

A Wimmer's Tale

By Daniel W. Small, Esq

It was a dark January night. A bit overcast. Cold. Snow promised by the weather bugs, no snow in sight—just the silent wrecker manned and womaned by a diligent repossession crew. The debtor had promised that the car would be on the street...and it was.

Early next day, the car rested safely in the repo lot, the unemployed debtor trying to find her way to look for more work and using her feet. The lender promptly sent out a standard foreclosure notification¹ and gave the debtor the usual 10-day notice before the car would be sold. It actually waited 20 days. The creditor even took the step of sending the notice by certified mail, return receipt requested, since that was a way of proving that the notice was sent and that it was sent on a specific, proveable date. Not a peep was heard from the debtor, who seemed to have worked hard to keep up her payments but apparently threw in the towel when her unemployment benefits ran out.

Twenty days later, after sending the notice of foreclosure, the creditor had not heard from the debtor and sold the car at a public auction. Some time after the foreclosure sale, however, the creditor got a surprise in the mail. The certified letter was returned unclaimed. The debtor filed suit and testified that she had never received the notice. She also testified that she did nothing after her car was repossessed, because the lending officer told her that her car would not be sold until after she'd been sent a letter (or did the lender say that the car would not be sold until she "got" the letter, as the debtor seemed to suggest?).

The trial judge decided that the debtor knew or should have known about the letter and upheld the foreclosure. The Tennessee Court of Appeals thought otherwise. It reversed the trial judge's decision, which was in favor of the lender, and slapped the lender with the statutory fine for defective foreclosure sales of collateral in a consumer case. It let the deficiency judgment stand, ap-

parently only because the debtor chose not to appeal it. The court did so even though it found that the foreclosure notice was proper in all respects and was sent a sufficient time before the sale to satisfy Revised Article 9 of the Tennessee Uniform Commercial Code.

Although the Court of Appeals acknowledged that the creditor had properly sent the foreclosure notification required by the statute², it expressly declared that Tennessee courts require more than "merely sending" the notification as the UCC requires. The court found that "merely sending notification" was "only the initial step" in the creditor's duty to "provide notice" of the sale to the debtor. The court determined that the creditor must take reasonable *subsequent steps* after sending the notification to "ensure delivery or receipt" of the notification by the debtor. The Court of Appeals held that since the creditor had not *verified* that the debtor actually received the foreclosure notification, the sale of the collateral was commercially unreasonable, and thus the creditor was liable for the statutory penalty.

The decision by the Court of Appeals should strike a damper chill in lenders' heads greater than a cold dreary January night strikes in their hearts. Here is what the Court of Appeals said:

*A perfectly complete and clear notice sent more than ten days before the proposed sale does not accomplish the purpose of the notice requirements if it is not received. Consequently, a creditor must use reasonable means to ensure delivery or receipt.*³

The Court of Appeals concluded by saying:

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. We hold that Auto Credit should have taken reasonable steps to determine whether the notice had been delivered to Ms Wimmer before it proceeded with the sale. It took no steps at all. Consequently, we reverse ... [and award her the



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*statutory penalty for a defective foreclosure of consumer goods].*⁴

As a result, the Court of Appeals' decision in the *Wimmer* case pretty much promised that creditors would have to serve debtors personally in order to assure that a sale had any chance of being found by a court to be "commercially reasonable."

Fortunately for bankers and other creditors doing business in Tennessee, the Tennessee Bankers Association chose to challenge this result—and it did so successfully in the Tennessee Supreme Court.⁵

In the Supreme Court, Legal Services representing the debtor, argued forcefully that sending notice by certified mail, return-receipt requested, was not a proper sending.⁶ Legal Services also seemed to argue that notice had to be received by the debtor before the sale or be found insufficient.

Legal Services' case was helped because, in most respects, the debtor was a person who appealed to our sense of fair play—she paid on her car for many months and even used some or all of her unemployment benefits to make car payments. She testified that she stopped paying only when those benefits ran out. Even the creditor's excellent trial counsel could not rebut her testimony entirely, although the trial judge clearly discounted her claims that she did not see any of the notices from the post office stating that she had a certified letter waiting to be signed for and picked up.

The TBA filed papers urging the

Tennessee Supreme Court to accept the creditor's appeal and then successfully petitioned the Supreme Court to let it join in the case on the creditor's behalf. TBA also argued successfully that a foreclosure notification sent by certified mail, return-receipt requested, was sufficient for sending proper notice. More importantly, the Tennessee Supreme Court correctly held that the creditor does not have a duty to "ensure or verify delivery or receipt" of the foreclosure notice by the defaulted debtor. The Court held that:

so long as the notification is "sent" within the meaning of Article 9, the creditor does not need to take additional steps to determine whether or not that notification has been received.⁷

However, it remains the law in Tennessee that if the creditor learns before the sale that the foreclosure notification was not received by the debtor, then the sale must almost certainly be put off.

Conclusion

The Supreme Court's decision in the *Auto Credit v Wimmer* case was the correct result. The justices are to be commended for their ruling. But without the TBA's intervention in the case, the chilly ruling by the Court of Appeals might have iced the case for Legal Services and set off an incredible amount of litigation challenging foreclosure sales in Tennessee. ■

Lessons from Wimmer

Creditors in Tennessee should take at least four lessons away from the *Wimmer* decision.

1. Make sure that you send a proper statutory notification. The forms of statutory notices are available at www.nashvillelaw.net.
2. Make sure that you send the foreclosure notification at least 10 days before the foreclosure sale. Remember that you will have to prove that you sent the notification. If the debtor is in the armed services and stationed overseas, or otherwise known to be out of the country, you need to make sure that you send notification in a manner calculated to assure that the debtor actually has time to receive and react to the notice *before* the sale, so you may need to give more time.⁸
3. It's better for everyone if you can have someone available and willing to testify that he or she called the debtor to tell him the date and time of the sale and that arrangements be made to ensure that the debtor and any bidders provided by the debtor have complete access to the sale.
4. If you find out that the foreclosure notification has not been delivered to the debtor *before* the sale, preferably (but not necessarily) a reasonable time before the sale, then you will probably have to put off the sale.⁹

Suggestions after Wimmer

Creditors in Tennessee may want to consider the following suggestions in planning for and conducting Article 9 foreclosures, that is, foreclosures of non-real estate collateral:

1. Use certified mail, return-receipt requested, at least 10 days before the sale to send the foreclosure notification to the debtor. **BUT**, a couple of days before you send that type of foreclosure notification, send one by regular mail in an unmarked stamped envelope with only a post office box return address—without the name of the bank on it. In this writer's experience, the unmarked letter will not be returned (most often because it was actually received), and, quite frequently, the certified mail will not be claimed—for reasons that should be apparent given the fact that the debtor is probably being dunned by other creditors. Make this a part of your lending policy.
2. After default, but not before, obtain a signed statement from the debtor surrendering the collateral and waiving the right to a foreclosure notification. Ask your bank's attorney to prepare a form of waiver that satisfies both of you.
3. Make sure that the debtor knows where and when the sale is going to be held, even if you have a waiver. This is a courtesy only at that point, and you should make that clear to the debtor. Nonetheless, it may mean that one or more additional bidders will attend the sale. Make sure that the debtor and bidders invited by the debtor have free access to the sale.

4. Give the debtor a reasonable time to get current or to find a buyer for the collateral. Encourage the debtor—in writing—to attend the sale and to bring or urge other bidders to attend.
5. Have the officer who calls the debtor document his or her conversations with the debtor, with the record being a regularly kept business record made at the time that the calls are made. Make sure that calling the debtor about the time and place of the sale is a specific part of your lending policy and a regularly conducted business activity. Then, even if the banker who made the calls is no longer available to testify, there is a reasonable chance that the bank can use the employee's written, regularly kept, ordinary course-of-business record as additional proof of the proper, timely, and valid foreclosure notification and the debtor's actual knowledge of the time and place of a public sale or the time after which a private sale was to be conducted.
6. If you get the foreclosure notification back—undelivered—before the sale, stop the sale. Start the notification process over.
7. If the debtor is overseas or out of state, make sure that you take the time needed to provide reasonable notification of the proposed sale to the debtor under the circumstances. Thanks to the legislative efforts of the TBA, creditors here generally have a 10-day "safe harbor," but that short time frame is not bullet-proof.

¹Following the form provided in Revised Article 9 of the Tennessee Uniform Commercial Code. Copies of the two statutory forms (for consumer debt and for commercial debt) may be found at www.nashvillelaw.net. They should be used for all sales governed by Tennessee's Revised Article 9.

²Tenn. Code Ann. § 47-9-611 declares that the creditor must "send" a timely and proper notification of the foreclosure sale not less than 10 days before the sale.

³*Auto Credit of Nashville v. Wimmer*, 2006 WL 2523979 (Tenn. Ct. App. 2006); *Opinion of the Court of Appeals*, at 3 (emphasis supplied).

⁴*Opinion of the Court of Appeals*, at 7 (emphasis supplied).

⁵*Wimmer*, 231 S.W.3d 896 (Tenn. 2007).

⁶Creditors use certified mail for a variety of purposes but, for the most part, it is understood that they use this method of delivery in order to prove that they actually mailed the notice and the date of that mailing.

⁷*Id.* at 902.

⁸Exception for perishable goods, stocks, etc. Tenn. Code Ann. § 47-9-611(d) (2007).

⁹This is the ruling in the *Mallicoat* decision, that apparently remains the law in our state. *Wimmer*, 231 S.W.3d at 901-02, citing *Mallicoat v. Volunteer Fin. & Loan Corp.*, 415 S.W.2d 347, 350 (Tenn. Ct. App. 1966).