

By Representative Minton

1 A bill to be entitled
2 An act relating to bulk sales; providing
3 definitions; providing applicability;
4 prescribing duties of buyers and sellers in
5 bulk-sales transactions; requiring notice to be
6 given to certain creditors of sellers;
7 providing limits for filing actions against
8 buyers in bulk sales; providing an effective
9 date.

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11 Be It Enacted by the Legislature of the State of Florida:

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13 Section 1. Bulk sales.--

14 (1) As used in this section, the term:

15 (a) "Assets" means the inventory that is the subject
16 of a bulk sale and any tangible personal property and
17 intangible personal property used or held for use primarily
18 in, or arising from, the seller's business and sold in
19 connection with that inventory, but the term does not include:

20 1. Fixtures other than readily removable factory and
21 office machines;

22 2. The lessee's interest in a lease of real property;
23 or

24 3. Property to the extent that it is generally exempt
25 from creditor process under nonbankruptcy law.

26 (b) "Bulk sale" means a sale not in the ordinary
27 course of the seller's business of more than half the seller's
28 inventory, as measured by value on the date of the bulk-sale
29 agreement if on that date the buyer has notice, or after
30 reasonable inquiry would have had notice, that the seller will

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1 not continue to operate the same or a similar kind of business
2 after the sale.

3 (c) "Claim" means a right to payment from the seller,
4 whether or not the right is reduced to judgment, liquidated,
5 fixed, matured, disputed, secured, legal, or equitable. The
6 term includes costs of collection and attorney's fees only to
7 the extent that the laws of this state permit the holder of
8 the claim to recover them in an action against the obligor.

9 (d) "Claimant" means a person holding a claim incurred
10 in the seller's business other than:

11 1. An unsecured and unmatured claim for employment
12 compensation and benefits, including commissions and vacation,
13 severance, and sick-leave pay.

14 2. A claim for injury to an individual or to property,
15 or for breach of warranty, unless:

16 a. A right of action for the claim has accrued;
17 b. The claim has been asserted against the seller; and
18 c. The seller knows the identity of the person
19 asserting the claim and the basis upon which the person has
20 asserted it.

21 3. A claim for taxes owing to a governmental unit.

22 (e) "Creditor" means a claimant or other person
23 holding a claim.

24 (f) "Date of the bulk sale" means the later of the
25 date on which:

26 1. More than 10 percent of the net contract price is
27 paid to or for the benefit of the seller; or

28 2. More than 10 percent of the assets, as measured by
29 value, are transferred to the buyer.

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1 For purposes of this paragraph, delivery of a negotiable
2 instrument to or for the benefit of the seller in exchange for
3 assets constitutes payment of the contract price pro tanto; to
4 the extent that the contract price is deposited in escrow, the
5 contract price is paid to or for the benefit of the seller
6 when the seller acquires the unconditional right to receive
7 the deposit or when the deposit is delivered to the seller or
8 for the benefit of the seller, whichever is earlier; and an
9 asset is transferred when a person holding an unsecured claim
10 can no longer obtain through judicial proceedings rights to
11 the asset which are superior to those of the buyer arising as
12 a result of the bulk sale. A person holding an unsecured claim
13 can obtain those superior rights to a tangible asset at least
14 until the buyer has an unconditional right, under the
15 bulk-sale agreement, to possess the asset, and a person
16 holding an unsecured claim can obtain those superior rights to
17 an intangible asset at least until the buyer has an
18 unconditional right, under the bulk-sale agreement, to use the
19 asset.

20 (g) "Date of the bulk-sale agreement" means the date
21 on which a bulk-sale agreement becomes enforceable between the
22 buyer and the seller.

23 (h) "Debt" means liability on a claim.

24 (i) "Net contract price" means the new consideration
25 the buyer is obligated to pay for the assets less:

26 1. The amount of any proceeds of the sale of an asset,
27 to the extent the proceeds are applied in partial or total
28 satisfaction of a debt secured by the asset; and

29 2. The amount of any debt to the extent it is secured
30 by a security interest or lien that is enforceable against the
31 asset before and after it has been sold to a buyer. If a debt

1 is secured by an asset and other property of the seller, the
2 amount of the debt secured by a security interest or lien that
3 is enforceable against the asset is determined by multiplying
4 the debt by a fraction, the numerator of which is the value of
5 the new consideration for the asset on the date of the bulk
6 sale and the denominator of which is the value of all property
7 securing the debt on the date of the bulk sale.

8 (j) "In the ordinary course of the seller's business,"
9 with reference to a sale, means that the sale comports with
10 usual or customary practices in the kind of business in which
11 the seller is engaged or with the seller's own usual or
12 customary practices.

13 (k) "United States" includes its territories and
14 possessions and the Commonwealth of Puerto Rico.

15 (l) "Value" means fair market value.

16 (m) "Verified" means signed and sworn to or affirmed.

17 (2)(a) Except as otherwise provided in paragraph (b),
18 this section applies to a bulk sale if:

19 1. The seller's principal business is the sale of
20 inventory from stock; and

21 2. On the date of the bulk-sale agreement the seller
22 is located in this state or, if the seller is located in a
23 jurisdiction that is not a part of the United States, the
24 seller's major executive office in the United States is in
25 this state.

26 (b) A seller is deemed to be located at his or her
27 place of business. If a seller has more than one place of
28 business, the seller is deemed located at the seller's
29 executive office.

30 (c) This section does not apply to:
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- 1 1. A transfer made to secure payment or performance of
2 an obligation.
- 3 2. A transfer of property that is exempt from
4 execution.
- 5 3. A sale of an asset encumbered by a security
6 interest or lien if all the proceeds of the sale are applied
7 in partial or total satisfaction of the debt secured by the
8 security interest or lien or if the security interest or lien
9 is enforceable against the asset after it has been sold to the
10 buyer and the net contract price is zero.
- 11 4. A general assignment for the benefit of creditors
12 or to a subsequent transfer by the assignee.
- 13 5. A sale by an executor, an administrator, a
14 receiver, a trustee in bankruptcy, or any public officer under
15 judicial process.
- 16 6. A sale made in the course of judicial or
17 administrative proceedings for the dissolution or
18 reorganization or an organization.
- 19 7. A sale to a buyer whose principal place of business
20 is in the United States and who:
- 21 a. Not earlier than 21 days before the date of the
22 bulk sale obtains from the seller a verified and dated list of
23 claimants of whom the seller had notice 3 days before the day
24 the seller sent or delivered the list to the buyer or conducts
25 a reasonable inquiry to discover the claimants;
- 26 b. Assumes in full the debts owed to claimants of whom
27 the buyer has knowledge on the date the buyer receives the
28 list of claimants from the seller or on the date the buyer
29 completes the reasonable inquiry, as the case may be;
- 30 c. Is not insolvent after the assumption; and
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1 d. Gives written notice of the assumption not later
2 than 30 days after the date of the bulk sale by sending or
3 delivering a notice to the claimants identified in
4 sub-subparagraph b.

5 8. A sale to a new organization that is organized to
6 take over and continue the business of the seller and that has
7 its principal place of business in the United States if:

8 a. The buyer assumes in full the debts that were
9 incurred in the seller's business before the date of the bulk
10 sale;

11 b. The seller receives nothing from the sale except an
12 interest in the new organization which is subordinate to the
13 claims against the organization arising from the assumption;
14 and

15 c. The buyer gives written notice of the assumption
16 not later than 30 days after the date of the bulk sale by
17 sending or delivering a notice to each creditor whose debt is
18 assumed.

19 9. A sale of assets having:

20 a. A value, net of liens and security interests, of
21 less than \$10,000. If a debt is secured by assets and other
22 property of the seller, the net value of the assets is
23 determined by subtracting from their value an amount equal to
24 the product of the debt multiplied by a fraction, the
25 numerator of which is the value of the assets on the date of
26 the bulk sale and the denominator of which is the value of all
27 property securing the debt on the date of the bulk sale; or

28 b. A value of more than \$25 million on the date of the
29 bulk-sale agreement.

30 10. A sale required by, and made pursuant to, statute.

31 (3)(a) In any bulk sale, the buyer shall:

- 1 1. Obtain from the seller a list of all business names
2 and addresses used by the seller within 3 years before the
3 date the list is sent or delivered to the buyer;
4 2. Unless excused under paragraph (b), obtain from the
5 seller a verified and dated list of claimants of whom the
6 seller had notice three days before sending or delivering the
7 list to the buyer and including, to the extent known by the
8 seller, the address of and the amount claimed by each
9 claimant;
10 3. Give notice of the bulk sale in accordance with
11 paragraph (4)(a);
12 4. Unless excused under paragraph (b), make available
13 the list of claimants by:
14 a. Promptly sending or delivering a copy of the list
15 without charge to any claimant whose written request is
16 received by the buyer no later than 6 months after the date of
17 the bulk sale; and
18 b. Permitting any claimant to inspect and copy the
19 list at any reasonable hour upon request received by the buyer
20 no later than 6 months after the date of the bulk sale; and
21 5. Assure that the consideration payable to the seller
22 in a transaction under this section is applied so far as
23 necessary to pay those debts of the seller which are indicated
24 on the list of claimants.
25 (b) A buyer who gives notice in accordance with
26 paragraph (4)(b) is excused from complying with the
27 requirements of sub-subparagraphs (a)2. and 4.
28 (4)(a) Except as otherwise provided in paragraph (b),
29 the buyer shall send or deliver a written notice of the bulk
30 sale to each claimant on the list of claimants and to any
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1 other claimant of whom the buyer has knowledge at the time the
2 notice of the bulk sale is sent or delivered.
3 (b) The written notice of the bulk sale must state at
4 least:
5 1. That the seller and buyer have entered into an
6 agreement for a sale that may constitute a bulk sale under the
7 laws of this state;
8 2. The date of the agreement;
9 3. The date on or after which more than 10 percent of
10 the assets were or will be transferred;
11 4. The date on or after which more than 10 percent of
12 the net contract price was or will be paid;
13 5. The name and mailing address of the seller;
14 6. Any other business name and address listed by the
15 seller;
16 7. The name of the buyer and an address of the buyer
17 from which information concerning the sale can be obtained;
18 8. A statement indicating the type of assets or
19 describing the assets item by item;
20 9. The manner in which the buyer will make available
21 the list of claimants, if applicable; and
22 10. If the sale is in total or partial satisfaction of
23 an antecedent debt owed by the seller, the amount of the debt
24 to be satisfied and the name of the person to whom it is owed.
25 (c) For purposes of subparagraphs (b)5. and 6., the
26 name of a person is the person's individual, partnership, or
27 corporate name.
28 (d) The buyer shall give notice of the bulk sale not
29 less than 15 days before the date of the bulk sale.
30 (5)(a) Except as provided in paragraph (c), and
31 subject to the limitation in paragraph (d):

1 1. A buyer who fails to comply with the notice
2 requirements of paragraph (3)(a) with respect to a creditor is
3 liable to the creditor for damages in the amount of the claim,
4 reduced by any amount that the creditor would not have
5 realized if the buyer had complied; and

6 2. A buyer who fails to comply with any other
7 requirement of paragraph (3)(a) with respect to a claimant is
8 liable to the claimant for damages in the amount of the claim,
9 reduced by any amount that the claimant would not have
10 realized if the buyer had complied.

11 (b) In an action under subparagraph (a)1., the
12 creditor has the burden of establishing the validity and
13 amount of the claim, and the buyer has the burden of
14 establishing the amount that the creditor would not have
15 realized if the buyer had complied.

16 (c) A buyer who:

17 1. Made a good-faith and commercially reasonable
18 effort to comply with the requirements of paragraph (3)(a) or
19 to exclude the sale from the application of this section under
20 paragraph (2)(c); or

21 2. On or after the date of the bulk-sale agreement,
22 but before the date of the bulk sale, held a good-faith and
23 commercially reasonable belief that this section does not
24 apply to the particular sale

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26 is not liable to creditors for failure to comply with this
27 section. The buyer has the burden of establishing the good
28 faith and commercial reasonableness of the effort or belief.

29 (d) A payment made by the buyer to a person to whom
30 the buyer is, or believes he or she is, liable under paragraph

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1 (a) reduces pro tanto the buyer's cumulative liability under
2 that paragraph.

3 (e) An action may not be brought under subparagraph
4 (a)2. by or on behalf of a claimant whose claim is
5 unliquidated or contingent.

6 (f) A buyer's failure to comply with the requirements
7 of paragraph (3)(a) does not impair the buyer's rights in or
8 title to the assets; render the sale ineffective, void, or
9 voidable; entitle a creditor to more than a single
10 satisfaction of his or her claim; or create liability other
11 than as provided in this section.

12 (g) Nothing in this section shall be construed to
13 relieve the seller of any obligations to any unsecured
14 creditor of the debtor.

15 (h) Unless otherwise agreed, a buyer has an immediate
16 right of reimbursement from the seller for any amount paid to
17 a creditor in partial or total satisfaction of the buyer's
18 liability under this section.

19 (i) Any unsecured creditor of the seller shown on the
20 list prescribed in this section which is not paid by the buyer
21 shall be treated as a creditor that holds a security interest
22 under chapter 679, Florida Statutes, in the supplies,
23 inventory, merchandise, materials, or other property subject
24 to the transfer. The security interest of such unsecured
25 creditor shall be deemed valid and perfected as of the date of
26 the transfer, but in all events shall be subject and
27 subordinate to any validly perfected security interest held by
28 any other creditor for value in good faith and without notice
29 of the security interest of any unsecured creditor created
30 under this section, regardless of whether such other interest
31 is perfected before or after the transfer. A purchaser for

1 value in good faith and without notice of the security
2 interest of any unsecured creditor created under this section
3 shall be deemed to take title to such supplies, inventory,
4 merchandise, materials, or other property free of such
5 security interest.

6 (6)(a) Except as provided in paragraph (b), an action
7 under this section against a buyer must be commenced within 1
8 year after the date of the bulk sale.

9 (b) If the buyer conceals the fact that the sale has
10 occurred, the limitation is tolled and an action under this
11 section may be commenced within the earlier of: 1 year after
12 the person bringing the action discovers that the sale has
13 occurred or 1 year after the person bringing the action should
14 have discovered that the sale has occurred, but no later than
15 2 years after the date of the bulk sale. Complete
16 noncompliance with the requirements of this section does not
17 of itself constitute concealment.

18 Section 2. This act shall take effect October 1, 1999.

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21 SENATE SUMMARY

22 Prescribes duties of buyers and sellers in specified
23 bulk-sale transactions. Requires notice of specified bulk
24 sales to be given to the seller's creditors. Prescribes
25 content of such notice. Prescribes the buyer's liability
26 upon failure to give a required notice and provides
27 remedies available to the buyer.
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