

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

JUNE 2012

2011 – 2012 REAL PROPERTY SECTION OFFICERS

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MESSAGE FROM THE CHAIR

It has been a real pleasure to chair the Real Property Section of our Bar this past year. I would like to thank all of the section officers and committee members for their time and support. A special thank you goes out to Rod Clement, of Bradley Arant Boult Cummings, LLP, who has continued to update our section with the latest real estate law cases and developments. He has volunteered his time and considerable experience over several years, and it is greatly appreciated.

This past year our section presented two very successful 1 hour *Lunch and Learn* CLEs, free to you as members. We paired with the Business Law Section in January for a record breaking attendance for *Lunch and Learn* (“Kinwood – Off-record Land Mine or One-Off Quirk?”) and paired with SONREEL in March to learn about federal and state laws as they relate to environmental issues in real property. These short CLE courses are a terrific way to stay ahead of the pack regarding your field of practice, and we thank you all for your support. If you have an idea for an CLE that you believe would be beneficial to our members, be sure to contact David Allen, your new chair.

We continue to have the 2nd largest section with 468 members at last count. (Litigation still outnumbers us!). Our membership dues have resulted in an excess of funds, so this spring we were able to award four (previously two) \$1,000.00 scholarships to deserving law students – two each to Ole Miss and Mississippi College. The Executive Committee is currently discussing donating part of the Section’s excess funds to Mississippi Volunteer Lawyers Project and to the Rural Services. This will be voted upon at the Section meeting on July 12 at the Bar Convention.

Below is the slate of this coming year's officers and Executive Committee, which will be presented at the Section meeting on July 12. Be sure to thank these volunteers for their time and enthusiasm. If you are interested in participating, please be sure to contact any of us, and be assured... we will be happy to enlist you in our endeavors. Let's continue to have a vibrant and active section to promote professionalism and expertise!

Please know that it has been an honor to serve as the chair. I have really enjoyed working with such great members and experts in the area of real estate.

Julie W. Brown, Chair

Proposed 2012-13 Officers

Chair	David Allen
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Secretary/Treasurer	Kenneth D. Farmer
Executive Committee	Thomas T. Ross, Jr., Eric L. Sappenfield and J. Lane Greenlee

MISSISSIPPI STATUTES EFFECTIVE JULY 1

A number of Mississippi statutes affecting real estate practice go into effect on July 1, 2012. Here are some of the most important.

Section 89-5-24 of the Mississippi Code, which lists formatting standards for documents to be filed in the land records, undergoes changes. The minimum font size increases from eight points to ten points. The list of parties of parties whose names, addresses and telephone numbers have to be on the first page of the instrument is expanded beyond the grantor and grantee to include every "borrower, beneficiary, trustee or other party to the instrument." Note that new Section 89-5-24((2)) only requires that this information be on the first page if the document contains any of this information, and does not itself requires that the names and addresses of every party to the instrument be listed in the instrument. Section 27-3-51 requires that the name, address and telephone number of the grantor and grantee of a deed be listed in the deed, but the editor is not aware of any requirement that a deed of trust show the address and telephone number of the beneficiary of the deed of trust (unless the deed of trust is also a financing statement). The editor's experience nevertheless is that most attorneys are putting the addresses and telephone numbers of the grantor and beneficiary, and sometimes the trustee, on the first page of deeds of trust.

New Section 15-1-81 goes into effect. This statute provides that promissory notes that are nonnegotiable under Article 3 of the Uniform Commercial Code will have the same statute of limitations as negotiable notes. Under the law as it existed prior to July 1, the statute of limitations for nonnegotiable notes was the three-year statute in Section 15-1-49, while negotiable notes enjoy a six-year statute of limitations under Section 75-3-118. The effect of the statute is that the statute of limitations on non-negotiable notes is extended from three years to six year. The reason that this is relevant to real estate

practice is the under Section 89-5-19, a purchaser or creditor searching the land records is entitled to take free of a deed of trust when it appears from the face of the recorded deed of trust that the statute of limitations has expired on the secured indebtedness. One searching the land records is usually not going to be able to tell from the face of a deed of trust whether the secured note is negotiable (with a six-year statute of limitations) or nonnegotiable (with a three-year statute of limitations), and thus cannot tell from the face of the deed of trust when he can take free of the deed of trust.

S.B. 2897 makes a number of changes to the Mississippi S.A.F.E Mortgage Act, Miss. Code Ann. § 81-18-1 to -63, that become effective on July 1. Changes include a new definition of “housing finance agency”; amending the definition of a “mortgage loan originator to add “for compensation or gain”, so that the definition reads that mortgage loan originator is an individual who “offers or negotiates terms of a residential mortgage loan for compensation or gain”; adds a paragraph elaborating on the meaning of “offering or negotiating” a loan; expands the exemptions from the Act to include as exempt a person who “owner finances in one (1) calendar year no more than ten (10) residential mortgage loans or no more than twenty percent (20%) of his total residential units sold, whichever is greater”: and adds exemptions for certain non-profit organizations, employees of government agencies, and those who assist licensed loan originators.

NEW MISSISSIPPI CASES

Waiver of Right of First Refusal

Richmond v. EBI, Inc., 53 So. 3d 859 (Miss. Ct. App. 2011). Brian Richmond’s grandmother, in her will, gave her son James and her daughter Shirley, Brian’s mother, certain land in DeSoto County, and gave Brian a right of first refusal to purchase the property “at the current selling price” if James or Shirley decided to sell their shares. No other terms of the right were specified. James and Shirley entered into a contract to sell the property for \$1,021,000, with closing scheduled for January 20, 2004. An attorney for James and Shirley wrote Brian, notified him of the pending sale, and stated that Brian had until December 22, 2003 to exercise the right of first refusal. On December 16, 2003, Brian replied that the terms of the letter were not acceptable or in compliance with his right of first refusal. Brian requested copies of the contract, an appraisal, a survey, an “environmental impact study,” and other documents. A copy of the contract was faxed to Brian, but none of the other documents that Brian requested were provided to him. Brian told the attorney that he was “ready, willing and able” to purchase the property, but insisted on additional documents and terms, including a lower price. Correspondence between the attorney for James and Shirley, on the one hand, and Brian on the other hand, continued with Brian asserting that he did not have to pay the full purchase price and requesting additional documentation regarding the offer. On January 20, 2004, the sellers’ attorney wrote Brian and told him that his right of first refusal had expired. One week later James sold his one-half interest in the property to EBI, Inc., the assignee of the contract, for \$459,923 (approximately one-half of the original purchase price of \$1,021,000). Shirley and Brian entered into an agreement for Shirley to sell her one-half agreement to Herbert Plantation, Inc., a corporation of which Brian was the president, for less than EBI had agreed to pay. EBI brought an action in the Chancery Court of DeSoto

County against Brian, asserting that Brian had waived his right of first refusal. EBI later amended its complaint to add Shirley as a party, and requested the court to order Shirley to convey her one-half interest to EBI pursuant to the original contract. The chancellor held that Brian had waived his right of first refusal because Brian never agreed to pay the contractual purchase price; enjoined Brian from asserting an interest in the property or interfering with EBI's purchase of the Shirley's one-half interest; and ordered specific performance by Shirley of her contractual obligation to sell her one-half interest to EBI. On appeal by Brian, the Mississippi Court of Appeals, in a decision by Justice Roberts, affirmed. According to the Court of Appeals, Brian waived the right of first refusal because he never agreed to pay the contractual price. "Brian never indicated that he intended to meet the offered purchase price. Instead, he attempted to negotiate a more favorable deal at a lower price. Acceptance of an option to buy real property must be absolute and unconditional without modifying the initial terms or imposing new terms."

Note 1: This is a significant case because the Mississippi case law on rights of first refusals is so thin. One manifestation of the thin pool of Mississippi authority on this subject is that the authority most cited by the Court of Appeals is an article from American Jurisprudence.

Note 2: What is the difference with an option to purchase and a right of first refusal? "In a typical option the optionee has the absolute right to purchase for a definite consideration. A pre-emptive right [a/k/a right of first refusal] involves the creation of a privilege to purchase only on the formulation of a desire on the part of the owner to sell." *Pace v. Culpepper*, 347 So. 2d 1313, 1315-16 (Miss. 1977), quoted in *Duke v. Whatley*, 580 So. 2d 1267, 1272 (Miss. 1991).

Note 3: A vague right of first refusal ("ROFR"), like the one in this case, is an insidious encumbrance on title. The seller has to negotiate a contract with one party and then give another party the right to buy on the same terms. This is a serious complication to selling property, and gives the holder of the ROFR the ability to kill a legitimate sale. For example, with no limit on the time for Brian to determine whether to exercise the right, Brian theoretically could have shown up with a check for the net purchase price at the closing and been entitled to purchase the land as long as the closing had not been completed. The uncertainty of whether the holder of the ROFR is going to exercise his right can be a serious impediment to selling property. It is not unheard of for sellers to have to pay the holder of a ROFR to waive its right.

Note 4: Brian at one point offered to purchase the property for the contract price but stated that he would not pay the commission due to the sellers' real estate brokers. The fact that the court stated that Brian never agreed to pay the full price suggests that the holder of the ROFR has to pay net purchase price under the contract, including the seller's brokers.

Note 5: This case also suggests to the editor that the holder of the ROFR is not entitled to any of the due diligence of the seller, absent a contractual obligation of the seller to provide this. In other words, the holder of the ROFR is not entitled to the title work,

survey, Phase 1 or other information about the property that the seller has in its possession. Without such information, certified to the holder of the ROFR and its lender, the holder of the ROFR probably will not be able to get financing to purchase the property. This provides a great drafting lesson for those preparing a ROFR on behalf of the holder of the ROFR: provide that the seller will give to the holder of the ROFR copies of all information about the property that the seller provides the contract purchaser.

Note 6: One issue regarding options and rights of first refusal that has been litigated in Mississippi is whether these rights are subject to the rule against perpetuities (“RAP”). To make a long story short, options and rights of first refusal are interests in real estate to which the RAP applies, subject to Mississippi’s limitations on the RAP. *See, e.g., Murphy Exploration & Production Co.*, 747 So. 2d 260 (Miss. 1999)(right of first refusal did not violate RAP); *C&D Transport Co. v. Gulf Transport Co.*, 526 So. 2d 526 (Miss. 1988)(option to purchase land subject to RAP subject to “wait and see” doctrine); *Pace v. Culpepper*, 347 So. 2d 1313 (Miss. 1977)(option violated RAP and was void). Three cases in fifty years makes Mississippi a virtual hotbed of RAP litigation. If you think that the RAP is academic, intangible and irrelevant to the point of inducing sleep, the editor recommends Justice McRae’s fierce dissent in the *Murphy Exploration* case for a different point of view.

Note 7: From the point of view of the holder of the ROFR, a concern exists that the parties to the contract are acting in bad faith in order to sell the land free of the ROFR. For example, in *Bramble v. Thomas*, 914 A. 2d 136 (Md. Ct. App. 2007), the court stated that the seller and purchaser in a contract had an implied obligation of good faith in dealing with the holder of the ROFR. In that case the court reversed a declaratory judgment of a lower court granting summary judgment in favor of the purchaser of the land and remanded the case to determine if the seller or the purchaser had acted in bad faith by adding a term to the contract for the sole purpose of discouraging the holder of a ROFR from exercising its right.

Revocation of Permits to do Business was Violation of Due Process

Bowlby v. Aberdeen, 681 F. 3d 215 (5th Cir. 2012). On July 13, 2009, the City of Aberdeen Planning and Zoning Board granted to Debra Bowlby permits necessary to operate a “Sno Cone” hut at a busy intersection. Bowlby had already purchased the hut and signed a lease with the owner of the property. On September 29, 2009, without any notice to Bowlby, the Board revoked the permits. The next day the city building inspector told Bowlby to close her business. Rather than appeal to the Mayor and Board of Alderman, Bowlby brought an action in the United States District Court for the Northern District of Mississippi asserting that the City’s action was an unconstitutional taking without compensation under the Fourteenth Amendment and therefore a denial of due process. The district court, in an memorandum opinion by Judge Mills reported at 2011 WL 1196049, reasoned that Bowlby’s claim was not ripe because she had not exhausted her state remedies. She could appeal the Planning and Zoning Board’s action to the Mayor and Board of Aldermen of Aberdeen, and then could appeal the decision of the Mayor and Board of Aldermen to the circuit court. The district court granted the City’s motion to dismiss Bowlby’s action. On appeal, the United States Court of Appeals for the

Fifth Circuit, in a decision by Judge Benavides, reversed and remanded. For purposes of due process, licenses and permits issued by a city qualify as property interests. In this case, Bowlby had a property right in the permits issued by the City to operate the Sno Cone hut. Once issued, a license or permit cannot be taken away by a city without due process. In this case, the due process injury was complete at the time that due process was denied and Bowlby's permits were taken away. When the deprivation of due process involves a regulatory taking, such as a rezoning, then the property owner who suffered the due process deprivation must exhaust her state remedies and get a final decision, in part to determine the extent of the regulations' effect on the value of the property. In this case the taking—the deprivation of the permits—was total, and even if the City later restored the permits, Bowlby had suffered damages from the denial of due process. Moreover, a due process claim that is brought concurrently with a takings claim is treated differently than a takings claim alone in terms of ripeness. Bowlby was not claiming the value of her real property loss. Rather, Bowlby was claiming damage from the lack of due process--taking the permits that she needed to run her business--rather than the loss of the business itself. According to the Fifth Circuit, this is a separate claim from the takings claim and was amenable to a court decision at this time.

Note 1: The editor has attempted to boil down an extended and arguably esoteric discussion about federal due process down to the point most relevant to real property practice: once a city or county issues a permit to conduct business, the city or county cannot take away that permit without a notice and hearing.

Note 2: The Fifth Circuit's holding that Bowlby can proceed with her claim for breach of due process seems to the editor arguably to be a stretch. Most of the court's opinion is spent distinguishing the facts of this case from every other United States Supreme Court and Fifth Circuit case on this topic, so that at the end of the day it appears that there is no case law precedent exists for this holding. As an academic matter, it would have been very easy to rely on the same authorities that the Fifth Circuit distinguishes to write an opinion holding that Bowlby had to appeal to the Mayor and Board of Alderman and then to the circuit court, before her due process action. As a practical matter, of course, no one is going to commit to this kind of tortuous litigation unless substantial money is at issue.

Note 3: As long as we are addressing practical matters, and not to be disrespectful to Ms. Bowlby, how did the Sno Cone lady beat the City, which was well-represented by a highly respected law firm, in a case involving sophisticated constitutional law questions? According to the opinion, her appeal was supported by the Pacific Legal Foundation, "a charitable organization dedicated to preserving the individual right to make reasonable use of private property." The PLF's website is at www.pacificlegal.org. The PLF submitted an amicus curiae brief to Fifth Circuit, and the Fifth Circuit found the brief persuasive. The PLF's article on this case is here, which explains from their point of view the significance of this case, is here: <http://blog.pacificlegal.org/2012/plf-secures-important-property-rights-victory-in-the-fifth-circuit/>.

Note 4: An interesting comparison to the *Bowlby* case is the vested rights doctrine. The vested rights doctrine provides that if the city has issued a permit for construction, and the owner has begun construction and expended substantial funds on the construction, the

owner has a vested right in the permit so that the owner can complete the construction even if the city changes relevant ordinances to prohibit the completion of the project. This doctrine has been well-developed in other states, but as far as the editor knows, the only Mississippi case is *Robinson Industries v. City of Pearl*, 335 So. 2d 892 (Miss. 1976). In this case the landowner began building a McDonalds' restaurant and an accompanying sign in the City of Pearl. The owner planned to build a sign seventy-five feet tall with McDonald's distinctive golden arches. Construction of the restaurant was commenced on March 13, and construction of the sign was commenced on August 8. In the interim, the City passed a new ordinance limiting the height of signs in the area of the restaurant to thirty feet. When the owner's contractor began construction of the sign, a City building inspector told the contractor that the sign could not exceed the thirty-foot limit. The owner appealed to the City, which denied the appeal, and then to the Circuit Court of Rankin County, which affirmed the City's action. The Mississippi Supreme Court affirmed the Circuit Court. The owner argued that he had made substantial progress on the restaurant and sign at the time of the City's action. The Mississippi Supreme Court found that the restaurant and sign were separate projects, and that while the owner had made substantial expenditures toward construction of the restaurant, "McDonald's expenditures toward erection of the sign were not so substantial as to grant it a vested right to continue the construction in derogation of the ordinance."

GENERAL

This Newsletter is a publication of the Real Property Section of The Mississippi Bar for the benefit of the Section's members. Members are welcomed and encouraged to send their corrections, comments, articles or news to the editor, Rod Clement, by mail to 188 East Capitol Street, Suite 400, Jackson, Mississippi 39201, or by email to rclement@bab.com. Although an earnest effort has been made to ensure the accuracy of the matters contained herein, no representation or warranty is made that the contents are comprehensive or without error. Summaries of cases or statutes are intended only to bring current issues to the attention of the Section's members for their further study and are not intended to and should not be relied upon by readers as authority for their own or their client's legal matters; rather, readers should review the full text of the cases or statutes referred to herein before relying on these cases or statutes in their own matters or in advising clients. All commentary reflects only the personal opinion of the editor and does not represent a position of the Real Property Section, The Mississippi Bar or the editor's law firm.