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UCC § 9-307
UCC § 9-306
UCC § 2-501
Identification of Goods

Mitchell v. Transamerica
Commercial Finance Corporation
and Amana Finance
(In re Doughty's Appliance, Inc.)

Adv. No. 99-3032-rld
Case No. 399-35924-rld7

7/22/99 RLD Published (236 BR 407)

Debtor, a retail home appliance dealer, converted its case from chapter 11 to chapter 7. The trustee filed a complaint seeking a determination of the validity, priority and extent of the liens on or interests in collateral repossessed prepetition. In particular, the trustee sought a determination of the rights of the inventory financiers vis-a-vis the rights of debtor's customers who had "Sales Orders" with respect to repossessed collateral.

The court held that under UCC § 9-307 the claims of the customers were superior to the rights of the inventory financiers as to appliances which were identified in Sales Orders. The court granted partial summary judgment as follows:

- i. Customers who had made no down payment were to be provided notice setting a deadline for the customer to tender full payment in cash or cash equivalents for the appliance(s) reflected in their Sales Orders or the inventory financiers would be free to dispose of the respective appliance(s) for their own account in a commercially reasonable manner.
- ii. All sales of appliances for which Sales Orders were issued prior to closure of the financing lines were authorized by the inventory financiers' security agreements, and the customers, whose purchases were memorialized in such Sales Orders, took appliances free of the security interests of the inventory financiers.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
) No. 398-34034-rld7
DOUGHTY'S APPLIANCE, INC.)
) Debtor.)
_____))
JOHN MITCHELL, TRUSTEE,) Adversary No. 99-3032-rld
) Plaintiff,)
))
) v.) MEMORANDUM OPINION
))
TRANSAMERICA COMMERCIAL FINANCE)
CORPORATION and AMANA FINANCE,)
) Defendants.)
_____))

20 This adversary proceeding has risen from the wreckage of the
21 Doughty's Appliance, Inc. bankruptcy case, Case No. 398-34034-rld7.
22 The following are designated as the court's findings of fact and
23 conclusions of law pursuant to Rule 52(a) of the Federal Rules of
24 Civil Procedure, applicable in this adversary proceeding under Rule
25 7052 of the Federal Rules of Bankruptcy Procedure, in support of
26 the court's grant of partial summary judgment at the hearing (the

1 "Hearing") on the plaintiff chapter 7 trustee's ("Trustee") Motion
2 for Summary Judgment, held on June 17, 1999. These findings and
3 conclusions are based upon the record, consisting of the pleadings
4 and affidavits on file in Adv. No. 99-03032-rld, and the arguments
5 of counsel for the parties at the Hearing.

6 FACTUAL BACKGROUND

7 Doughty's Appliance, Inc. ("Doughty's") was in the business
8 of selling home appliances and electronic equipment at retail.
9 Transamerica Commercial Finance Corporation ("Transamerica") and
10 Amana Finance ("Amana") provided inventory floor financing to
11 Doughty's. Transamerica and Amana perfected security interests in
12 Doughty's inventory and proceeds with Uniform Commercial Code
13 ("UCC") financing statements filed in Oregon. After Doughty's
14 defaulted in its payments to Transamerica and Amana on their
15 inventory financing loans, Transamerica and Amana, during the
16 period May 7, 1998, to May 12, 1998, repossessed their collateral.
17 On May 29, 1998, Doughty's filed a voluntary chapter 11 petition.
18 The case subsequently was converted to chapter 7 on June 24, 1998.

19 The Trustee filed this adversary complaint seeking a
20 determination of the validity, priority and extent of Transamerica
21 and Amana's liens on or interests in the repossessed collateral and
22 in certain collateral items held in storage. In particular, the
23 Trustee seeks a determination of the rights of Transamerica and
24 Amana as inventory financiers vis-à-vis the rights of Doughty's
25 customers for whom Sales Orders exist with respect to the
26 repossessed collateral or in whose names inventory items were

1 tagged. This matter is before me on the Trustee's motion for
2 summary judgment. Resolution of the dispute requires analysis of
3 the interplay among various sections of the UCC, with particular
4 emphasis on § 9-307.¹

5 Between July 25, 1997, and April 30, 1998, Doughty's sold to
6 customers appliances which subsequently were repossessed by
7 Transamerica and Amana. These sales are evidenced by Sales Orders
8 which include the name of the manufacturer, the SKU number (an
9 industry standard model number), the stock number, and a
10 description of each appliance sold, including its color. Doughty's
11 sold consumer appliances and electronic equipment in high volumes
12 from several stores, and customer Sales Orders would be filled
13 either from inventory on the floor or from inventory ordered from
14 the manufacturers whose product lines were carried by Doughty's.
15 Doughty's inventory was turning over constantly from customer sales
16 and orders to manufacturers to restock.

17 Transamerica and Amana contend that the Sales Orders do not
18 identify the appliances sufficiently for purposes of § 9-307.
19 Transamerica and Amana further contend that one or more of the
20 following events preclude some if not all of the customers from
21 acquiring rights under the UCC superior to those of a secured
22 inventory financier: (1) the closure of Doughty's inventory
23 financing line with Transamerica on February 13, 1998; (2) the
24 closure of Doughty's inventory financing line with Amana on

25
26 ¹ Unless otherwise indicated, all section references are to
the Uniform Commercial Code.

1 April 10, 1998; and (3) the entry by the Clackamas County Circuit
2 Court on April 17, 1998, of a temporary restraining order enjoining
3 Doughty's from selling any inventory financed by Transamerica or
4 Amana. Pursuant to a stipulation with Doughty's, during the period
5 May 7 through May 12, 1998, Transamerica and Amana repossessed the
6 inventory each had financed. In addition, Transamerica had a
7 blanket security interest perfected in all of the remaining
8 inventory of Doughty's, which currently is in storage.

9 The concerned customer Sales Orders fall into three
10 categories based upon the down payments made by the customers:
11 those for which no down payment was made, those for which some down
12 payment was made, and those for which the entire purchase price was
13 paid.² None of the concerned collateral items is unique or
14 unusual. Over time, Doughty's had acquired and sold significant
15 quantities of each appliance model concerned in this adversary
16 proceeding.

17 LEGAL DISCUSSION

18 A. Summary Judgment Standards.

19 Granting a motion for summary judgment is appropriate only
20 if there is no genuine dispute as to any material fact, and the
21 moving party is entitled to judgment as a matter of law. Fed. R.
22 Bankr. P. 7056; Fed. R. Civ. P. 56(c); State Farm Mutual Auto Ins.

23
24 ² Transamerica and Amana do not differentiate between
25 Doughty's customers who paid the purchase price in full or who made
26 only a partial down payment for the items they wished to purchase,
and I find no reason to differentiate between the two groups of
customers for purposes of this proceeding.

1 Co. v. Davis, 7 F.3d 180, 182 (9th Cir. 1993). Material facts are
2 such as may affect the outcome of the case. Anderson v. Liberty
3 Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d
4 202 (1986). In considering a motion for summary judgment, the
5 court is required to draw all inferences from the evidence in the
6 light most favorable to the nonmoving party. Id.

7 B. Disposition of Inventory Collateral.

8 1. Customers Who Have Made No Down Payment. At the
9 Hearing, the parties both recognized that there was one category of
10 Doughty's customers with respect to which their disputes were
11 easily resolved. Those customers represented by Sales Orders who
12 paid nothing for their purchases would have to pay the entire
13 retail purchase price to Transamerica in order to receive their
14 goods. Such payment would maximize the recovery to Transamerica
15 upon disposition of its collateral. Accordingly, the parties are
16 agreed that a notice will be sent to all such Doughty's customers
17 setting a deadline for them to tender full payment in cash or cash
18 equivalents for their merchandise. If full payment is not received
19 by the deadline, Transamerica will be free to dispose of the
20 merchandise covered by such customers' Sales Orders for its own
21 account in a commercially reasonable manner.

22 2. Sales Prior to Line Closure. Section 9-306(2) provides
23 that "... a security interest continues in collateral notwith-
24 standing sale, exchange or other disposition thereof unless the
25 disposition was authorized by the secured party in the security
26 agreement or otherwise...." [Emphasis added.] The Inventory

1 Security Agreements between Doughty's and Transamerica and Amana
2 respectively, each allowed "sales of inventory at retail in the
3 ordinary course of [Doughty's] business." See Declaration of Kathy
4 Moody, Exhibit A, p. 2, ¶ 5(c), and Exhibit B, p. 1, ¶ 5(c).

5 Both Inventory Security Agreements provide that they are to
6 be interpreted and enforced in accordance with Illinois law. See
7 Declaration of Kathy Moody, Exhibit A, p. 3, ¶ 16, and Exhibit B,
8 p. 3, ¶ 16. However, Transamerica and Amana take the position that
9 the choice of law provisions in the Inventory Security Agreements
10 control with respect to issues between Doughty's and the respective
11 secured parties only. Transamerica and Amana argue that disputes
12 between the secured parties and third party customers are governed
13 by the law of the state where the collateral is located and where
14 the security interests of Transamerica and Amana are perfected--in
15 this case, Oregon.

16 I agree. Official Comment 1 to § 9-103 provides: "[W]hen
17 conflicting claims to collateral arise, the question depends on
18 *perfection* of security interests, and thus on the effect of
19 perfection or non-perfection." Section 9-103(1)(b) provides that
20 "... the effects of perfection or non-perfection of a security
21 interest in collateral are governed by the law of the jurisdiction
22 where the collateral is when the last event occurs on which is
23 based the assertion that the security interest is perfected or
24 unperfected."

25 Because the security interests of Transamerica and Amana
26 were perfected in Oregon, Oregon law applies. Section 9-103(1)(b)

1 recognizes that it would not be fair to require buyers of financed
2 inventory collateral, who were not parties to the Inventory
3 Security Agreements, to be bound by a choice of law provision to
4 which they did not agree. ORS 79.3060(2), consistent with § 9-
5 306(2), recognizes sales free of a security interest if the
6 security agreement authorizes such sales.

7 The record indicates that all of the Doughty's customer
8 Sales Orders in dispute in this proceeding were entered into in the
9 ordinary course of Doughty's business. Transamerica and Amana do
10 not contend otherwise, at least with respect to Sales Orders dated
11 prior to line closure. Accordingly, I find that customer Sales
12 Orders with respect to Transamerica collateral entered into prior
13 to February 13, 1998, when the Transamerica inventory financing
14 line was closed, were authorized by the security agreement between
15 Transamerica and Doughty's. Likewise, I find that customer Sales
16 Orders with respect to Amana collateral entered into prior to
17 April 10, 1998, when the Amana inventory financing line was closed,
18 were authorized by the security agreement between Doughty's and
19 Amana. Customers with all such Sales Orders take their Doughty's
20 merchandise free of the security interests of Transamerica and
21 Amana, consistent with the provisions of ORS 79.3060(2).

22 3. Sales Subsequent to Line Closure. The difficulty
23 inherent in resolving the competing claims of parties such as
24 Transamerica and Amana and the Doughty's retail customers concerned
25 in this adversary proceeding is that the "villain" of this piece
26 has left the stage--permanently. An insolvent Doughty's is in no

1 position to make them whole, and it is up to the court to determine
2 between two innocent parties who should bear the risk of loss.

3 White and Summers answer the risk of loss issue with the
4 following example:

5 "Consider the case of Mrs. Jones who buys a washing machine
6 from Big George's Appliance Store. Assume further that Bank
7 has filed a financing statement which covers all of Big
8 George's inventory and that the security interest is not
9 discharged by sale. In these circumstances is it reasonable
10 to expect Mrs. Jones to search the files, to ask Bank for a
11 subordination? And if that is not reasonable, is it fair to
12 permit Bank to assert its security interest in the washing
13 machine after Mrs. Jones has paid full value? Of course, it
14 is neither reasonable to expect her to investigate nor fair
15 to subordinate her interest. Thus, we have 9-307(1) which
16 renders the Bank's security interest subordinate to her
17 interest as purchaser." James J. White and Robert S.
18 Summers, Uniform Commercial Code Vol. 4, p. 350 (4th ed.
19 1995).

20 a. Section 9-307(1). Section 9-307(1) provides that:

21 "A buyer in ordinary course of business ... other than a
22 person buying farm products from a person engaged in farming
23 operations takes free of a security interest created by his
24 seller even though the security interest is perfected and
25 even though the buyer knows of its existence."

26 As with § 9-306(2), Oregon has adopted a version of § 9-307(1)
consistent with the model act. See ORS 79.3070(1).

Inventory financiers, such as Transamerica and Amana, are
loath to concede the priority of their secured position in
inventory items to any other parties. The disputes in this case
focus on whether the concerned customers of Doughty's qualify as
buyers in the ordinary course of business.

b. Buyer in the Ordinary Course. The definition of a
"buyer in the ordinary course of business" is set forth in § 1-
201(9):

1 "'Buyer in the ordinary course of business' means a person
2 who in good faith and without knowledge that the sale to him
3 is in violation of the ownership rights or security interest
 of a third party in the goods buys in ordinary course from a
 person in the business of selling goods of that kind...."

4 There is nothing in the record to indicate, and Transamerica
5 and Amana do not argue that the Doughty's customers concerned in
6 this proceeding did not act in good faith. Transamerica and Amana
7 do assert generally that 29 of the concerned transactions occurred
8 after the Clackamas County Circuit Court entered its restraining
9 order against Doughty's disposing of Transamerica and Amana's
10 collateral and violated said order. In these circumstances,
11 Transamerica and Amana argue that such transactions cannot be
12 characterized as having been conducted in the ordinary course of
13 Doughty's business.

14 However, there is nothing in the record to establish that
15 any of the concerned Doughty's customers knew that a purchase of
16 any product from Doughty's would be in violation of the ownership
17 rights or security interests of Transamerica or Amana, or that any
18 such purchase would be in violation of an order of the Clackamas
19 County Circuit Court. Based upon the sales records set forth in
20 the Affidavit of Kathy Moody, Doughty's customers purchased
21 appliances during normal business hours from a retailer that held
22 itself out to the public as specializing in sales of such items.
23 Accordingly, I find that the Doughty's customers entered into
24 purchase transactions in the ordinary course of Doughty's business
25 in good faith and without knowledge that sales to them would be in
26 violation of the ownership rights or security interests of

1 Transamerica or Amana.

2 c. Sale and Identification Issues. Transamerica and
3 Amana further argue that Doughty's customers are not buyers in the
4 ordinary course of business because no sales to them were
5 consummated, i.e., they never took title to the concerned inventory
6 items, and in any event, the concerned inventory items were not
7 identified to the customers' contracts. I will consider each of
8 these arguments in turn.

9 i. Transfer of Title Is Not Dispositive in
10 Article 9. Transamerica and Amana argue that Doughty's customers
11 cannot qualify as buyers in the ordinary course of business because
12 they did not take title to the goods they wished to purchase, and
13 no sale for UCC purposes took place. Transamerica and Amana rely
14 on the provisions of § 2-106(1), which provides that a "sale" is
15 "the passing of title from the seller to the buyer for a price
16 (Section 2-401)."

17 The internal reference to § 2-401 in § 2-106(1) is
18 significant. The preamble to § 2-401 states that:

19 "Each provision of this Article with regard to the rights,
20 obligations and remedies of the seller, the buyer,
21 purchasers or other third parties applies irrespective of
22 title to the goods except where the provision refers to such
23 title. Insofar as situations are not covered by the other
24 provisions of this Article and matters concerning title
25 become material the following rules apply...." [Emphasis
26 added.]³

25 ³ The Article referred to in § 2-401 is UCC Article 2 on
26 "Sales," and I note that Official Comment 1 to § 1-206(1) likewise
appears to limit its application to Article 2 of the UCC.

1 By its terms, § 9-307(1) does not limit its application to
2 situations where title has been transferred, and in fact, does not
3 contain any references to title. Not tying the rights of ordinary
4 course buyers to formal title transfers is consistent with the
5 objectives of Article 9. As stated in the Official Comments to
6 § 9-101:

7 "The aim of this Article is to provide a simple and unified
8 structure within which the immense variety of present-day
9 secured financing transactions can go forward with less cost
and with greater certainty.

10 This Article does not determine whether 'title' to
11 collateral is in the secured party or in the debtor and
12 adopts neither a 'title theory' nor a 'lien theory' of
security interests. Rights, obligations and remedies under
the Article do not depend on the location of title (Section
9-202)."⁴

13 In other words, Article 9 was designed to facilitate the
14 flow of commerce, and technical issues with respect to title
15 transfers must not be allowed to impede that flow. If a loss
16 arises from the failure of a retail inventory seller, Article 9,
17 and specifically, § 9-307(1), allocates the risk of such loss to
18 the party best able to foresee and protect against or absorb the
19 loss. As stated by the court in Chrysler Credit Corp. v. Sharp,
20 288 N.Y.S.2d 525, 534 (N.Y. Sup. Ct. 1968):

21 "If there is a usage of trade which exposes an entruster on

22
23 ⁴ Section 9-202 provides that, "[e]ach provision of this
24 Article with regard to rights, obligations and remedies applies
25 whether title to collateral is in the secured party or in the
26 debtor." The Official Comments to § 9-202 state that: "The rights
and duties of the parties to a security transaction and of third
parties are stated in this Article without reference to the location
of 'title' to the collateral." [Emphasis added.]

1 floor plan to certain risks, these are risks against which
2 he can guard by audits and accounting procedures or he can
3 refuse to knowingly expose himself to the risk with the
4 particular dealer.... The Court feels a buyer who makes a
5 purchase on a printed form contract in good faith with a
6 full understanding it is a binding contract, ... must,
7 certainly as to a retail financier furnishing new value on
8 the strength of such contract and as to an entruster giving
9 the dealer wide latitude of sale [sic] goods, be deemed a
10 buyer in the ordinary course of business, without regard to
11 the technicalities of when title is to pass pursuant to
12 collateral oral agreements or as to time of delivery and
13 without the necessity of determining whether such delay
14 brings about technically, a bailment, a non-delivery, a
15 repossession or whatever."

9 The general provisions of the UCC and its official
10 commentary support an interpretation of § 9-307(1) that would not
11 restrict its application based upon title transfer requirements.
12 Further support is provided by the language used in § 9-307(1) in
13 comparison to a predecessor statute and in the language used in the
14 UCC replevin section in Article 2.

15 The Uniform Trust Receipts Act § 9(2) (1933) provided
16 protection for a "buyer in the ordinary course of trade," defined
17 as a person "to whom goods are sold and delivered...." The
18 retention of the word "sale" while omitting the requirement of
19 delivery in § 9-307(1) appears to be an intentional deletion of a
20 transfer of title requirement. See Big Knob Volunteer Fire Co. v.
21 Lowe & Moyer Garage, Inc., 487 A.2d 953, 958 (Pa. Sup. Ct. 1985).

22 The replevin section of Article 2, § 2-716, requires
23 identification to the contract but not delivery. If an Article 2
24 buyer is entitled to possession from the seller through replevin or
25 specific performance without a transfer of title through delivery,
26 why should a buyer in the ordinary course under § 9-307(1) be

1 placed in a worse position with respect to a secured lender?

2 Although there is some contrary authority, the majority of
3 modern decisions reject a transfer of title requirement for the
4 application of § 9-307(1) for the benefit of a buyer in the
5 ordinary course of business. See, e.g., Carey Aviation, Inc. v.
6 Giles World Marketing, Inc., 46 B.R. 458 (D. Mass. 1985); In re
7 Darling Homes, Inc., 46 B.R. 370, 377-79 (Bankr. D. Del. 1985);
8 Daniel v. Bank of Hayward, 425 N.W.2d 416, 421-22 (Wis. 1988); Big
9 Knob Volunteer Fire Co. v. Lowe & Moyer Garage, Inc., 487 A.2d at
10 958; Wilson v. M & W Gear, 442 N.E.2d 670, 672 (Ill. App. 1982);
11 Holstein v. Greenwich Yacht Sales, Inc., 404 A.2d 842 (R.I. 1979);
12 and Rex Financial Corp. v. Mobile America Corp., 580 P.2d 8 (Ariz.
13 App. 1978).

14 The decision of the Oregon Supreme Court in Schultz v. Bank
15 of the West, 325 Or. 81, 934 P.2d 421 (Or. 1997), is not contrary
16 to this line of authority. In Schultz, the Oregon Supreme Court
17 ignores the reality of the marketplace and interprets the consignor
18 who grants a security interest as the "seller" for purposes of § 9-
19 307(1) in order to aid the ultimate buyer against the claims of the
20 consignor's secured lender. As a matter of policy, the result
21 makes sense for Article 9 purposes. See James J. White and Robert
22 S. Summers, Uniform Commercial Code, supra at 307. However, as
23 pointed out by Justice Graber in dissent, the majority's
24 interpretation of the consignor as seller in the Schultz case
25 ignores the requirement of § 1-201(9) that a buyer in the ordinary
26 course purchase from a seller "in the business of selling goods of

1 that kind." I am quite comfortable that the Oregon Supreme Court,
2 consistent with Schultz, would have no troubles of statutory
3 interpretation in determining that the Doughty's customers
4 concerned here are buyers in the ordinary course of business, in
5 spite of their goods not having been delivered for transfer of
6 title purposes.⁵

7 Each Doughty's Sales Order includes the following statements
8 directly above the customer signature line:

9 This acknowledges merchandise purchased at the price shown
10 and a copy of this invoice. Delivery of merchandise
11 purchased by check is subject to check clearing bank. If
12 this is a finance purchase, it is subject to the terms and
13 conditions of our Finance Agreement. Returned goods are
14 subject to a 10% restocking fee and must be accompanied by
15 this receipt. Declaration of Kathy Moody, Ex. C [Emphasis
16 added].

17 Having signed such Sales Orders with respect to particularly
18 described merchandise upon the premises of a volume retail dealer

19 _____
20 ⁵ Transamerica and Amana rely on the decision of the Florida
21 District Court of Appeal in Kit Car World, Inc. v. Skolnick, 616
22 So.2d 1051 (Fla. App. Ct. 1993), in support of their argument that
23 transfer of title is indispensable to buyer in the ordinary course
24 status. In the Kit Car World case, the defunct and insolvent seller
25 had been in the business of selling replica car kits. Seven
26 customers who had paid full price for kits that they never received
intervened in litigation with the secured inventory financier,
claiming a conversion of their kits. The court found that there
were enough parts in the seller's inventory to complete seven kits.
But, no such kits had been put together, and there were no matches
between the numbers on frames and bodies of replica cars in
inventory with numbers on the customers' purchase orders. The case
might have turned on lack of identification to the customers'
contracts rather than on no transfer of title. In any event, the
court appeared to be particularly troubled that many other customers
who had paid full price for nondelivered kits were not represented
in the litigation, and similarly situated customer creditors,
accordingly, would be treated very differently if the seven
intervening customers succeeded with their claims. See id. at 1054.

1 in consumer appliances, Doughty's customers had every legitimate
2 expectation that they had bought the goods covered by the Sales
3 Orders. To hold that no "sale" took place in these circumstances,
4 as urged by Transamerica and Amana, because of a technical issue as
5 to title transfer, would be contrary to the provisions and spirit
6 of § 9-307(1) and would run counter to the understanding of the
7 marketplace. Accordingly, I find that title transfer, through
8 delivery or otherwise, is not required to confer buyer in the
9 ordinary course status on the Doughty's customers concerned in this
10 proceeding for purposes of ORS 79.3070(1).

11 ii. The Goods in Inventory Were Identified to
12 the Sales Orders. As a next line of defense, Transamerica and
13 Amana argue that Doughty's customers are not entitled to buyer in
14 the ordinary course status because the goods they purported to buy
15 were not properly identified to the contract. The concept of
16 identification is discussed in § 2-501(1), which provides:

17 "[I]dentification can be made at any time and in any manner
18 explicitly agreed to by the parties. In the absence of
19 explicit agreement identification occurs (a) when the
contract is made if it is for the sale of goods already
existing and identified...."

20 The text of § 2-501 and its official commentary indicates
21 that the primary purpose of identification is to establish a
22 "special property" and an insurable interest in goods.

23 Comment No. 2 states:

24 "In the ordinary case identification of particular existing
25 goods as goods to which the contract refers is unambiguous
and may occur in one of many ways. It is possible, however,
26 for the identification to be tentative or contingent. In
view of the limited effect given to identification by this

1 Article, the general policy is to resolve all doubts in
2 favor of identification." [Emphasis added.]

3 Because § 9-307(1) provides for an exception to the general
4 rule that a party with a security interest that is properly
5 attached and perfected prevails against the competing claims of
6 parties whose claims are not so perfected, it is appropriate that a
7 consumer buyer must present a claim to existing and identified
8 goods in order to prevail against a fully perfected inventory
9 financier. Most courts that have considered this issue have so
10 held. See, e.g., In re Darling's Homes, Inc., 46 B.R. at 378-79;
11 Daniel v. Bank of Hayward, 425 N.W.2d at 423; Big Knob Volunteer
12 Fire Co. v. Lowe & Moyer Garage, Inc., 487 A.2d at 958; and
13 Holstein v. Greenwich Yacht Sales, Inc., 404 A.2d at 845. I have
14 found no Oregon decisions on point.

15 In Wilson v. M & W Gear, 442 N.E.2d at 673, the Illinois
16 Court of Appeals rejected the need for identification entirely in
17 the § 9-307 context. In Wilson, a customer purchased a fourteen
18 foot M & W grain drill that was not currently in the seller's
19 inventory. The customer paid for the drill by trading in his old
20 drill and tendering a check for the balance of the purchase price.
21 Within two weeks thereafter, M & W delivered two such grain drills
22 to the seller, and the seller notified the customer that his drill
23 had arrived. Further, on several occasions before the secured
24 party took possession of the seller's remaining inventory, seller's
25 owner discussed with the customer the attachments that would be
26 necessary for the drill, and arrangements for its delivery. The

1 Wilson court minimized the importance of identification in arriving
2 at its decision in favor of the customer, following an earlier
3 decision of the Illinois Appellate Court in Herman v. First Farmers
4 State Bank of Minier, 392 N.E.2d 344 (Ill. App. Ct. 1979), a case
5 involving fungible bulk goods.

6 In my view, the Illinois Appellate Court went too far in
7 declaring identification unnecessary in the Wilson case, where
8 there was substantial evidence to establish identification to the
9 contract for §§ 2-501 and 9-307(1) purposes. Bearing in mind the
10 admonition of Official Comment No. 2 to § 2-501 to resolve all
11 doubts in favor of identification, the result in Wilson appears
12 reasonable and justified. However, for the reasons stated in
13 Section B.2 of this Memorandum Opinion, I am not bound by Wilson.

14 In this proceeding, the record establishes that certain
15 Doughty's inventory items have been tagged for particular
16 customers, and with respect to other items in inventory, either
17 repossessed by Transamerica or Amana or in storage, the Sales
18 Orders identify the purchased goods by manufacturer, model number,
19 SKU number, description and color. I agree with the Wilson court
20 in this instance that "[r]equiring a serial number on each order
21 form would be superfluous." See Wilson v. M & W Gear, 442 N.E.2d
22 at 674.

23 It is not clear from the record what specific items were in
24 inventory when the Sales Orders were prepared. However, Doughty's
25 was a volume retailer of consumer appliances and electronic
26 equipment from a number of stores. It had acquired and sold

1 significant quantities of each appliance model concerned in this
2 adversary proceeding. Doughty's had lines of credit with its
3 suppliers that allowed it to fill inventory orders on a revolving
4 basis. If a particular appliance or equipment model was not in
5 stock in sufficient quantities to fill all customer orders on a
6 given day, Doughty's would fill the customers' Sales Orders from
7 its next deliveries from the manufacturer.

8 In these circumstances, I find that the Sales Orders or
9 identifying tags adequately identified appliances to the customers'
10 contracts for purposes of §§ 2-501 and 9-307(1), and I further find
11 that such identification applies with respect to all Doughty's
12 inventory whether repossessed by Transamerica or Amana, or in
13 storage and whether or not all such inventory was in stock at
14 Doughty's at the time that any concerned Sales Order was prepared.⁶

15 Based upon the foregoing findings, I find that the Doughty's
16 customers with Sales Orders or identifying tags covering goods in
17 storage or among repossessed inventory were buyers in the ordinary
18 course entitled to their goods purchased from Doughty's free of the
19 security interests of Transamerica and Amana pursuant to
20 ORS 79.3070(1).

21
22 ⁶ The Trustee concedes that if a Sales Order purports to cover
23 goods that were not in Doughty's inventory, either repossessed or in
24 storage, the concerned customer would have no inventory claim.

24 However, an additional issue is raised with regard to customer
25 Sales Orders for multiple items where only some of the goods
26 reflected on the Sales Orders were in inventory. The parties are
submitting additional briefs, at their request, and I have scheduled
a further hearing to consider this issue.

1 4. Section 2-502 Does Not Apply to Disputes Between Buyers
2 and Secured Parties. Transamerica and Amana contend that § 2-502,
3 covering Buyer's Right to Goods on Seller's Insolvency, applies in
4 this proceeding. Based on that premise, Transamerica and Amana
5 further argue that the Doughty's customers concerned in this
6 proceeding either have not established or cannot establish that the
7 requirements of § 2-502 have been met to allow them to recover the
8 goods described in their Sales Orders.

9 I disagree, based on the structure of the UCC. Article 2
10 deals with disputes and relations between buyers and sellers.
11 Article 9 deals with the rights and obligations of secured parties.
12 Sections 9-306 and 9-307 provide for the interface between
13 inventory financiers and buyers. I find that § 2-502 is irrelevant
14 to the relationship between inventory financiers and buyers and does
15 not govern the resolution of the issues raised in this proceeding.
16 See, e.g., Carey Aviation, Inc. v. Giles World Marketing, Inc., 46
17 B.R. at 460-61; and In re Pennsylvania Conveyor Co., Inc., 31 B.R.
18 680, 681-83 (Bankr. W.D. Pa. 1982).

19 5. The Trustee's Avoidance Powers Do Not Cut Off the Rights
20 of Buyers in the Ordinary Course Against Secured Inventory
21 Financiers. Transamerica and Amana further rely on the argument
22 that the rights of buyers in the ordinary course are cut off by the
23 avoidance powers of the bankruptcy trustee pursuant to § 544(a) of
24 the Bankruptcy Code. 11 U.S.C. § 544(a) provides that:

25 The trustee shall have, as of the commencement of the case,
26 and without regard to any knowledge of the trustee or of any
 creditor, the rights and powers of, or may avoid any

1 transfer of property of the debtor or any obligation
2 incurred by the debtor that is voidable by-

3 (1) a creditor that extends credit to the debtor at the
4 time of the commencement of the case, and that obtains, at
5 such time and with respect to such credit, a judicial lien
6 on all property on which a creditor on a simple contract
7 could have obtained such a judicial lien, whether or not
8 such a creditor exists;

9 (2) a creditor that extends credit to the debtor at the
10 time of the commencement of the case, and obtains, at such
11 time and with respect to such credit, an execution against
12 the debtor that is returned unsatisfied at such time,
13 whether or not such a creditor exists; or

14 (3) a bona fide purchaser of real property, other than
15 fixtures, from the debtor, against whom applicable law
16 permits such transfer to be perfected, that obtains the
17 status of a bona fide purchaser at the time of the
18 commencement of the case, whether or not such a purchaser
19 exists [and has perfected such transfer].

20 The trustee's avoidance powers under 11 U.S.C. §§ 544(a)(1)
21 and (2) cut off the rights of judgment and lien creditors with
22 rights unperfected as of the bankruptcy filing date against the
23 bankruptcy estate and, therefore, are not applicable to the dispute
24 before me. 11 U.S.C. § 544(a)(3) works to cut off the rights of
25 bona fide purchasers of real property only. The analogous parties
26 with respect to personal property are buyers in the ordinary course
of business. Yet, there is no reference in 11 U.S.C. § 544(a) to
such buyers.

Since Congress dealt specifically with bona fide purchasers
of real property and included no provisions with respect to buyers
in the ordinary course of business of personal property in 11
U.S.C. § 544(a), when it clearly could have done so, I find that 11
U.S.C. § 544(a) does not work to cut off their rights against

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1 secured party inventory financiers.⁷

2 CONCLUSION

3 Based upon the foregoing findings of fact and conclusions of
4 law, I find that the Trustee is entitled to partial summary
5 judgment for the benefit of Doughty's customers with respect to
6 Sales Orders or tagged inventory covering inventory repossessed by
7 Transamerica or Amana or remaining in storage. To the extent that
8 no inventory was repossessed or is in storage with respect to
9 particular Doughty's customer Sales Orders, I understand that the
10 Trustee is asserting no claim. I will prepare and enter a final
11 judgment on partial summary judgment, since I find there is no just
12 reason for delay, consistent with the provisions of Fed. R. Civ. P.
13 54(b), applicable in this adversary proceeding pursuant to Fed. R.
14 Bankr. P. 7054.

15 The issue of potential buyer in the ordinary course status
16 with regard to Sales Orders where repossessed inventory or stored
17 inventory exists for part but not all of the order is to be briefed
18 and heard at the hearing scheduled for September 22, 1999. I
19 further am reserving for trial issues with respect to customer

20 ///

21 ///

22 ///

23 ///

24
25 ⁷ Doughty's customers may have independent claims against
26 Doughty's bankruptcy estate subject to allowance and in the
priorities as provided for in Sections 502 and 507(a) of the
Bankruptcy Code, 11 U.S.C. §§ 502 and 507(a).

1 Sales Orders dated following the dates of repossession, and
2 customer Sales Orders, if any, competing for the same inventory
3 items.

4
5
6 RANDALL L. DUNN
Bankruptcy Judge

7
8
9 cc: Brad T. Summers
Thomas A. Gerber