

STATE OF TENNESSEE

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Opinion No. 05-111

Title Pawn Lenders (also known as Title Pledge Lenders)

QUESTIONS

1. Must title pawn lenders conform to the provisions of the Uniform Commercial Code?
2. Must title pawn lenders comply with the Uniform Commercial Code in the provisions regarding default, repossession, and disposition of collateral?
3. If the answer to question one or two is yes, is there any difference in the procedure for default, repossession, and disposition of collateral by a title pawn lender and that required of any other lender whose loan is secured by a vehicle?

OPINIONS

1. & 2. Under the statutes now in effect, a title pledge lender is a “secured party” within the meaning of Article 9 of the Tennessee Commercial Code. A title pledge lender, therefore, must comply with Article 9 unless the title pledge laws exempt the title pledge lender or directly conflict with the duties of a secured party under Article 9. Under Tenn. Code Ann. § 45-15-104, a licensed title pledge lender who complies with Tenn. Code Ann. §§ 45-15-101, *et seq.*, with regard to disposition of titled personal property has not violated the Tennessee Commercial Code provisions governing disposition of secured property after default.

2005 Tenn. Pub. Acts Ch. 440 has amended Tenn. Code Ann. § 45-15-104(b) to delete the exemption from compliance with Tenn. Code Ann. § 47-9-610. 2005 Tenn. Pub. Acts Ch. 440, § 3. This provision becomes effective November 1, 2005. From that date, therefore, title pledge lenders must comply with all applicable provisions of Article 9 of the Tennessee Commercial Code, including Tenn. Code Ann. § 47-9-610 on the disposition of collateral after default.

3. Under the statutes now in effect, title pledge lenders and secured parties are both authorized to repossess pledge property upon default by the party who pledged the property. Each may proceed by judicial process or without judicial process if the lender proceeds without a breach of the peace. While a title pledge lender has an absolute right to dispose of the property after holding it for twenty days without redemption, a secured party under Tenn. Code Ann. § 47-9-610

must dispose of collateral in a “commercially reasonable” manner. As noted above, title pledge lenders are exempted under current law from any liability for failing to comply with Tenn. Code Ann. § 47-9-610. In addition, under Tenn. Code Ann. § 47-9-611, a secured party must send notice of disposition of collateral “under § 47-9-610” to various parties, including the debtor. Since the title pledge lender is authorized to repossess titled property under Tenn. Code Ann. § 45-15-114(b), the duty to notify the debtor under Tenn. Code Ann. § 47-9-611 does not appear to apply. Both title pledge lenders and other secured parties must comply with the applicable statutes governing motor vehicles. *See, e.g.*, Tenn. Code Ann. § 55-5-128 (sheriff must be notified of repossession).

Under the new statute, effective November 1, 2005, a title pledge lender must hold collateral for twenty days after default. The lender then has sixty days to dispose of the collateral in a “commercially reasonable manner.” The statute expressly makes the “commercially reasonable” standard under Article 9 applicable to disposition of pledged titled property. The duty to notify the debtor under Tenn. Code Ann. § 47-9-611 appears to continue to be inapplicable under the new law. As under statutes now in effect, both title pledge lenders and other secured parties must comply with the applicable statutes governing motor vehicles.

ANALYSIS

This opinion addresses title pawn lenders. The entire statutory scheme governing title pledge lenders has essentially been rewritten by 2005 Public Acts Ch. 440, most of which becomes effective November 1, 2005. Under the new act, title pledge lenders must obtain a license from the Tennessee Department of Financial Institutions. Further, while the current statutes exempt a title pledge lender from compliance with the Tennessee Commercial Code with regard to disposition of collateral, the new act has removed that exemption, effective November 1, 2005.

1. & 2. Compliance with Uniform Commercial Code

a. Under Current Law

Under statutes now in effect, a “title pledge lender” as defined under Tenn. Code Ann. § 45-15-103(6) is required to be licensed and comply with Tenn. Code Ann. §§ 45-15-101, *et seq.* “Title pledge lender” means any person engaged in the business of making title pledge agreements and/or property pledge agreements with pledgors. The statute defines “title pledge agreement” as follows:

“Title pledge agreement” means a thirty-day written agreement whereby a title pledge lender agrees to make a loan of money to a pledgor, and the pledgor agrees to give the title pledge lender a security interest in unencumbered titled personal property owned by the pledgor. The pledgor shall agree for the title pledge lender to keep possession of the certificate of title. The pledgor shall have the exclusive right to redeem the certificate of title by repaying the loan of money in full and complying with the title pledge agreement. When the certificate of title is redeemed, the title pledge lender shall

release the security interest in the titled personal property and return the personal property certificate of title to the pledgor. The title pledge agreement shall provide that upon failure by the pledgor to redeem the certificate of title at the end of the original thirty-day agreement period, or at the end of any thirty-day renewal or renewals thereof, the title pledge lender shall be allowed to take possession of the titled personal property. The title pledge lender shall retain physical possession of the certificate of title for the entire length of the title pledge agreement, but shall not be required to retain physical possession of the titled personal property at any time. A title pledge lender may only hold unencumbered certificates of title for pledge.

Tenn. Code Ann. § 45-15-103(5). “Titled personal property” means any personal property, the ownership of which is evidenced and delineated by a state-issued certificate of title. Tenn. Code Ann. § 45-15-103(8). “Property pledge agreement” means:

any written bailment or similar agreement whereby a title pledge lender agrees to make a loan of money to a pledgor, and the pledgor agrees for the title pledge lender to take physical possession of unencumbered titled personal property owned by the pledgor, and to take possession of the personal property certificate of title. The pledgor shall have the exclusive right to redeem the titled personal property by repaying the loan of money in full and by complying with the property pledge agreement. When the titled personal property is redeemed, the title pledge lender shall return the titled personal property and the certificate of title to the pledgor. The property pledge agreement shall provide that upon failure by the pledgor to redeem the titled personal property at the end of the original thirty-day agreement period, or the end of any subsequent thirty-day renewal or renewals thereof, the title pledge lender shall be allowed to sell or otherwise dispose of the titled personal property.

This opinion will assume the request refers to title pledge lenders as defined above.¹ This opinion will also assume that your question refers to compliance with Article 9 of the Tennessee Commercial Code, which applies to secured transactions.

Questions 1 and 2 are whether title pledge lenders must comply with all the provisions of the Uniform Commercial Code, specifically with the provisions of the Uniform Commercial Code regarding default, repossession, and disposition of the collateral. Article 9 of the Tennessee Commercial Code sets forth various duties of a secured party. In general, Article 9 applies to any “transaction, regardless of its form, that creates a security interest in personal property or fixtures

¹ A pledge of title documents is not a pawn transaction subject to the Tennessee Pawnbrokers Act. Tenn. Code Ann. § 45-6-203.

by contract.” Tenn. Code Ann. § 47-9-109(a)(1). A “secured party” under the Tennessee Commercial Code includes a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding. Tenn. Code Ann. § 47-9-102(72)(A). Tenn. Code Ann. § 45-15-103(5), which defines the term “title pledge agreement,” refers to an agreement under which the lender obtains a security interest in unencumbered titled personal property of the pledgor. The statutory scheme does not expressly provide that a title pledge lender who takes possession of pledged property along with the title certificate obtains a security interest, but the statute states that such title pledge lender is not required to note “liens” for these transactions, defined as property pledge transactions. It appears, therefore, that a title pledge lender is a “secured party” within the meaning of Article 9 of the Tennessee Commercial Code. A title pledge lender must comply with Article 9 unless the title pledge laws exempt the title pledge lender or directly conflict with the duties of a secured party under Article 9.

Tenn. Code Ann. § 45-15-104 provides that “title pledge lenders exercising any of the powers in compliance with this chapter’s provisions shall not be deemed in violation of § 47-9-610, § 47-14-112, or § 47-14-117.” Tenn. Code Ann. § 47-9-610 applies to disposition of collateral by a secured party after default. This provision is part of the Tennessee Commercial Code. State law expressly provides, therefore, that a licensed title pledge lender who complies with Tenn. Code Ann. §§ 47-15-101, *et seq.*, with regard to disposition of titled personal property has not violated the Tennessee Commercial Code provisions governing disposition of secured property after default. But the statutory scheme governing title pledge lenders does not exempt these lenders from other applicable provisions of Article 9 of the Tennessee Commercial Code setting out the responsibilities of a secured party.

b. Under 2005 Tenn. Pub. Acts Ch. 440

The new law has rewritten Tenn. Code Ann. § 45-15-103 containing definitions. But the definitions of “title pledge lender,” “title pledge agreement,” “titled personal property,” and “property pledge agreement” under the new law are the same as those quoted above. 2005 Tenn. Pub. Acts Ch. 440, § 2. *See also* 2005 Tenn. Pub. Acts Ch. 440, § 9, new Tenn. Code Ann. § 45-15-110(c). Thus, under the new law, a title pledge lender will also be a “secured party” within the meaning of Article 9 of the Tennessee Commercial Code and, therefore, must comply with Article 9 unless the title pledge laws exempt the lender from compliance. The new law has amended Tenn. Code Ann. § 45-15-104(b) to delete the exemption from compliance with Tenn. Code Ann. § 47-9-610. 2005 Tenn. Pub. Acts Ch. 440, § 3. Further, as discussed below, the new law explicitly makes the “commercially reasonable” standard under Article 9 applicable to disposition of pledged titled personal property. Effective November 1, 2005, therefore, title pledge lenders must comply with all applicable provisions of Article 9 of the Tennessee Commercial Code, including Tenn. Code Ann. § 47-9-610 on the disposition of collateral after default.

3. Default, Repossession, and Disposition of Collateral under the Uniform Commercial Code and for Title Pledge Lenders

a. Under Current Law

The last question is, if the answer to question one or two is yes, whether there is any difference in the procedure for default, repossession, and disposition of collateral by a title pledge lender and that required of any other lender whose loan is secured by a vehicle. Under Tenn. Code Ann. § 45-15-114, upon the expiration of a property pledge agreement, a title pledge lender must hold the property for at least twenty days, and may then sell it. Tenn. Code Ann. § 45-14-115(a). Subsection (b) of the statute provides for the title pledge lender's right to take possession of property where the lender holds the title certificate to the property. This statute provides:

(b) The title pledge lender has, upon default by the pledgor of any obligation pursuant to the title pledge agreement, the right to take possession of the titled personal property. In taking possession, the title pledge lender or the lender's agent may proceed without judicial process if this can be done without breach of the peace; or, if necessary, may proceed by action to obtain judicial process. After taking possession of the titled personal property, the title pledge lender shall retain possession of the titled personal property and the certificate of title for a twenty-day holding period.

(1) If, during the twenty-day holding period, the pledgor pays the repossession fee, and redeems the titled personal property and certificate of title by paying all outstanding principal, interest, and other customary fees, the pledgor shall be given possession of the titled personal property and the certificate of title without further charge.

(2) If the pledgor fails to redeem the titled personal property and certificate of title during the twenty-day holding period, then the pledgor shall thereby forfeit all right, title, and interest in and to the titled personal property and certificate of title, to the title pledge lender, who shall thereby acquire an absolute right of title and ownership to the titled personal property. The title pledge lender shall then have the sole right and authority to sell or dispose of the unredeemed titled personal property.

Under Tenn. Code Ann. § 47-9-609, a secured party has a similar right to take possession of collateral. Under Tenn. Code Ann. § 47-9-610, however, a secured party must dispose of collateral in a "commercially reasonable" manner. Unlike title pledge lenders, therefore, a secured party need not necessarily hold collateral for twenty days before disposing of it; but all aspects of the disposition must be commercially reasonable. As noted above, title pledge lenders are expressly

exempted from any liability for failing to comply with Tenn. Code Ann. § 47-9-610. In addition, under Tenn. Code Ann. § 47-9-611, a secured party must send notice of disposition of collateral “under § 47-9-610” to various parties, including the debtor. Since the title pledge lender is authorized to repossess titled property under Tenn. Code Ann. § 45-14-115(b), the duty to notify the debtor under Tenn. Code Ann. § 47-9-611 does not appear to apply. Both title pledge lenders and other secured parties must comply with the applicable statutes governing motor vehicles. Tenn. Code Ann. § 45-15-120; Tenn. Code Ann. § 55-5-128 (sheriff must be notified of repossession).

b. Under 2005 Tenn. Pub. Acts Ch. 440

The new law has rewritten Tenn. Code Ann. § 45-15-114. Under the new subsection (a), as under the current law, upon the expiration of a property pledge agreement, a title pledge lender must hold the property for at least twenty days, and may then sell it. The new subsection (b) provides:

(b) The title pledge lender has, upon default by the pledgor of any obligation pursuant to the title pledge agreement, the right to take possession of the titled personal property. In taking possession, the title pledge lender or the lender’s agent may proceed without judicial process if this can be done without breach of the peace; or, if necessary, may proceed by action to obtain judicial process. After taking possession of the titled personal property, the title pledge lender shall retain possession of the titled personal property and the certificate of title for a twenty (20) day holding period. There shall be no further interest or other fees charged to the pledgor from the commencement of the twenty (20) day holding period.

(1) If, during the twenty (20) day holding period, the pledgor pays the repossession charge, and redeems the titled personal property and certificate of title by paying all outstanding principal, interest and fees authorized by this chapter owed by the pledgor to the title pledge lender, the pledgor shall be given possession of the titled personal property and the certificate of title without further charge.

(2) If the pledgor fails to redeem the titled personal property and certificate of title during the twenty (20) day holding period, then the title pledge lender shall have a period of sixty (60) days in which to sell the titled personal property in a commercially reasonable manner. *For purposes of this section, “commercially reasonable” is a sale that would be commercially reasonable under Tennessee Code Annotated, Title 47, Chapter 9, Part 6.* The proceeds of the commercially reasonable sale shall be applied to the principal, interest and all fees authorized by this chapter owed by the pledgor to the title pledge lender, including the actual direct costs of the sale.

Any surplus from the sale of the titled personal property shall be remitted to the pledgor after such sale and shall not be retained by the title pledge lender. The commissioner shall prescribe by rule the manner in which the title pledge lender shall remit any surplus to the pledgor.

2005 Tenn. Pub. Acts Ch. 440, § 11 (emphasis added). Under the new statute, therefore, effective November 1, 2005, a title pledge lender must hold collateral for twenty days after default. The lender then has sixty days to dispose of the collateral in a “commercially reasonable manner.” The statute expressly makes the “commercially reasonable” standard under Article 9 applicable to disposition of pledged titled property. The duty to notify the debtor under Tenn. Code Ann. § 47-9-611 appears to continue to be inapplicable under the new law. As under statutes now in effect, both title pledge lenders and other secured parties must comply with the applicable statutes governing motor vehicles.

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