. In local bank practice an unsecured line of credit is frequently followed by a secured one. Secured credit arrangements routinely contemplate that successive security transfers will secure all of the bank's advances. Creditor notification as provided in Section 6-105(1) would be both an intolerable nuisance and dangerous to the borrower.

....

The lawyers who comprise this local group will play an important if indeed not a controlling part in determining whether the Uniform Commercial Code is enacted. Letter from Professor Warren L. Shattuck to Professor Charles Bunn (Oct. 9, 1952) (quoted in Hawkland, *The Trouble with Article 6 of the U.C.C.: Some Thoughts About Section 6-103*, 82 COM. L.J. 113, 114 (1977)).

96. P. ALCES, *supra* note 6, at ¶ 4.04[2](a).

transactions and bulk sales law. In each, the court struggled with the secured transactions exceptions from Article 6 and construed the exceptions in terms sufficiently narrow to preclude their application. The result was to void the transfers as noncomplying bulk sales.

*Starman v. John Wolfe, Inc.*⁹⁷ held that the section 6-103(3) exception only applies in the case of a transfer to the secured party and does not apply to remove the sale from the scope of Article 6 if the sale was made to some third party for the benefit of the secured party. Because a portion of the proceeds realized upon the sale of the assets subject to the collateral interest went to parties other than the secured creditor, the court concluded that "some creditors were preferred over [the complaining trade creditor] to his detriment."⁹⁸ The court focused on the prejudicial impact that the foreclosure sale had on the junior unsecured creditor and found in such prejudice a reason to narrowly construe the scope of the subsection (3) exception. It is not clear, however, that the court was constrained by the statute to reach that result. After all, so long as the collateral that is sold in bulk was subject to the collateral interest of a creditor, and not to the claims of the junior unsecured creditors, it is difficult to see how the junior creditor is any more prejudiced by the sale than it was by the initial grant of the collateral interest. Moreover, the grant of the collateral interest would be within the subsection (1) exception. Indeed, the *Starman* result may be explained by the fact that there was no evidence in that case that the creditor held a perfected security interest in the assets transferred in bulk. But if that were the *ratio decidendi* of the *Starman* opinion, it is not clear why it was necessary for the court to circumscribe so incongruously the scope of the subsection (3) exception.

A 1987 decision of the United States Court of Appeals for the Eighth Circuit, *Stone's Pharmacy, Inc. v. Pharmacy Accounting Management, Inc.*,⁹⁹ also offered a curious, or at least creative, construction of subsection (3) that resulted in application of Article 6 to an Article 9 foreclosure sale. Stone's Pharmacy, the plaintiff, held an unsecured claim against the defendant-transferor,

97. 490 S.W.2d 377 (Mo. Ct. App. 1973).

98. *Starman*, 490 S.W.2d at 383.

99. 812 F.2d 1063 (8th Cir. 1987).

Pharmacy Accounting Management, Inc. (PAM). InterFirst Bank held a blanket collateral interest in the assets of PAM, but permitted PAM to transfer the assets to FoxMeyer free of the security interest so long as PAM turned over the proceeds of the sale to InterFirst. Stone's Pharmacy objected that the sale was not excepted from the scope of Article 6 by subsection 6-103(3). The court agreed and, relying on *Starman*, found that in order for the exception to apply, "the transferor must be in default and all the proceeds must be paid to the secured creditor."¹⁰⁰ Because the court was unable to determine that the secured party had a mature right to foreclose, the court concluded that the subsection (3) exception was not available.

In *Hixon v. Pride of Texas Distributing Co.*,¹⁰¹ a Texas appellate court reached the same result, also reasoning "that in order for a transfer to be exempt under [6-103(3)] there must be evidence of a default on the part of the debtor which results in the secured party having a present right to foreclose."¹⁰² It is unclear what is gained by the requirement that in order for the exception to apply, the debtor must have been in default under the terms of the security agreement. Certainly, that requirement could always be satisfied by the simple expedient of including an insecurity clause¹⁰³ in the loan agreement, a common provision.

The incongruity of excepting secured transactions from the scope of Article 6 and then the courts' circumventing the exceptions belies a fundamental tension in commercial law. Though it is difficult to distinguish the grant of an all-assets collateral interest from an absolute sale of those same assets, it is a distinction that retains considerable currency in fraudulent disposition law. Further, it is not always clear that the scope of general fraudulent disposition law is drawn in terms that recognize the commercial

100. *Stone's Pharmacy*, 812 F.2d at 1066.

101. 683 S.W.2d 173 (Tex. Ct. App. 1985).

102. *Hixon*, 683 S.W.2d at 178.

103. See U.C.C. § 1-208 (1987). That section states:

Terms providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

Id.

and economic reality of certain dispositions. The difficulty that courts have in confronting the fraudulent transfer aspects of certain leveraged business acquisitions provides an analogous context in which to observe the affinity between bulk sales and fraudulent disposition law. The next section of this Article treats the leveraged business acquisition jurisprudence that has influenced fraudulent disposition law generally and may, more specifically, accommodate an understanding of the relation between bulk sales law and general commercial fraud principles.

2. *Leveraged Business Acquisitions.*—From the perspective of general commercial fraud principles, there are certain similarities between bulk sales law and fraudulent disposition law as applied to leveraged business acquisitions or “LBOs.” The variations on the LBO theme are legion,¹⁰⁴ yet they are fundamentally similar.¹⁰⁵ Before the transaction, the target has shareholders who have an equity interest in the target and unsecured trade creditors who have an interest in the assets of the target and who are protected by bulk sales law to the extent that the enterprise is within the scope of Article 6. In order to cash out their interest, the share-

104. Professor Carlson has identified alternative LBO forms: (1) Where a shell company purchases the stock of a target company with the proceeds of a loan secured by the target company's stock; (2) same as (1) above, except instead of using the target's stock as security, the shell company causes the target to grant an upstream secured guaranty; (3) same as (1) above, except after the target's stock is acquired by the shell company, both companies merge, and the merged entity mortgages its assets to secure the loan; (4) The management group is already a shareholder in the target company, and to obtain full control the target secures a loan against its assets, and uses the proceeds to redeem its outstanding shares, so the management group is the only shareholder; (5) same as (4) above, except the target re-lends the proceeds to the management group which then buys out other owners of the target company with the loan proceeds; (6) A loan is secured against a subsidiary of the target company, and the proceeds are used by the management group to redeem the target company's stock. See Carlson, *Leveraged Buyouts in Bankruptcy*, 20 GA. L. REV. 73, 80-83 (1985).

105. A typical LBO occurs in this way:

The aging management and shareholders (sellers) of a privately held company approach a group interested in acquiring the company. Ambition-rich but relatively cash-poor, the acquisition group arranges financing through a bank or commercial finance company. The lender advances the loan proceeds against the assets (accounts receivable, inventory, equipment, real property) of the acquired company. The acquisitions group pays for the sellers' interest in cash (and perhaps a promissory note). Sellers transfer ownership of the company and its assets to the acquisition group subject to the security and perhaps mortgage interest of the lender. The individual members of the acquisition group, at the insistence of the secured lender, often will execute personal (usually secured) guaranties of the acquisition loan.

Alces & Dorr, *supra* note 11, at 560.

holders sell their equity interest to the acquisition group which "leverages" the assets of the target to finance the acquisition. As a consequence of the transaction, the unsecured creditors of the target who, before the LBO, stood ahead of the equity holders, are now subordinate to the secured party-acquisition lender who financed the LBO. But what matters for constructive fraudulent transfer purposes is that the target does not benefit from the acquisition loan. The proceeds are funnelled through the target to the selling shareholders and the members of the acquisition group own and control a business without having invested substantial capital. The unsecured trade creditors are prejudiced because the target did not receive a reasonably equivalent value in exchange for the hypothecation of its assets. And so long as the target was insolvent at the time of the LBO or as a result of it,¹⁰⁶ the transaction may be avoided as a constructively fraudulent transfer.

There is little doubt that the typical LBO is a fraudulent transfer. Even the staunchest critics of fraudulent transfer law, as now enacted, admit as much.¹⁰⁷ The issue, as developed in the courts¹⁰⁸ and law review commentaries,¹⁰⁹ is whether the fraudulent disposition law *should* apply to the leveraged business acquisition. There are at least three perspectives that bear consideration and which, properly understood, suggest the affinity between bulk sales law and general fraudulent disposition principles. The following three sections of this Article present the three approaches in a nutshell.¹¹⁰

a. Contract Bargain Model.— Dean Jackson and Professor Baird developed the contract bargain model to define the scope of fraudulent transfer law:

[O]ne must recognize that the debtor-creditor relationship is essentially contractual. . . . The ambition of the law governing the debtor-creditor relationship, including fraudulent conveyance law, should provide all the parties with the type of contract that they would

106. See U.F.C.A. § 4, 7A U.L.A. 474 (1918); U.F.T.A. § 4(a)(2), 7A U.L.A. 653 (1984).

107. See Baird & Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 851 (1985).

108. See P. ALCES, *supra* note 6, ¶ 5.02[4][a] and cases cited therein.

109. See, e.g., Baird & Jackson, *supra* note 107.

110. See also Alces, *Presentation, "Application of the Uniform Fraudulent Transfer Act to Leveraged Buyouts,"* 1989 ASSOCIATION OF AMERICAN LAW SCHOOLS ANNUAL MEETING.

have agreed to if they had the time and money to bargain over all aspects of their deal.¹¹¹

Baird and Jackson's conclusion, then, is that debtors and their creditors would not contract for a body of private fraudulent transfer law that would preclude the LBO.¹¹² The unsecured trade creditors would not, assuming they know what is good for them, *ex ante*, preclude LBOs because LBOs are, according to Baird and Jackson, in the interest of the unsecured creditors.¹¹³

The contract bargain model has been criticized on several bases. Professor Carlson has argued that the model does not take into account the interests of the acquisition lender: "The person who pays the bill under fraudulent conveyance law is the third party who may not retain a gift or dividend. Why should that party participate in a hypothetical creditor's bargain?"¹¹⁴ Carlson's argument is that LBOs should be subject to even less fraudulent disposition exposure than would be dictated by the Baird and Jackson contract bargain model. In fact, Carlson elsewhere has expressed a deep contempt for the premise of the Baird and Jackson contract bargain analysis.¹¹⁵

Professor Smyser, in one of the most articulate criticisms of the Baird and Jackson approach, has formulated the deficiencies and shortsightedness of the contract bargain model:

Professors Baird and Jackson's argument is premised on a *laissez faire* approach which views fraudulent conveyance statutes as a paternalistic interference with freedom of contract. . . . [They] fail to consider carefully the extent to which the fraudulent conveyance statutes, by limiting the application of the constructive fraud provisions to transfers for inadequate consideration made under circumstances of insolvency, or near insolvency, restrict the statutes' application to transactions which creditors would in fact generally find objectionable. . . . [And they] fail to analyze the underlying financial dynamics of leveraged buyouts and thus ignore the serious potential for abuse of creditors inherent in leveraged buyouts of financially troubled companies.¹¹⁶

111. Baird & Jackson, *supra* note 107, at 835-36.

112. *Id.*

113. *Id.* at 853.

114. Carlson, *supra* note 104, at 103 n.95.

115. See Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341, 1354 (1987).

116. Smyser, *Going Private and Going Under: Leveraged Buyouts and the Fraudulent Conveyance Problem*, 63 IND. L.R. 781, 791 (1988).

Smyser also notes that the safeguards which Baird and Jackson contend are in place to protect unsecured trade creditors simply are not available.¹¹⁷ For example, Baird and Jackson argue that larger creditors would be in a position to insist upon negative pledge clauses in their contracts with the target. The protections afforded by such contract provisions would, in turn, inure to the benefit of the other creditors of the target who might not have sufficient bargaining power to insist upon similar provisions in their own agreements.¹¹⁸ But Smyser responds that "the creditors who are in a position to have the greatest leverage in their negotiations with the [target may not] have an actual incentive to protect the interests of other creditors."¹¹⁹

Further, the contract bargain model causes the same uneasiness as many other applications of micro-economic principles to commercial transactions. We are just not always sure that individual actors know what is best for them and can take care of themselves or that it makes sense to entertain the fiction that all transactors will, collectively, reach the best conclusions. The concept of actual consent is also troublesome in contract law, as is the relationship between tort and contract generally. Perhaps most troublesome is the problem of indeterminable transaction costs.

b. Property Model.—In response to the Baird and Jackson contract bargain model, the commentators, as well as the courts, have adopted an approach that may perhaps best be labelled the "property model." That approach focuses on the language of uniform fraudulent disposition law and recognizes that the creditors of the debtor-transferor in fact have a property right in the assets of the target that is protected by fraudulent disposition law. Indeed, this is perhaps the dominant paradigm in the literature and the case law.¹²⁰

There is a similarity between the contract and property models. Both contemplate the right of the unsecured creditor/victim to alienate the interest that is compromised by the LBO. But then the approaches diverge in the way each calculates the damage re-

117. *Id.*

118. Baird & Jackson, *supra* note 107.

119. Smyser, *supra* note 116, at 787 n.16; see also Note, *Fraudulent Conveyance Law and Leveraged Buyouts*, 87 COLUM. L. REV. 1491, 1511 (1987).

120. See Note, *Fraudulent Conveyance Law as a Property Right*, 9 CARDOZO L. REV. 843 (1987).

covery available to the victim. The contract model dictates that the unsecured creditor cannot recover damages for what it would have gladly surrendered willingly in the first place.¹²¹ The property model, on the other hand, suggests that you can recover, at least in the LBO context, the full value of the property fraudulently transferred.¹²²

An elaboration of the property model promulgated in the express provisions of the UFCA, UFTA and Bankruptcy Code section 548 has been urged by the commentators. Professor Carlson would protect the property rights of the transferee by his construction of the savings clause.¹²³ This statutory construction supports Carlson's thesis, similar to Baird and Jackson's, that LBOs are essentially good for unsecured creditors. LBOs accommodate the infusion of streamlined management.¹²⁴ Carlson sees the LBO as an effort to improve the financial condition of the target rather than an effort to compromise the interests of many in favor of the few. So unless the acquisition lender actually intends to harm the target and the target's creditors, Carlson would not sanction the application of fraudulent disposition law to frustrate LBOs.

Professor Sherwin reaches a very similar result by her construction of the "good faith" element in the "fair consideration" definition in the UFCA.¹²⁵ She would focus on the restitutionary nature of fraudulent disposition law to support her conclusion that

121. See Baird & Jackson, *supra* note 107, at 834, 836-43.

122. Cf. Calabresi & Melamed, *Property Rules, Liability, Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105 (1972) ("no one can take the entitlement to private property from the holder unless the holder sells it willingly and at the price at which he . . . values the property").

See also U.F.C.A. section 9(1) which provides that a creditor may "(a) [h]ave the conveyance set aside or the obligation annulled . . . or (b) [d]isregard the conveyance . . ." and U.F.T.A. § 7(a) which provides that a creditor may obtain "(1) avoidance of the transfer or obligation . . . ; (2) an attachment or other provisional remedy against the asset transferred"

123. Carlson, *supra* note 104, at 86-87 ("The phrase 'to the debtor' seems to be a drafting error Hence, section 548(c) should be read as if 'to the debtor' were omitted . . . [so] section 548(c) focuses on what the lender *gives*, not on what the lender gives *to the debtor*." (emphasis in original)).

124. See *id.* at 95 ("[t]he LBO produces new management with a credible chance to increase cash flow, thereby further improving the position of the unsecured creditors").

125. Sherwin, *Creditors' Rights Against Participants in a Leveraged Buyout*, 72 MINN. L. REV. 449, 468 (1988) (arguing that unless a lack of good faith is present an LBO should not be considered fraudulent (relying on U.F.C.A. § 3, 7A U.L.A. 427, 448 (1918))).

some insidious intent on the part of the transferee is prerequisite to sanctioning the trade creditors' recovery from the transferee. It is apparent, however, that both Carlson and Sherwin at least implicitly recognize that the unsecured trade creditors of the target have a property interest in the assets of the target. They only differ in the way and the extent to which they would construe the uniform fraudulent disposition law to vindicate that property interest.

c. *Tort Model*.—Finally, it may advance the commercial fraud law debate to recognize the tort aspects of a bulk sale or fraudulent disposition proscribed by the UFCA, UFTA, or the Bankruptcy Code. The bulk sales law's focus on misrepresentation principles was noted at the outset of this Article.¹²⁶ But, it is plausible to perceive the LBO as an intentional, not merely a constructive, misrepresentation.¹²⁷

Another commentator has described the tortious nature of a fraudulent disposition: "Fraudulent conveyances are, after all, in the nature of torts. A lender that draws on the upstream guaranty of an insolvent subsidiary takes property that otherwise would generally be available to creditors of the insolvent subsidiary. Such an act seems analogous to a tort."¹²⁸ Perhaps it is most analogous to the tort of conversion, a tort that is essentially premised on strict liability¹²⁹ and which contemplates as damages the victim's recovery of either the converted property or the value of the converted property.¹³⁰ That perception of the tort aspects of an LBO also reinforces the view that unsecured trade creditors have a property right in the debtor-transferor's assets.

126. See *supra* text accompanying notes 11-14.

127. See Alces, *Generic Fraud and the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 743, 764 (1987) ("[o]nce the relationship between constructive fraudulent transfer law and intentional fraudulent transfer law is understood, it is no longer so clear that . . . LBOs should not be subject to avoidance as transactions intended to defraud the debtor/transferor's unsecured creditors").

128. Schwarcz, *The Impact of Fraudulent Conveyance Law on Future Advances Supported by Upstream Guaranties and Security Interests*, 9 CARDOZO L. REV. 729, 735 n.22 (1987).

129. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 97 (4th ed. 1982).

130. *Id.* See also *Sloan v. Butler*, 148 Ark. 117, 228 S.W. 1046 (1921); *West Tulsa Belt Ry. Co. v. Bell*, 54 Okla. 175, 153 P. 622 (1915); *Baltimore & Ohio R.R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N.E. 476 (1892). For Article 9 conversion cases, see, e.g., *Thompson v. Ford Motor Credit Co.*, 550 F.2d 256 (5th Cir. 1977), and *Ford Motor Credit Co. v. Cole*, 503 S.W.2d 853 (Tex. Civ. App. 1973).

Professor Smyser implicitly endorses the tort law conceptions of the leveraged business acquisition. She concludes that LBOs are no better, so far as the trade creditors of the target are concerned, than corporate dispositions proscribed by the corporate law. Fraudulent disposition law, then, should be utilized to compensate the unsecured trade creditors of the target for the harm caused by the LBO.

[T]he remedy resulting from the application of fraudulent conveyance statutes must be consistent with this purpose [avoidance of prejudice to unsecured creditors]. . . . [T]he remedy should be an equitable one designed to place the parties to the transfer in the position they would have occupied had the improper transfer not occurred.¹³¹

Once construed in tort terms, fraudulent disposition law may be applied to address several of the problems that have concerned courts confronting the fraudulent disposition issues presented by LBOs.¹³²

131. Smyser, *supra* note 116, at 821: Smyser's article may be considered an endorsement of the application of Clark's approach to LBOs as fraudulent dispositions. Also note that Clark incorporated the Hand formula ($B < P \times L$) with regard to piercing the corporate veil. Clark, *supra* note 68, at 540-60.

132. For example, in determining who is the proper party plaintiff in any LBO as fraudulent transfer action, distinctions exist between present and future creditors. UFTA section 4(a) provides that transfers made or obligations incurred are fraudulent as to present and future creditors if made or incurred:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; [derived from UFCA section 7] or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business transaction; [derived from UFCA section 5] or

(ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due. [derived from UFCA section 6]

U.F.T.A. § 4(a), 7A U.L.A. 652 (1984).

UFTA section 5(a) provides that transfers made or obligations incurred by the debtor are fraudulent as to present but not future creditors if made or incurred "without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." U.F.T.A. § 5(a), 7A U.L.A. 657 (1984). This section was derived from U.F.C.A. § 4, 7A U.L.A. 474 (1918). A proper party defendant in an LBO as fraudulent transfer action may include selling shareholders. *See, e.g., Sharrer v. Sandles*, 477 N.Y.S.2d 897, 103 A.D.2d 873 (1984) (court invalidated collateral interest sellers of stock had taken in target's assets); the acquisition group, *e.g., Ohio Corrugating Co. v. Surety Pac. Bus. Credit, Inc.*, 70 Bankr. 920

The point here, however, is to recognize that an LBO is a form of bulk sale.¹³³ Fundamentally, there must be consistent principles in the various incarnations of commercial fraud law and those principles must, as well, be consistently applied. It is for that reason that LBO cases have something valuable to say for the student of bulk sales law. The next sections of the Article treat development of the pertinent LBO case law by focusing on the leading case, *United States v. Tabor Court Realty Corp.*¹³⁴

3. *Constructive and Actual Fraud Distinguished.*—It is generally understood in commercial fraud law that there are two kinds of fraud: constructive and actual.¹³⁵ Actual fraud contemplates insidious intent; it is what generally comes to mind when reference is made to misrepresentation. It is difficult to prove because the trier of fact must determine that the defendant had a particular intent, a subjective and problematic determination. Constructive fraud liability, on the other hand, is imposed on a defendant not so much because of what the defendant did as because of the effect that the defendant's actions had on the plaintiff. The focus, in commercial fraudulent disposition law, is on prejudice to the plaintiff rather than the benefit realized by the defendant.¹³⁶ Constructive fraud liability has matured as a surrogate for actual fraud liability as a

(N.D. Ohio 1987) (acquisition group held liable); and the acquisition financier, e.g., *United States v. Gleneagles Inv. Co.*, 565 F. Supp. 556 (M.D. Pa. 1983) (court invalidated acquisition financier's collateral interest in target's assets), *aff'd sub nom.*, *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3d Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987).

Reference to tort principles also provides guidance on issues concerning the extent of the plaintiff's recovery. See Baird, *supra* note 74.

133. Professor Carlson equates an LBO with a form of bulk sale. See Carlson, *Is Fraudulent Conveyance Law Efficient*, 9 CARDOZO L. REV. 643, 674 n.75 (1987).

134. 803 F.2d 1288 (3d Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987).

135. The distinction between actual fraud and constructive fraud—indicated by “signs and marks of fraud”—was first set forth in *Twynne's Case*, 3 Coke Rep. 806, 76 Eng. Rep. 809 (Star Chamber 1601). This distinction was later incorporated into UFTA section 7. Compare U.F.C.A. § 7, 7A U.L.A. 509 (1918) (focusing on actual intent of transferor) with U.F.C.A. §§ 4-6, 7A U.L.A. 474, 504, 507 (1918) (focusing on lack of “fair consideration” and financial condition of debtor).

For cases discussing this distinction, see *Foffey v. Winninger*, 156 Ind. App. 233, 296 N.E.2d 154 (1973); *Miskimins v. City Nat'l Bank*, 248 Ark. 1194, 456 S.W.2d 673 (1970); *Snell v. Cornehl*, 81 N.M. 248, 466 P.2d 94 (1970).

136. According to the UFTA, “value” is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. U.F.T.A. § 3 comment 2, 7A U.L.A. 650-51 (1984).

response to the evidentiary problems inherent in proving a defendant's actual intent.

a. The Distinction Blurred: UFTA.—At the margins, the distinctions between constructive and actual fraud may blur. It is recognized that insofar as actual intent to defraud is generally not susceptible of direct proof,¹³⁷ it must be established by reference to objective indicia. And those indicia, typically, also signal the prejudice to the plaintiff that is the focus of constructive fraud law.

In the UFTA, the merger between constructive and actual fraud is manifest. The UFTA, like its predecessor, the UFCA, provides that transfers made "with the actual intent to hinder, delay, or defraud any creditor of the debtor" are voidable by those who were creditors of the debtor at the time of the transfer and by those who become creditors of the debtor sometime thereafter.¹³⁸ The UFTA elaborates the indicia of actual intent to defraud:

(b) In determining actual intent . . . consideration may be given, among other factors, to whether:

- (1) the transfer or obligation was to an insider;
- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) the transfer or obligation was disclosed or concealed;
- (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) the transfer was of substantially all the debtor's assets;
- (6) the debtor absconded;
- (7) the debtor removed or concealed assets;
- (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) the transfer occurred shortly before or shortly after a substantial debt was incurred;

137. See *Cresswell v. Sullivan & Cromwell*, 704 F. Supp. 392, 406 (S.D.N.Y. 1989) (citing *Rea v. Missouri*, 84 U.S. 532, 543 (1873); *Goshen Litho, Inc. v. Kohls*, 582 F. Supp. 1561, 1564 (S.D.N.Y. 1983)).

138. U.F.T.A. § 4(a)(1), 7A U.L.A. 652 (1984); see U.F.C.A. § 7, 7A U.L.A. 448 (1918).

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.¹³⁹

That list of indicia is reminiscent of the *Twyne's Case* badges of fraud, which were discussed earlier in this Article.¹⁴⁰ Several of the UFTA indicia conjure images of bulk transfer law. But more pertinent for the argument here are elements (8), value of consideration received in exchange by the debtor, and (9), financial condition of the debtor. These two elements are also the principal focus of the constructive fraud provisions of the UFTA.¹⁴¹ There is not only a coincidence of elements between the actual and constructive fraud bases of avoidance but a duplication of the indicia. That confirms the fundamental similarity of the two forms of fraudulent disposition law, at least at the margins.

b. *United States v. Tabor Court Realty Corp.*—The purpose underlying discussion of fraudulent disposition ramifications of LBOs in this Article is to suggest that the lesson learned from diligent study of LBOs has taught the commercial bar a good deal about the general nature of commercial fraud law. That lesson may aid understanding of the repeal and revision alternatives of Article 6. Perhaps no decision has had a greater impact on fraudulent disposition law as it pertains to LBOs than has *Tabor Court Realty*.¹⁴² A discussion of that case will elucidate the application of fraudulent disposition law, both constructive and actual, to the typical bulk sales context: That result is a potential consequence of the partial or complete abrogation of the uniform bulk sales law.

Raymond Colliery Co. (RC), a closely held corporation, was the parent of several coal mining subsidiaries. In addition to the subsidiaries, RC owned real property used for the mining of coal. When RC began to experience serious financial difficulties, the principals of RC decided to sell the corporation. Sale of the corporation was accommodated by acquisition financing provided to the purchasers by Institutional Investors Trust (IIT). As a condition of the financing, IIT took a collateral interest in the assets of RC as well as in the assets of the subsidiaries owned by RC. The United

139. U.F.T.A. § 4(b), 7A U.L.A. 653 (1984).

140. See *supra* text accompanying notes 20-31.

141. See U.F.T.A. § 4(a)(2), 7A U.L.A. 653 (1984).

142. 803 F.2d 1288 (3d Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987).

States government sought to unravel the transaction in an effort to recover unpaid taxes.

The United States attacked the LBO as both a constructive and actual fraudulent conveyance under the Pennsylvania UFCA. With regard to the constructive fraud count, the government argued both that RC had not received a fair equivalent for what it gave to IIT¹⁴³ and that IIT had not transferred the loan proceeds to RC in good faith.¹⁴⁴

The district court found that the government had established the bases of constructive fraudulent conveyance liability and also determined that IIT was chargeable with knowledge of the consequences of its actions.¹⁴⁵ Therefore, insofar as the LBO operated to the prejudice of the unsecured creditors of RC, the court found that actual intent to hinder, delay, or defraud was also established by the record. The Third Circuit affirmed the trial court's determination and found untenable the defendant's argument that fraudulent disposition law was inapplicable to LBOs.¹⁴⁶

The Third Circuit focused on the prejudicial impact of the LBO and the transactors' knowledge that prejudicial consequences would necessarily flow from their actions: "[A]n intent to hinder, delay, or defraud creditors may be inferred from transfers in which consideration is lacking and where the transferor and transferee have knowledge of the claims of creditors and know that the creditors cannot be paid."¹⁴⁷ Consider the impact that observation could have on the application of the intentional fraudulent disposition law to bulk sales. There is other authority supporting such a broad construction of the intent element in fraudulent disposition law.¹⁴⁸ The Third Circuit's discovery and implementation of that

143. UFCA sections 4, 5, and 6 each require for constructive fraud that there be a lack of "fair consideration." U.F.C.A. §§ 4-6, 7A U.L.A. 474, 504, 507 (1918). Fair consideration is defined in section § 3(a) to require that there be a "fair equivalent" given in exchange for the property which is transferred. *Id.* § 3(a), 7A U.L.A. 448.

144. The UFCA section 3(a) definition of fair consideration also requires that the exchange be made in "good faith." *Id.*

145. *United States v. Gleneagles Inv. Co.*, 565 F. Supp. 556, 585 (M.D. Pa. 1983).

146. *Tabor Court Realty*, 803 F.2d at 1297.

147. *Id.* at 1304.

148. *Se, e.g., Consolve v. Cohen (In re Roco Corp.)*, 701 F.2d 978 (1st Cir. 1983); *Bank of Pa. v. Adlman (In re Adlman)*, 541 F.2d 999 (2d Cir. 1976); *Prisbrey v. Noble*, 505 F.2d 170 (10th Cir. 1974); *De West Realty Corp. v. Commissioner*, 418 F. Supp. 1274 (S.D.N.Y. 1976); *Elliot v. Elliot*, 365 F. Supp. 450 (S.D.N.Y. 1973); *United States v. 58th St. Plaza Theatre, Inc.*, 287 F. Supp. 475 (S.D.N.Y. 1968); *In re Process-Manz Press, Inc.*, 236 F.

coincidence may have a significant impact on commercial fraud jurisprudence. It invites broader application of commercial fraud principles to avoid prejudice to junior unsecured creditors in both the fraudulent disposition and bulk sales contexts.

c. *Characterization of the Bulk Sale: LBO Parallels.*—The consequence of an LBO, from the perspective of the target's unsecured creditors, is divestment of the assets to which those creditors were looking, at least in some metaphysical way, to realize on their claims against the target. Similarly, the bulk sale divests the transferor of the assets to which its creditors were looking to realize on their claims. The distinction between the two transactions is in the value realized by the target/bulk transferor. Given the operation of the fraudulent disposition solvency and reasonably equivalent value/fair consideration criteria, an LBO is virtually always subject to avoidance as a constructively fraudulent disposition. The target receives no value¹⁴⁹ and either is insolvent at the time of the LBO or is rendered insolvent as a result of the transaction. Further, as *Tabor Court Realty* demonstrates, it is not difficult for a court to infer that the transferee was well aware of the impact the LBO would have on the target's unsecured creditors and, on that basis, to find sufficient evidence of an actual intent to hinder, delay, or defraud.

In the case of a bulk sale, however, the commercial fraud analysis differs given the dynamics of the transaction. The transferee may well, and indeed in the ordinary course would, pay a reasonably equivalent value for the assets transferred in bulk. Of course, if the transferee does not do so, it is not difficult for a court to void the sale as a constructively fraudulent disposition. But what of the bulk sale in which the transferee does pay a reasonably equivalent value but does not comply with the notice requirements of either original or revised Article 6? The Reporter of a preliminary draft

Supp. 333 (N.D. Ill. 1964); *rev'd*, 369 F.2d 513 (7th Cir. 1966), *cert. denied*, 386 U.S. 957 (1967).

149. Compare *Baird & Jackson*, *supra* note 107, at 853 ("[w]ith the buyout may come more streamlined and more effective management") and *Carlson*, *supra* note 104, at 95 ("LBO produces new management with a credible chance to increase cash flow, thereby further improving the position of the unsecured creditors") with *Smyser*, *supra* note 116, at 801 ("[a]s yet, the evidence appears insufficient to support a conclusion that leveraged buyouts produce real economic gains in terms of corporate productivity or management efficiency"); see Note, *supra* note 119, at 1501 ("any indirect benefits accruing to a company following an LBO are merely conjectural and indeterminate").

of revised Article 6, Chancellor William Hawkland, drew the bulk sale-fraudulent disposition parallel in clear terms. In the course of explaining the revision's limitations of actions provision, and the effect of the parties' failure to comply with the notice requirements of the statute, the Reporter observed:

[the] limitation period is tolled if, in addition to non-compliance, the bulk buyer actively conceals the sale. Suit against the bulk buyer may be brought within one year after the sale is, or should have been, discovered, whichever occurs first. *Also, in such a case, the transfer probably could be attacked as fraudulent.*¹⁵⁰

That comment did not survive in the final form of the revision, but the noncompliance/concealment issue will still arise under Alternative B. Chancellor Hawkland could not have been suggesting that the noncomplying bulk sale would be avoidable as constructively fraudulent. That would turn on the value paid for the assets by the transferee. He must have been suggesting the availability of an actual intent to hinder, delay, or defraud action when there is noncompliance. Recall that an actual intent to defraud action may be brought notwithstanding the adequacy of the value paid by the transferee. So if Chancellor Hawkland was right, a noncomplying bulk sale may be avoidable by operation of the actual fraud provisions of the fraudulent disposition law. The next section of this Article considers the fraudulent disposition law theories that may be used either to supplement bulk sales law in those states that opt for Alternative B or provide an independent and viable basis for recovery in those states that opt for Alternative A, the repealer.

III. THE BRAVE NEW WORLD

If either of the recently promulgated alternatives in the new Article 6 is adopted in the states there will, necessarily, be an adjustment of the expectations of commercial transactors. That will certainly take time. A part of that adjustment will involve the development of offensive commercial fraud theories by counsel for parties who would have prevailed under original Article 6 but who would not have the same avoidance rights under the new regime. This section of the Article considers the impact of the general fraudulent disposition law in states which (1) repeal Article 6 (Al-

150. U.C.C. § 6-108 comment (July 31, 1987 Revised Draft).

ternative A), and (2) in states that adopt the revised version (Alternative B).

First, however, it is worthwhile to offer a general observation about the bulk sales revision process. It is clear from the prefatory note that the drafting committee was much impressed by the arguments of that portion of the commercial bar that is hostile toward Article 6.¹⁵¹ As the prefatory note makes clear, the ALI and NC-CUSL recommend first and foremost that the states repeal Article 6 altogether, leaving the states with no body of bulk sales law at all. It is not surprising, then, that Alternative B, the revised version of Article 6, represents a compromise between those who feel that there should be no bulk sales law and those who believe that the idea of bulk sales legislation is a good one but the execution of the idea in the original Article 6 was deficient. The revision cuts back substantially on Article 6, removing from its scope many transactions that would be subject to regulation under the current law and compromising the leverage afforded unsecured trade creditors of the debtor-transferor. Quite apart from whether bulk sales law is or is not a good thing, this section of the Article tries to discern what the commercial fraud landscape would look like if either of the alternatives become law.

A. *A World Without Uniform Bulk Sales Law*

The extensive treatment of fraudulent disposition law in this Article, particularly with regard to its application to LBOs, is designed to provide the foundation for conclusions regarding the application of the UFCA, UFTA and Bankruptcy Code section 548 to bulk sales if there were no uniform bulk sales legislation.

So long as the transferee pays a fair consideration or reasonably equivalent value for the assets transferred to him in bulk, a plaintiff unsecured creditor of the debtor-transferor will not be able to bring a constructive fraud action, even if the debtor is insolvent at the time of the sale or is rendered insolvent as a result of the sale. Similarly, so long as the debtor's financial condition is not impaired to the point of insolvency at the time of or as a result

151. U.C.C. Article 6 prefatory note (1988) states that: "The Article . . . impedes normal business transactions For this reason, Article 6 has been subjected to serious criticism. See, e.g., Rapson, *U.C.C. Article 6: Should it be revised or 'Deep-Sixed'?*, 38 Bus. Law. 1753 (1983)."

of the bulk sale, the fact that the transferee did not pay a sufficient consideration for the assets transferred in bulk will not, standing alone, provide the basis of a constructive fraudulent disposition attack.

It is important to recognize, however, that determinations concerning the adequacy of consideration paid for assets and the financial viability of an entity that has executed a bulk sale are problematic at best.¹⁵² Therefore, it may be that a substantial number of the cases that are now brought under Article 6 would provide the stuff of viable constructive fraudulent disposition claims under the uniform state or federal bankruptcy law. Certainly there has been an increased interest in the application of the fraudulent disposition law to new contexts over the last few years.¹⁵³

Perhaps more troublesome for those concerned with the persistence of bulk sales attacks after repeal of Article 6 is the scope of the actual intent to hinder, delay, or defraud basis of a fraudulent disposition action. While the primary object of the debtor-transferor and transferee may not be to prejudice the interests of the debtor's unsecured trade creditors, cases such as *Tabor Court Realty* make clear that intent may not be difficult to infer, particularly if the trier of fact is looking for a way to redress what it perceives as an inequity. Further, the indicia of intent catalogued in section 4(b) of the UFTA, as suggested above,¹⁵⁴ provide ample basis to void a bulk sale as an actually fraudulent disposition.

152. See, e.g., Alces & Dorr, *supra* note 11, at 542-44; Blumberg, *Intragroup (Upstream, Cross-Stream, and Downstream) Guaranties Under the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 685, 708-09 (1987) (discussing the various measures of "insolvency" in the UFCA, UFTA, and the Bankruptcy Code).

153. See, e.g., *Kupetz v. Continental Ill. Nat'l Bank & Trust Co.*, 77 Bankr. 754 (C.D. Cal. 1987), *aff'd*, 845 F.2d 842 (9th Cir. 1988); *Madrid v. Lawyers Title Ins. Corp. (In re Madrid)*, 725 F.2d 1197 (9th Cir.), *cert. denied*, 469 U.S. 833 (1984); *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599 (2d Cir.), *cert. denied*, 464 U.S. 822 (1983); *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979 (2d Cir. 1981); *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980). See also Ehrlich, *Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives*, 71 VA. L. REV. 933 (1985); Henning, *An Analysis of Durrett and Its Impact on Real and Personal Property Foreclosures: Some Proposed Modifications*, 63 N.C.L. REV. 257 (1985); Walls, *Promises to Keep: Intercompany Guaranties and Fraudulent Transfers in Bankruptcy*, 19 U.C.C. L.J. 219 (1987).

154. See *supra* text accompanying notes 138-141.

Finally, to add insult to injury, avoidance of a bulk sale on the basis of actual intent to defraud may be even more inimical to the interests of the transferee than avoidance under original Article 6. Under the bulk sales law presently in force in the states, only creditors with claims against the debtor at the time of the bulk sale have standing to avoid the sale.¹⁵⁵ Section 4 of the UFTA provides that both those creditors with claims existing at the time of the fraudulent disposition as well as those whose claims arise after the disposition may set aside a transfer of assets if the transfer was effected with the actual intent to hinder, delay, or defraud.¹⁵⁶ Further, section 4 of the UFTA, as well as the parallel provisions of the UFCA and Bankruptcy Code section 548,¹⁵⁷ provide that "future creditors," those whose claims arose after the disposition, may avoid the sale if the transferor made the transfer:

(2) without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due.¹⁵⁸

It is likely that the subsection (2)(i) alternative, inadequacy of remaining assets, would be pertinent in the aftermath of a bulk sale. If that is the case, and plaintiff's counsel utilizes that fraudulent disposition theory, transferees may have more to fear in a world without Article 6 than they would if original Article 6 remains in force.

B. A World With Revised Article 6

Though the revision would adjust substantially the bulk sales status quo, the remarks in this section of the Article will focus on

155. A bulk sale "is ineffective against any creditor of the transferor unless . . . the transferee gives notice." U.C.C. § 6-105 (1987). Creditors referred to in Article 6 "are those holding claims based on transactions or events occurring before the bulk transfer." *Id.* § 6-109. See P. ALCES, *supra* note 156.

156. U.F.T.A. § 4, 7A U.L.A. 652 (1984)

157. *Id.*; U.F.C.A. §§ 5-7, 7A U.L.A. 504, 507, 509 (1918); 11 U.S.C. § 548 (1988).

158. U.F.T.A. § 4(a)(2), 7A U.L.A. 653 (1984).

two particular innovations of the proposal that are designed to address perceived shortcomings in the original version: (1) the exception from the scope of the law for those who make a good faith, though deficient, effort to comply with the law,¹⁵⁹ and (2) provision of an *in personam* rather than *in rem* right to avoid application of the *Moore v. Bay* rule.¹⁶⁰

Section 6-107 of Alternative B determines the transferee's liability for failing to comply with notice provisions. This liability is the focus of this section of the Article. With regard to the good faith defense to an action against the bulk transferee, section 6-107 provides:

(3) A buyer who:

(a) made a good faith and commercially reasonable effort to comply with the requirements of Section 6-104(1)¹⁶¹ or to exclude

159. U.C.C. § 6-107(3)(a) (1988).

160. *Id.* §§ 6-107(1), (8). Subsection (8) expressly provides that:

A buyer's failure to comply with the requirements of Section 6-104(1) does not (i) impair the buyer's rights in or title to the assets, (ii) render the sale ineffective, void, or voidable, (iii) entitle a creditor to more than a single satisfaction of his [or her] claim, or (iv) create liability other than as provided in this Article.

Id. § 6-107(8).

161. Revised section 6-104(1) provides:

(1) In a bulk sale as defined in Section 6-102(1)(c)(ii) the buyer shall:

(a) obtain from the seller a list of all business names and addresses used by the seller within three years before the date the list is sent or delivered to the buyer;

(b) unless excused under subsection (2), obtain from the seller a verified and dated list of claimants of whom the seller has notice three days before the seller sends or delivers the list to the buyer and including, to the extent known by the seller, the address of and the amount claimed by each claimant;

(c) obtain from the seller or prepare a schedule of distribution (Section 6-106(1));

(d) give notice of the bulk sale in accordance with Section 6-105;

(e) unless excused under Section 6-106(4), distribute the net contract price in accordance with the undertakings of the buyer in the schedule of distribution; and

(f) unless excused under subsection (2), make available the list of claimants (subsection (1)(b)) by:

(i) promptly sending or delivering a copy of the list without charge to any claimant whose written request is received by the buyer no later than six months after the date of the bulk sale;

(ii) permitting any claimant to inspect and copy the list at any reasonable hour upon request received by the buyer no later than six months after the date of the bulk sale; or

(iii) filing a copy of the list in the office of the [Secretary of State] no later than the time for giving a notice of the bulk sale (Section 6-105(5)). A list filed

the sale from the application of this Article under Section 6-103(3)¹⁶² or

(b) on or after the date of the bulk-sale agreement, but before the date of the bulk sale, held a good faith and commercially reasonable belief that this Article does not apply to the particular sale is not liable to creditors for failure to comply with the requirements of Section 6-104. The buyer has the burden of establishing the good faith and commercial reasonableness of the effort or belief.¹⁶³

That savings provision appears extreme. From the perspective of some, it may render bulk sales law impotent. The revised Article 6 would provide a remedy only where the plaintiff can overcome the assertion of the good faith defense, which, as a practical matter, will require the plaintiff to show a bad faith or commercially unreasonable failure to comply on the part of the buyer.

Given the identity between the bases of a bulk sales action under the revision and an actual intent to defraud action under the UFTA, UFCA, or Bankruptcy Code, it is not immediately clear why a plaintiff would proceed under revised Article 6 rather than under fraudulent disposition law. Add to that the fact that more plaintiffs can recover under fraudulent disposition law, and it seems that the revision would quickly be a dead letter, no more efficacious than repeal of all bulk sales law.

Further, the provision of an *in personam* rather than *in rem* remedy in the revision makes it even more difficult to imagine why a plaintiff would use revised Article 6 instead of fraudulent disposition law. The rule of *Moore v. Bay* provides that a trustee in bankruptcy avoiding a transfer pursuant to section 544(b) of the

in accordance with this subparagraph must state the individual, partnership, or corporate name and a mailing address of the seller.

Id. § 6-104(1).

162. U.C.C. § 6-103(3) (1988) provides:

(3) This Article does not apply to:

- (a) a transfer made to secure payment or performance of an obligation;
- (b) a transfer of collateral to a secured party pursuant to Section 9-503;
- (c) a sale of collateral pursuant to Section 9-504;
- (d) retention of collateral pursuant to Section 9-505;

(e) a sale of an asset encumbered by a security interest or lien if (i) all the proceeds of the sale are applied in partial or total satisfaction of the debt secured by the security interest or lien or (ii) the security interest or lien is enforceable against the asset after it has been sold to the buyer and the net contract price is zero.

Id.

163. *Id.* § 6-107(3).

Code, the so-called "strong-arm provision," may prosecute the claim of an existing creditor of the debtor without being limited in the amount of recovery to the amount of that particular creditor's claim against the debtor.¹⁶⁴ If the trustee succeeds to the rights of a creditor holding an *in rem* claim against the debtor, such as the claim of a creditor with standing to avoid a bulk sale under original Article 6 or a fraudulent disposition under the UFTA or UFCA, the trustee may recover all of the assets transferred. That can result in the transferee's being left with a claim in bankruptcy for the value paid for the assets and having to return the assets to the trustee for liquidation and pro rata distribution to all those holding claims against the bankruptcy estate.

In order to avoid the bankruptcy trustee's imposition of that pervasive section 544(b) right, the drafters of Alternative B have replaced the *in rem* right provided under original Article 6 with an *in personam* right.¹⁶⁵ While the *in personam* remedy derives from section 6-107 generally, subsection (8) makes clear the drafter's intention:

(8) A buyer's failure to comply with the requirements of Section 6-104(1) does not (i) impair the buyer's rights in or title to the assets, (ii) render the sale ineffective, void, or voidable, (iii) entitle a creditor to more than a single satisfaction of his [or her] claim, or (iv) create liability other than as provided in this Article.¹⁶⁶

Insofar as the revision would deny the trustee an *in rem* remedy in precisely those circumstances in which the trustee may have an *in rem* right under fraudulent disposition law, it is not clear why the trustee would pursue the Article 6 remedy if he can recover more using the UFCA, UFTA, or section 548 of the Bankruptcy Code. While the provision of an *in personam* rather than an *in rem* remedy may be an improvement in the law, insofar as it avoids the *Moore v. Bay* incongruity,¹⁶⁷ it is not likely to be very effective in light of the fact that the trustee can still utilize the *in rem* remedy

164. *Moore v. Bay*, 284 U.S. 4, 5 (1931).

165. U.C.C. § 6-107 & comment 2 (1988).

166. *Id.* § 6-107(8).

167. Professor Kennedy has criticized *Moore v. Bay* and urged that the doctrine not be extended. See Kennedy, *The Trustee in Bankruptcy as a Secured Creditor Under the Uniform Commercial Code*, 65 MICH. L. REV. 1419, 1422 (1967), discussed in Alcos, *Unexpired Leases in Bankruptcy: Rights of the Affected Mortgagee*, 35 U. FLA. L. REV. 656, 672 (1983).

and its *Moore v. Bay* corollary by prosecuting an action under fraudulent disposition law rather than under revised Article 6.

IV. CONCLUSION AND RECOMMENDATION

This Article has described the parallels between bulk sales principles and general fraudulent disposition principles. It has argued not for or against either of the alternatives promulgated by the ALI and NCCUSL. Instead, it has suggested how the commercial fraud jurisprudence might adjust to fill in any crevices created in the law by the abrogation of original Article 6 in whole or in part.

Given the fundamental affinity between bulk sales law and fraudulent disposition law, it is likely that a commercial legislation landscape devoid of bulk sales law or with only an emasculated form of bulk sales law would invite creative interposition of general fraudulent disposition principles into transactions heretofore considered the province only of bulk sales law. Given the malleable nature of fraud law, it would not be surprising if it were construed in ways to fill any apparent legislative vacuum. Experience with LBOs has demonstrated how principles gleaned from the Statute of 13 Elizabeth, a sixteenth century enactment, may be used to frustrate the expectations of those involved in the most sophisticated twentieth century transactions. The property interests vindicated by the application of fraudulent disposition law to LBOs are sufficiently similar to those treated by the bulk sales law to justify application of the same commercial fraud principles. Legislators must take into account the LBO experience in deciding upon the efficacy of the repeal or enactment of the revised version of Article 6.

The source of the jurisprudential conundrum posited in this Article is the promulgation of piecemeal legislation designed to respond to, rather than reevaluate and inform, the development of commercial practices. The alternatives are not unique in their shortsightedness.¹⁶⁸ This Article, then, must conclude by urging a

168. The courts have struggled with the application and interpretation of the UFCA. It was in response to these problems that the UFTA was drafted. Drafters of the law adopted other provisions from the UFCA and the Bankruptcy Reform Act of 1978. For a discussion of the dangers attending such patchwork legislation, see Alces & Dorr, *supra* note 11, at 535-37, 547.

comprehensive reevaluation of commercial fraud principles. Such an ambitious undertaking will reveal the incongruities of the current fraudulent disposition and bulk sales law and provide a foundation for the development of coherent commercial fraud legislation.