

MARKS & WEINBERG, P.C.

In Re: Outboard Marine Corp.

52 U.C.C. Rep. Serv.2d 488; 2003 Bankr. LEXIS 1356

Outboard Marine Corporation ("Debtor") filed a Chapter 11 petition and moved to sell all of its operating assets free and clear of all liens, claims, encumbrances, and interests. Debtor's motion was objected to by Makino which claimed a validly perfected security interest in certain pieces of manufacturing machinery it had sold to Debtor prior to the bankruptcy filing.

Makino, which requested partial summary judgment on this issue, contended that its purchase agreement with Debtor gave it an enforceable, properly perfected security interest in the machinery sold to Debtor and that it therefore was entitled to receive the proceeds of the sale of such machinery. The Court determined that North Carolina state law applied to ascertain what property the debtor owned immediately preceding the time of bankruptcy, what liens existed on such property at that time, and the order of priority among the respective creditors holding such liens.

The Court noted that Article 9 of the UCC requires two documents to create a perfected security interest in a debtor's collateral. First, there must be a signed security agreement adequately describing the collateral so that an "attachment" occurs. Second, the secured party must perfect its interest by filing a "financing statement" providing notice to other creditors that a security interest is claimed in the collateral.



The Court initially found that Makino filed a financing statement in compliance with the UCC, but that it failed to execute a formal security agreement. However, Makino argued this financing statement when read in combination with the language in the terms and conditions accompanying the invoices, constituted a sufficient basis to find that a security agreement was created.

The Court noted that while most authorities conclude that a standard financing statement, in and of itself, does not create a security interest, courts uniformly hold that there are no "magic words" or precise formula necessary to create such an interest, as long as the formal requirements of the UCC are satisfied. The Court considered the language of the preprinted invoice terms and conditions to reflect Makino's desire to create a security interest. However, the Court determined the documents were silent as to Debtor's intent.

The Court concluded that this uncertainty created a factual question that highlighted the need for further investigation. Since there was, in the Court's opinion, a material factual dispute as to Debtor's intent to grant Makino a security interest, the Court denied Makino's motion for partial summary judgment.

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