PUBLICATION

Tennessee Court Changes Foreclosure Notice Procedures

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Summary: A recent Tennessee case requires secured lenders to verify the debtor's receipt of the notice of a foreclosure sale of personal property.

The Tennessee Court of Appeals[1] has ruled that a creditor in Tennessee might be liable to a borrower for statutory damages for a foreclosure sale of collateral where the Court deemed notice to the borrower of the sale to be insufficient or unreasonable. The decision of the Court of Appeals articulates a rule of law that will have a far ranging effect on the relationship of creditors and debtors in Tennessee so that the method of giving proper notice of a foreclosure sale is now an uncertainty.

Basically, the Court has changed Tennessee's "commercially reasonable sale" notice requirement from "sending notice" to "verifying receipt" of the notice. The ruling also imposes a case-by-case analysis as to what constitutes reasonable notice and casts a shadow over the procedures used in Tennessee for many years as to the proper procedure for disposing of collateral. At issue is a provision of Article 9 of the Tennessee Uniform Commercial Code — in particular, the issue of notice given to debtors in advance of the sales of repossessed collateral.[2] This is an important issue that could affect a significant number of repossession sales every year in Tennessee.

In sum, the Court of Appeals below held that a creditor could not proceed with a sale of collateral in circumstances in which the creditor lacked knowledge as to whether or not the required pre-sale notice actually had been received by the debtor. In practice, the rule articulated by the Court of Appeals may preclude a creditor from proceeding with a sale, even when proper statutory notice, such as a letter sent by certified mail, return receipt requested, 10 days in advance of the sale, has been sent and the creditor has no reason to suspect a problem with delivery of the notice.

In the particular case brought before the court, Melissa Wimmer purchased a vehicle from Downtown Motors in Gallatin. She financed the purchase, and the loan was assigned to Auto Credit of Nashville secured by the vehicle. Ms. Wimmer's payments were sporadic, and when she fell two payments behind in January of 2002, Auto Credit contacted her by phone to inquire about the payments, and she allegedly told Auto Credit to come "get the car because she has had nothing but trouble out of it since she got it." Having a deficiency balance of over $3,000, Auto Credit repossessed the vehicle at her home two days later, and the following day sent her a certified letter, return receipt requested, notifying her that the vehicle would be sold unless she paid her debt. Postal records show that notices were left for her three times before the sale. The vehicle was sold 20 days after the original notice of sale was mailed. Five days after the sale, the Post Office returned the certified letter to Auto Credit marked unclaimed.

We believe that the notice rule set forth in the opinion of the Court of Appeals is in error, as it is internally inconsistent in its reasoning and holding, is inconsistent with the statutory provisions of the Uniform Commercial Code, and is contrary to the law of other jurisdictions. For example, the Court of Appeals correctly noted that "proof of actual notice to or receipt by the debtor is not required," and that the creditor is not "forced to take responsibility for lost mail or the debtor's refusal to accept properly delivered mail."[3] Yet, the Court concluded "in light of Auto Credit's failure to verify delivery of the notice of disposition of collateral, we conclude

that the evidence preponderates against the trial court's finding that Auto Credit furnished reasonable notice to Ms. Wimmer."[4]

In its opinion, the Court of Appeals acknowledged that it was not addressing a situation in which the creditor had knowledge of problems with the notification, but instead was dealing with the situation in which the creditor does not know whether or not the notice has been delivered.[5] The Court of Appeals held that the "failure to verify delivery of the notice" was fatal and held that the creditor "should have taken reasonable steps to determine whether the notice had been delivered."[6] This is an imposition of additional duties on creditors to determine whether there are such problems with delivery.

Both the Tennessee Bankers Association and the Tennessee Consumer Finance Association (TCFA) have filed requests with the Tennessee Supreme Court to intervene in the case to protect the interests of creditors in Tennessee. Steve Eisen and Brad Trammell of Baker Donelson are representing TCFA in this case, and submitted information to the Tennessee Supreme Court highlighting the importance of this case and asking the Supreme Court to accept the case for review. On January 23, 2007, based partially on the information submitted, the Tennessee Supreme Court decided to review the case. Legislation also will be submitted to the Tennessee General Assembly to attempt to change the law directly. We believe that the adoption of such an important change in the relationship between creditors and debtors should only come after a full consideration of the issues involved, including a substantive analysis of the statutes in question as well as the state of the law in other jurisdictions.[7]

1 *Auto Credit of Nashville, Plaintiff/Appellee,* vs. *Melissa Wimmer, Defendant/Appellant* (No.: M2005-00978-COA-R3-CV, WL 2523979, Tenn. Ct. App., August 31, 2006).

2 Tennessee Code Annotated §47-9-611.

3 *See* Opinion, at p. 5.

4 *Id.*, p. 7.

5 *See* Opinion, at pp. 7-8.

6 *See* Opinion, at p. 9.

7 *See* T.C.A. § 47-1-102(2)(c) (one underlying purpose and policy of the Tennessee General Assembly in adopting the revised Article 9 is "to make uniform the law among the various jurisdictions").