

HOUSE BILL REPORT

HB 1013

As Reported By House Committee On:
Judiciary

Title: An act relating to the Uniform Commercial Code--Bulk Sales.

Brief Description: Adopting the revised uniform commercial code on bulk sales.

Sponsors: Representatives Appelwick and Riley.

Brief History:

Reported by House Committee on:
Judiciary, February 2, 1993, DPS.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 17 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Padden, Ranking Minority Member; Ballasiotes, Assistant Ranking Minority Member; Campbell; Chappell; Forner; Johanson; Locke; Long; Mastin; H. Myers; Riley; Schmidt; Scott; Tate; and Wineberry.

Staff: Patricia Shelledy (786-7149).

Background: Bulk sale legislation originally was enacted in response to concern that a merchant would acquire stock in trade on credit, then sell the entire inventory and abscond with the proceeds. The creditors had a right to sue the merchant, but that right was often of little practical value. The creditors had no recourse against the buyer. Legislatures reacted to this risk to creditors by enacting laws regulating bulk sales. The salient component of these laws is to impose duties upon the buyer to notify the seller's creditors of the sale and to assure a distribution of the sale to the creditors. The buyer's failure to comply would enable a creditor to set aside the sale and take the inventory.

Washington law on bulk transfers applies to any transfer in bulk, not in the ordinary course of the transferor's business, of a major part of the transferor's materials, supplies, merchandise, or other inventory.

The article applies to vendors engaged in buying, selling, and dealing in goods, wares, or merchandise, or in the business of operating a restaurant, cafe, beer parlor, tavern, hotel, club, or gasoline service station.

A number of transfers are excepted from the article, such as those made to give security for the performance of an obligation, general assignments for the benefit of creditors, transfers in settlement of a lien or other security interests, sales by executors or trustees, sales made in judicial or administrative proceedings to dissolve or reorganize the company, transfers to a person who is bound to pay the debtor's debts, transfers to a new business which is buying the debtor's business and the new business gives notice to creditors and assumes the debts, transfers of property exempt from execution, and any sale subject to a public auction on a lien foreclosure.

A bulk transfer is ineffective against any creditor of the transferor unless the transferee requires the transferor to provide a list of existing creditors, the parties prepare a schedule of the property transferred sufficient to identify it, the transferee keeps the list and schedule for six months after the transfer, and permits creditors to inspect them. Additional filing requirements are also imposed.

Specific notice requirements exist. The transferee is obligated to assure that new consideration paid for the goods is applied to pay the transferor's creditors. If any debts are in dispute the necessary sum may be withheld from distribution until the dispute is resolved. If the amount paid is insufficient to satisfy all claims, the distribution is pro rata.

A subsequent good faith purchaser who purchases the goods from the original transferee without notice of a defect in the bulk sale takes the property free of the original transferee's liabilities.

The National Conference of Commissioners on Uniform State Laws and the American Law Institute believe that bulk sales laws impede normal business transactions and that changes in the business and legal contexts in which bulk sales are conducted have made regulation of bulk sales unnecessary.

Actions to contest a bulk sale must be commenced within six months after the date the transferee takes possession of the goods unless the transfer was concealed. If concealed, the action must be commenced within six months of discovery of the transfer.

Summary of Substitute Bill: The current article known as the Uniform Commercial Code--Bulk Transfers is repealed. A revised article on bulk sales, recommended by the National Conference of Commissioners on Uniform State Laws and the American Institute, is adopted.

1. Application reflected in title. The new article applies only to sales and not to other transfers.
2. Definitions. New definitions are adopted. Two kinds of "bulk sales" are defined. One kind is conducted by an auctioneer or liquidator, and the other is a direct sale by the seller to a buyer. The act only applies to sales not in the seller's ordinary course of business that comprise more than half of the seller's inventory, if the auctioneer or the buyer has notice, or after a reasonable inquiry would have had notice, that the seller will not continue to operate the same or a similar kind of business after the sale. Inventory considered is all the seller's inventory, whether or not located in this state.
3. Application of this article. The article only applies to sales by businesses whose principle business is the sale of inventory from stock. Restaurants, cafes, beer parlors, taverns, hotels, clubs, and gasoline service stations are excluded.

A number of "transfers" are specifically excluded from coverage. In addition to some exclusions under the current act, sales to buyers are excluded if the buyer: (1) (a) obtains from the seller, not more than 21 days before the sale, a list of claimants of whom the seller has notice, three days before the seller delivers the list to the buyer, or (b) conducts a reasonable inquiry to discover the claimants; (2) assumes the seller's debts to the known claimants; (3) is solvent; and (4) gives written notice of the sale not later than 30 days after the sale by sending the notice to the claimants or by filing a notice with the Department of Licensing. Sales by buyers are also excluded if the buyer assumes the seller's debts that were incurred in the seller's business before the sale and the buyer issues a notice of the sale. Sales to new organizations that are taking over the business are also excluded if the new organization assumes the debts, issues notice, and the seller receives nothing other than an interest in the new organization that is subordinate to the claims.

The article does not apply to sales of assets which have a net value of less than \$10,000 or more than \$25 million.

Specific requirements for issuing the notices are set forth.

4. Buyer's obligations. The buyer in a bulk sale must obtain a list from the seller of all business names and addresses used by the seller within the three years before the list is sent to the buyer, obtain a list of claimants from the seller, prepare a schedule of distribution, give notice of the sale to claimants on the seller's list and any other known claimants, distribute the net contract price in accordance with the buyer's undertakings in the schedule; make the list of claimants available to a claimant who requests the list in writing or requests to inspect the list, or files a copy of the list with the Department of Licensing. A buyer may be excused from obtaining a list of claimants and making the claimants' list available if the buyer files a written notice of the bulk sale with the Department of Licensing when the seller has 200 or more claimants.

Precise requirements for issuing the notice of sale to the claimants are set forth. A statutory form is provided.

5. Schedule of distribution. The buyer and seller must agree on how the net contract price is to be distributed and must set forth their agreement in a written schedule of distribution. The buyer's undertakings run only to the seller unless the buyer fails to comply with the buyer's stated undertakings toward creditors. Both the buyer and the seller may be excused from their obligations under the schedule of distribution if some or all of the anticipated distribution to creditors becomes unavailable because of a court order, other legal process, or change of law. The buyer and seller must continue to distribute the assets as much as possible in accordance with the schedule or reach a new agreement regarding distribution.
6. Liability for failure to comply. A buyer who fails to comply with the buyer's undertakings in the schedule of distribution may be liable to the creditor for damages in the amount of the claim, reduced by any amount the creditor would not have realized if the buyer had complied. The creditor must establish the validity and amount of the claim. The buyer must establish that amount the creditor would not have realized if the buyer complied. A buyer who makes a good faith effort to comply or to exclude the sale from the application of the article, or who holds a good faith belief that the article does not apply is not liable for failure to comply. The buyer must establish good faith. The cumulative liability of the buyer for failure to comply may not exceed an amount equal to twice the net

contract price, less any amount paid, if the assets consist only of inventory or equipment, or, twice the net value of the inventory and equipment less any amount paid which is allocable to the inventory and equipment, if the assets include property other than inventory and equipment. The buyer's failure to comply does not impair the buyer's rights to the assets, render the sale void, entitle the creditor to more than the satisfaction of the creditor's claim, or create liability other than as provided under the article. The buyer has an immediate right to reimbursement from the seller for payment of the debt.

7. Sales by auctioneers or liquidators. Most requirements imposed on buyers and sellers apply to sales by auctioneers or liquidators on the seller's behalf. The auctioneer is considered the "buyer." Notice requirements vary to notify creditors of the auction. A statutory form is provided. The liability of an auctioneer for failure to comply with requirements may not exceed the amount of the net proceeds of the auction or sale allocable to inventory or equipment sold less the amount paid to creditors. A payment made to a person whom the auctioneer believes is entitled to payment reduces the auctioneer's liability. A buyer who buys at a bulk sale by auction need not comply with requirements imposed on buyers who buy directly from the seller and is not liable for the auctioneer's failure to comply.
8. Filing requirements and fees. Requirements are established for filing the required notices and lists with the Department of Licensing. The Department of Licensing may by rule establish fees for filing notices, lists, and certificates.
9. Statute of limitations. An action against a buyer, auctioneer, or liquidator must be commenced within one year after the date of the bulk sale. If the sale is concealed, the statute is tolled until one year after the plaintiff discovered or should have discovered the sale but in no event more than two years after the sale.
10. Miscellaneous. A couple of statutory provisions to correct cross-references should be added to the bill.

Substitute Bill Compared to Original Bill: The filing officer for filing notices, lists, and obtaining certificates of filing is changed from the secretary of state to the Department of Licensing which currently has responsibility for filings under other articles of the

Uniform Commercial Code. A provision that left blank specific filing fees the filing officer could charge for filing notice, lists, and conducting searches for certificates is stricken and replaced with a provision that allows the Department of Licensing to set fees by rule. Technical cross-references to this act in other articles in the Uniform Commercial Code are corrected.

Fiscal Note: Requested January 27, 1993.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: None.

Testimony Against: None.

Witnesses: None.