

**NEWSLETTER OF THE REAL PROPERTY SECTION  
OF THE MISSISSIPPI BAR**

**FEBRUARY 2011**

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**STATE LEGISLATION**

Real Property Electronic Recording Act

House Bill 599 would adopt a Mississippi version of the Uniform Real Property Electronic Recording Act. This bill has passed the House and the Senate but different versions have to be reconciled. The bill would allow electronic filing of real estate documents with electronic signatures. It also provides that an acknowledgment with an electronic signature of the notary and an electronic image of the stamp will meet the requirements for a valid acknowledgment. Electronic recording would not be mandatory but optional; chancery clerks would still accept paper documents. The bill also would create the Mississippi Electronic Recording Commission with eleven appointed members who would establish standards for electronic recording. The bill would not require chancery clerks to establish electronic recording. One reason is that no money is allocated to pay for the computer equipment that would be required, and not all counties will be able to fund the cost of implementing an electronic recording system right away.

Amendments to Acknowledgments Statute

The Real Property Section drafted a bill to revise Section 89-3-7 of the Mississippi Code, the safe-harbor forms of acknowledgments, to make three changes. First, the bill adds a new safe-harbor form of acknowledgment for business entities that gave a form that would work for any type of entity. The intent of this provision was to address multi-layered forms of acknowledgment (for example, a corporate general partner of a limited partnership that is the manager of a limited liability company.) The form is similar to the California form of acknowledgment, which would help with the problem of California notaries being prohibited from signing any forms of

acknowledgment other than their own state-prescribed forms. Second, the bill provided that if an acknowledgment was taken outside of Mississippi and conformed to the laws of the state of execution, the acknowledgment would be effective in Mississippi. In other words, the bill gave the acknowledgment the same effect as it would have had under the laws of the state of execution. Third, the Section's bill provided that if an acknowledgment was complete and the instrument was signed, the acknowledgment was presumed to have been taken as of the date of execution of the instrument. This provision was intended to address the circumstance when an instrument is dated "as of" a date after the date of the acknowledgment. The Section's bill provided that this portion of the bill applied to all acknowledgments, regardless of whether executed before or after the effective date of the act. In other words, this portion of the bill cured any potential problems with existing instruments dated "as of" a date after the date of the acknowledgment.

Identical versions of the Section's bill were introduced into the House and the Senate. The House and Senate amended their respective versions of the bill. Both the House and the Senate kept the proposed additional form of acknowledgment for multi-layered entities (the California form) and deleted the provision that would have given retroactive treatment to forms of acknowledgments from other states. The Senate did not make any other substantial changes to the Section's bill and passed its bill, SB 2365, as amended. The House, in the Judiciary A Committee, made some additional major changes. The House deleted the fix for the "as of" issue. The House added a new subsection (2) to Section 89-3-1 that states that the clerk can refuse to admit an instrument that does not have a valid acknowledgment, but that if the clerk records the instrument, the instrument is constructive notice even if the acknowledgment is not valid. The bill as amended, HB 723, passed the House on March 2. Meanwhile, the Senate version was sent to the House, referred to the House Judiciary A Committee, and died in that committee on March 3.

So the House bill is still alive, although it has been substantially amended from the version drafted by the Real Property Section.

### Increasing Minimum Font Size

House Bill 600 would amend Section 89-5-24 to increase the minimum size font in recorded documents. Under the current version of Section 89-5-24, the font must be not smaller than eight points. House Bill 600 would amend Section 89-5-24 to require that the legal description and the names of the parties shall be no smaller than twelve points. House Bill 600 also adds requires additional information on the front page of every document for recording. Section 89-5-24 currently requires that the name and address and telephone number of the preparer, a return address, the title of the document, all grantors' names, all grantees' names, and any address and telephone number required by Section 27-3-51 (i.e., if the instrument is a deed, the telephone numbers of the grantor and grantee). House Bill 600 would require the following additional information on the first page: all borrowers' names, all beneficiaries' names, and all trustees or other parties' names. The House passed the bill with amendments. The Senate made changes to the

House bill, including requiring that all documents have not less than ten point type. The Senate bill has now been sent to the House for its approval.

### Refund of Historic Tax Credits

House Bill 1311 would amend the Mississippi historic tax credit, Section 27-7-22.31. Under the current statute, if the amount of the credit for the year in which the rehabilitated property went into service exceeded the state income tax, the excess amount can be carried forward for up to ten years. As an alternative to carrying the credit forward, House Bill 1311 would allow the taxpayer to claim a refund of ninety percent of the amount of the excess. Half of the refund would be paid in the year that the Department of Revenue approves the refund, and the other half would be paid the next year. Under House Bill 1311, existing excess credits that are attributable to rehabilitated property placed in service prior to January 1, 2011 are also eligible for refunds.

### Digital Subdivision Plats

House Bill 1377 would have amended Section 17-1-23, which governs the filing of subdivision plats, to require that new subdivisions be filed in digital format. It also would have amended Section 25-58-21, which created the Mississippi Coordinating Council for Remote Sharing and Geographic Information Systems, to provide that the Council create digital plat submission standards. This bill was referred to the House Judiciary A Committee and died in the Committee. According to an article on the website of the Mississippi Business Journal dated March 2, 2011, State Representative Scott Delano of Biloxi, who proposed the bill, the bill if enacted “would prevent fraudulent schemes such as the commercial real estate Ponzi scheme perpetrated by the Evans brothers.” (quoting the Mississippi Business Journal, not Mr. Delano).

## **FEDERAL LEGISLATION**

### Dodd-Frank Act Amends Protecting Tenants at Foreclosure Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank Act”) will make many changes to mortgage lending, and a complete summary of the changes is beyond the scope of this newsletter. One change that seems to have been flying under the radar so far is a change to the Protecting Tenants at Foreclosure Act of 2009 (“PTFA”). The PTFA, which is codified at 12 USC 5220, provides if a lender forecloses on dwelling, and a tenant was occupying the dwelling “before the notice of foreclosure” under a “bona fide lease”, the purchaser at the foreclosure sale will purchase subject to the lease. If a tenant was in the dwelling under a lease terminable at will, the lender can terminate the tenant’s possession, but must give the tenant ninety-days notice to vacate the dwelling. The PTFA has encouraged owners who are in default to enter into leases in order to make it less appealing for their lender to foreclose. For example,

consider Home Lease Exchange LLC and their website, [www.forceyourlendertomodify.com](http://www.forceyourlendertomodify.com). This company assists owners whose dwellings are being foreclosed to swap five-year leases with other owners whose houses also are being foreclosed upon, with the stated intention of discouraging any third party from purchasing the property at a foreclosure sale and giving the owners leverage over their lenders through the PTFA to obtain a modification of the loan. Here are some lines from the video tutorial on the website: “Are you putting your lender under duress by notifying them to modify your loan or live with a five-year lease? You certainly are! But then again, isn’t your lender putting you under duress by forcing you out of your home?”

The PTFA contains a number of undefined terms and consequential uncertainties, as discussed in the July 2009 edition of the Newsletter. Neither the PTFA as enacted nor the regulations issued by the Department of Housing and Urban Development defined the date of the “notice of foreclosure.” In Mississippi, most attorneys have considered the date of the “notice of foreclosure” to be the date of the trustee’s notice of sale that is posted in the courthouse and published in the newspaper. The Dodd-Frank Act amended the PTFA to add a definition of “notice of foreclosure.” Section 1484 of the Dodd-Frank Act provides that “the date of a notice of foreclosure shall be deemed to be the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust or security deed.” Under this definition, the date of the “notice of foreclosure” in Mississippi would be the date of the foreclosure sale, or possibly the date that the trustee’s deed to the purchaser is recorded, not the date of the trustee’s notice of sale. So prior to the Dodd-Frank Act, under the common reading of the PTFA, a tenant who entered into a lease after the trustee’s notice of sale was published and posted was not considered to be entitled to the protections of the PTFA. Now it appears that a tenant who enters into a lease at any time prior to the foreclosure sale is protected by the PTFA. In other words, the Dodd-Frank Act extends by approximately thirty days (the period of time between the first notice of sale and the sale) the time for tenants to execute a lease that would be protected under the PTFA. Since the owner will know during this thirty-day period that the foreclosure process has commenced, the owner may be tempted to engage in collusive behavior to try to stop the foreclosure and avoid being dispossessed after the sale, or to lease to a tenant who is not aware of the imminent foreclosure, so that the owner can get a month’s rent before he loses the property.

## RECENT CASES

### Federal tax lien has priority over State Tax Commission lien

*Estate of Davis v. Mississippi State Tax Comm’n*, 45 So.3d 274 (Miss. 2010). Randall Scott Davis died in 2004. He did not pay any taxes for the last eight years of his life. Federal tax liens were arose in 2005 when federal taxes were assessed, but the Internal Revenue Service (“IRS”) did not file notices of liens. The Mississippi State Tax Commission (“STC”) filed notices of state tax liens subsequent to the assessment of the federal tax liens. An administration was filed for Davis’ estate in Lee County Chancery

Court. The chancery court declared the estate insolvent. Both the IRS and the STC filed claims for unpaid taxes. The IRS argued that it had priority over the STC under the federal priority act, 31 USC § 3713, which provides that if the estate of a person indebted to the federal government is insolvent, the federal government gets paid first. The STC argued that under the federal tax lien laws, the priority of a federal tax lien when no notice is filed is subordinate to the priority of a judgment lien creditor; and under Section 27-7-55 of the Mississippi Code, a tax lien filed by the STC has the same effect as an enrolled judgment of a court of record. The chancellor determined that state law governs determines the meaning of a “judgment,” and that based on Section 27-7-55, the STC was a judgment lien creditor who had priority over the federal tax lien, and therefore the STC was entitled to be paid first out of Davis’ estate. On appeal by the IRS, the Mississippi Supreme Court, in a decision by Justice Chandler, reversed and remanded. A federal regulation states that a “judgment lien creditor” means a person who has obtained a judgment “in a court of record and of competent jurisdiction”, and “does not include the determination of a quasi-judicial body or of an individual acting in a quasi-judicial capacity such as the action of State taxing authorities.” An STC lien represents an administrative determination, not a judgment from a court of record, according to the court. The Mississippi Supreme Court gave weight to a United States Supreme Court case that held that a New Hampshire state tax lien was not a lien of a “judgment creditor,” in part because of the need for uniformity in the meaning of this term. The Mississippi Supreme Court reversed the judgment of the chancery court and remanded the case for appropriate distribution of the funds in Davis’ estate.

Note 1: One difference between federal and state tax liens is that federal tax liens arise by operation of law, while the STC has to take affirmative action in order to get a lien. A federal tax lien arises from the time of assessment of the assessment, under Section 6322 of the Internal Revenue Code. A STC lien, on the other hand, does not become a lien until it is entered in the judgment rolls. Miss. Code Ann. § 27-7-55.

Note 2: The effect of this case is that a STC lien can never have priority over a federal tax lien, regardless of whether a notice of federal tax lien is filed. The order in time of the liens and recording are irrelevant because the STC is not a real judgment lien creditor. Because of the volume, it is not feasible for the STC to hold a real judicial hearing every time a taxpayer fails to pay its taxes.

Note 3: While an unrecorded federal tax lien will always beat a STC lien, this case does not affect the general rule that a federal tax lien will be subordinate in priority to a real (not state tax administrative) judgment lien creditor whose judgment is filed prior to the notice of federal tax lien. It seems counter-intuitive that a judgment to the state would have less priority than a judgment to a private party.

Note 4: This case also has no effect on the priority of a STC lien against a real judgment creditor; a previously recorded STC lien will have priority over a subsequently filed judgment lien creditor. In the absence of the federal statutes and regulations that give the IRS priority over an administrative lien, the STC lien would be deemed a valid judgment under Mississippi law, and the usual race-notice priorities would apply.

Note 5: Suppose that a federal tax lien arises but no notice is filed, a STC lien is filed, and a judgment lien is filed against the same property, in that order. The federal tax lien will have priority over the STC lien but is subordinate to the judgment lien creditor. But the STC lien has priority over the judgment lien. Who wins?

Note 6: The general priority rule of federal tax liens is stated in Section 6323(a) of the Internal Revenue Code: a federal tax lien “shall not be valid as against any purchaser, holder of a security interest, mechanic’s lienor, or judgment lien creditor” until a notice of lien is filed by the IRS. Actual knowledge of the existence of a federal tax lien is not relevant under the Internal Revenue Code except for certain loans or purchases made forty-five days after a notice of tax lien is filed, as described in Section 6323(b). On the other hand, Mississippi has a race-notice priority system. Suppose that at the time that land is purchased, the purchaser has actual knowledge that a federal tax lien exists because an assessment has been made, but no notice of federal tax lien is filed at the time that the deed to the purchaser is recorded. In other words, the purchaser wins the race to the courthouse but has actual knowledge of the existence of the federal tax lien. Under Section 6323(a) of the Internal Revenue Code, quoted above, it appears that the purchaser’s interest has priority over the IRS since no notice of the federal tax lien had been filed at the time of the purchase, but under Mississippi’s race-notice statute, it appears that the IRS should have priority since the purchaser had actual notice that of the federal tax lien.

#### Unauthorized Sublease of Telecommunications Easement Not a Trespass

*McLaughlin v. Mississippi Power Co.*, U.S. District Court for the Southern District of Mississippi, No. 1:01CV228 LG-JMR, 2010 WL 3927632 (Oct. 4, 2010). Mississippi Power Company (“MPC”) obtained easements over McLaughlin’s land that gave the company “the right to construct, operate and maintain electric transmission lines and all telegraph and telephone lines, towers, poles and appliances necessary or convenient in connection therewith ...” MPC subsequently installed fiber optic cable in the easement and leased part of this fiber optic cable to Worldcom. The Mississippi Public Service Commission authorized third parties to use MPC’s fiber optic network in exchange for financial assistance in constructing the network. In 2001 McLaughlin filed a class action lawsuit on behalf of himself and other landowners against MPC and Worldcom, claiming that MPC violated the terms of its easements and committed trespass by installing excess fiber optic cable and leasing this cable to Worldcom. Worldcom filed bankruptcy in New York, the case against MPC in Mississippi was stayed, and McLaughlin’s claims were litigated in the bankruptcy court in New York. The bankruptcy court granted Worldcom’s motion for summary judgment against McLaughlin. The United States District Court for the Southern District of New York affirmed the bankruptcy court’s decision. The New York district court found that under Mississippi law, trespass exists only to the extent that it causes physical damage to the property. Since McLaughlin did not prove any physical damage to his property, no trespass occurred. The New York district court also found that, under Mississippi law, the transmission of light impulses through fiber optic cable caused no additional servitude,

and therefore McLaughlin was not entitled to further compensation. With the bankruptcy case resolved, MPC filed a motion for summary judgment against McLaughlin in the Mississippi district court. The United States District Court for the Southern District of Mississippi, in a decision by Judge Guirola, granted the motion for summary judgment and dismissed the case. Judge Guirola adopted the findings of the New York court regarding Mississippi law on trespass. The Mississippi district court's opinion addresses three arguments made by the plaintiffs. First, McLaughlin alleged that MPC abused its easements by installing the excess fiber optic cable and leasing it to third parties and that MPC had been unjustly enriched. The Mississippi district court found that no cause of action exists in Mississippi for abusive use of an easement. Following *McDonald v. Mississippi Power Co.*, 732 So.2d 893 (Miss. 1999), the Mississippi district court found that MPC had the right under the language of its easement from McLaughlin to install fiber optic cable on McLaughlin's land. Second, McLaughlin argued that the terms of his easement to MPC did not permit subleasing the fiber optic cable to third parties because, under the wording of the granting clause, MPC could only use the easement for electrical generation. The Mississippi district court reasoned that McLaughlin's subleasing argument failed because no unauthorized entry or trespass had occurred. There are three elements to a trespass claim: an intrusion upon the land of another without right, damage as a result of the physical invasion, and that the person charged is responsible. The Mississippi district court wrote that even if MPC was not entitled to sublease the fiber optic cable, the use of the fiber optic cable by a third party did not result in an additional servitude or any damage to his land, so the subleasing claim failed. Judge Guirola also wrote that, since the Mississippi Public Service Commission had authorized Worldcom to use MPC's excess fiber cable in exchange for Worldcom's financial assistance in completing MPC's fiber optic system, the Public Service Commission arguably had defined Worldcom's use as being in connection with providing electricity. Third, McLaughlin argued that MPC had been unjustly enriched by its unauthorized use of the easement (though not stated in the opinion, McLaughlin presumably also asked for an accounting or other disgorgement of profits from the unauthorized use.) The Mississippi district court also found that no cause of action existed in Mississippi for abusive use of an easement, and that unjust enrichment and the disgorgement of profits was not a remedy for an alleged trespass in Mississippi.

Note 1: In order to understand this case, one must understand the *McDonald* case upon which the Mississippi District Court relied. In the *McDonald* case, an easement from McDonald to MPC gave MPC the right to "construct, operate and maintain electric lines and all telegraph and telephone lines, towers, poles, wires, and appliances and equipment necessary or convenient in connection therewith from time to time ..." The Mississippi Supreme Court in *McDonald* held that a fiber optic cable was like a telephone line and that the language of the easement therefore was broad enough to permit MPC to install fiber optic cable. But the Mississippi Supreme Court held that the particular language of the easement restricted MPC's use of the fiber optic cable to providing electricity to its customers, and did not permit MPC to sublease its fiber optic cable to third parties for other uses, and remanded the case to the chancery court for further proceedings. The lack of authority to sublease is the issue that McLaughlin picked up on and argued.

Note 2: The *McLaughlin* case contains an interesting nugget of information about the ultimate resolution of the *McDonald* case that is not otherwise reported. Judge Guiarola in the *McLaughlin* case wrote that after the Mississippi Supreme Court remanded the *McDonald* case to the Chancery County of Jasper County, the Chancery Court transferred the case to the Circuit Court. The Circuit Court of Jasper County determined that the landowners in that case were not entitled to any damages.

Note 3: Despite the tortuous procedural history, the multiple courts involved, and the fact that the case is not (yet) published, the *McLaughlin* case seems significant to the editor because of its holding on the Mississippi law of trespass in the context of telecommunications easements. The holding that leasing the fiber optic cable did not create an additional servitude is not new; the Mississippi Supreme Court stated in the *McDonald* case that MPC's lease of its fiber optic would not constitute an additional servitude on the property if MPC had the authority to lease it. But the resolution of the trespass issues is interesting. The *McDonald* case only addressed the landowner's claim for injunctive relief, and did not address trespass. The *McLaughlin* case seems to take the next step beyond *McDonald* by holding that even if the holder of the telecommunications easement does not have authority to sublease the easement to another party, the landowner is not entitled to damages. This seems like a very favorable case for holders of utility easements.

Note 4: The editor does not quite follow the *McLaughlin* court's reasoning that *McLaughlin's* argument that the sublease (it's not really a sublease, it's an assignment or license) from MPC to third parties was really a claim of trespass, and that since no trespass occurred, the argument that no authority exists for the sublease must fail. In a case in which the plaintiff is only seeking damages and not injunctive relief, the difference may be academic. But it seems to the editor that the question of the power of an easement holder to assign a portion of its easement to a third party under the terms of the easement is a separate issue of contract interpretation from the question of whether an attempted assignment constitutes a trespass under real property law. Similarly, the editor has a hard time understanding the suggestion that an administrative body like the Public Service Commission can give an easement holder authority to assign rights that the easement holder does not otherwise have under the terms of the easement.

Note 5: Applying ancient common-law doctrines like trespass to today's world is a continuing challenge. An extreme example is *Comer v. Murphy Oil USA*, 585 F.3d 855 (5<sup>th</sup> Cir. 2009), in which the Fifth Circuit held that plaintiffs had standing to assert a claim that global warming constituted a trespass under Mississippi law.

#### Foreclosing Lender Not Require to Give Notice to Grantor's Heirs

*Estate of May v. First Federal Bank for Savings*, 32 So.3d 1227 (Miss. Ct. App. 2010). May borrowed money from First Federal Bank for Savings in 2000 to purchase land in Marion County, and executed a deed of trust to First Federal to secure the loan. In 2002 May died. The loan went into default. First Federal did a non-judicial foreclosure in 2004. In 2007, a representative of May's estate filed a complaint in the Chancery Court

of Marion County to set aside the foreclosure. The complaint alleged that improper notice of the sale was given to the May's heirs and sought damages. The Chancery Court granted summary judgment for First Federal. The estate appealed. The Mississippi Court of Appeals, in a decision by Justice Lee, affirmed. The estate alleged that the bank should have notified May's heirs of the pending foreclosure. The Court of Appeals stated that the only notice required by Mississippi law is the posting and publication of the trustee's notice of sale, which was properly done. The bank did not have any obligation to determine May's heirs or to give them notice. The Court of Appeals noted that First Federal sent notice of delinquency to May, that a bank officer met with some of the heirs prior to the foreclosure, and that one of the heirs had brought a copy of the trustee's notice of sale to the meeting.

Note 1: The result in this case is not surprising. No actual notice was required to be given to the owner of the land, so it makes sense that no additional notice is required to be given to his heirs. It is surprising that, as far as the editor has been able to tell, this specific issue has not previously been addressed in Mississippi.

Note 2: It would be beyond impractical to require that actual notice be given to the heirs of the owner of the property. The lender would have to monitor the grantor's health until the time that the sale was concluded. What if the grantor has abandoned the property and can't be located? If the grantor did die before the foreclosure, there would have to be a determination of heirship and the lender would probably have to do a judicial foreclosure, which could take years. One of the main benefits to all parties of Mississippi's relatively summary and inexpensive non-judicial foreclosure process is that this process gets property back on the market quickly with a minimum of waste. This benefit would be lost if the property is tied up in court for years, as is the case in states that require judicial foreclosures.

## GENERAL

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