NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

MAY 2011

2010 – 2011 REAL PROPERTY SECTION OFFICERS

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NEW LEGISLATION

The following bills relevant to real property have been passed by the legislature and signed by the governor.

Acknowledgments

HB 723 makes two important changes regarding acknowledgments. First, it amends Miss. Code Ann. Section 89-3-7 to add a new safe-harbor form of acknowledgment that can be used by any business organization:

> Personally appeared before me, the undersigned authority in and for the said county and state, on this _____ day of _____, 20_____, within my jurisdiction, the within named _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed in the above and foregoing instrument and acknowledged that he/she/they executed the same in his/her/their representative capacity(ies), and that by his/her/their signature(s) on the instrument, and as the act and deed of the person(s) or entity(ies) upon behalf of which he/she/they acted, executed the above and foregoing instrument, after first having been duly authorized so to do.

Second, HB 723 amends Section 89-3-1 to provide that the clerk may refuse to record an instrument if the instrument is not property acknowledged. However, if the instrument is not properly acknowledged but the clerk nevertheless records it, the instrument is still constructive notice. This change in the law does not affect existing priorities. HB 723 becomes effective on July 1, 2011.

Note 1: The original version of this bill provided that if a form of acknowledgment was proper under the laws of another state, the form would be sufficient in Mississippi. This portion of the original bill did not make it into the final version. But given that any form of acknowledgment gives constructive notice if the instrument is filed, and that few clerks check the form of acknowledgments anyway, it appears that the effect is the same; if an instrument is recorded that complies with the law of another state, but not Mississippi's requirements, and the clerk nevertheless records the instrument, the instrument will still give constructive notice.

Electronic Recording

HB 599 authorizes electronic recording of documents in the land records, and makes conforming amendments to the recording statutes to permit electronic recording. It establishes the Mississippi Electronic Recording Commission with eleven appointed members to establish standards and practices. Appointments are to be made by October 1, 2011 and the Commission's first meeting is required to be held no later than November 1, 2011. HB 599 becomes effective on July 1, 2011. The editor's understanding is that it is not inexpensive for counties to set up electronic recording, and that many smaller counties will not have electronic recording when it becomes available.

Formatting and Required Information on Documents to be Recorded

Section 89-5-24 requires that documents presented to the chancery clerk for recording in the land records must meet certain formatting requirements and must contain certain information. HB 600 amends this statute in several ways. HB 600 amends Section 89-5-24(1)(b) to require that all documents must be typed in a font no smaller than 10 point in size. Prior to HB 600, 8 point font was the minimum permissible size. HB 600 also amends Section 89-5-24(2)(a) to provide that the preparer's address must be the physical mailing address and business telephone number. Under the current version of Section 89-5-24(2)(a), the preparer can list a post office box and a cell or home telephone number. HB 600 further amends Section 89-5-24(2)(a) by requiring that the name, physical mailing address and business telephone number of every grantor, grantee, borrower, beneficiary, trustee or other party to the instrument be listed on the first page of every instrument. Prior to HB 600, telephone numbers of the parties were only required on deeds and not deeds of trust or other instruments. HB 600 becomes effective on July 1, 2012.

Cancellation of Judgments

Section 15-1-43 governs renewal of judgments. The current version of Section 15-1-43 provides that a judgment can be renewed by filing with the clerk that rendered the judgment a Notice of Renewal in the form described in the statute. HB 810 adds to the Section 15-1-43 the following sentence: "A judgment or decree can be renewed only if, at the time of the renewal, the existing judgment or decree has not expired." HB 810 also adds a requirement that the Notice of Renewal contain a "certification that at the time of filing of the notice the judgment remains valid and has not been satisfied or barred." One consequence of this change is that, prior to HB 810, the judgment creditor arguably had

the right under Section 89-5-19 to renew the judgment up to six months after the judgment appeared to have expired. HB 810 closes the door on this argument. HB 810 becomes effective on July 1, 2011.

Historic Tax Credits

Section 27-7-22.31 allows a credit against state income tax for certain costs incurred in the rehabilitation of certified historic structures. If the credit exceeds the state income tax of the owner of the credit, the owner of the credit is entitled carry forward the excess for up to ten years. HB 1311 amends Section 27-7-22.31 to give the taxpayer the alternative to claim a refund of ninety percent of the excess rather than carry it forward.

Note: The Internal Revenue Service is becoming more aggressive in challenging historic tax credits. In *Virginia Historic Tax Credit Fund 2001 LP v. Commissioner of Internal Revenue*, the United States Court of Appeals for the Fourth Circuit on March 29, 2011, reversed the Tax Court and held that the transactions at issue did not qualify for the historic tax credits. The Internal Revenue Service also has recently appealed another ruling of the Tax Court that permitted historic tax credits, *Historic Boardwalk, LLC v. Commissioner of Internal Revenue*, 136 T.C. 1 (2011).

VOID DEED INTO GRANTOR MADE DEED OF TRUST VOID

Northlake Development, L.L.C. v. Bankplus, 2011 WL 1743943, No. 2010-FC-01308-SCT (Miss. May 5, 2011). The facts of this case have been described at length in prior newsletters. To summarize, Earwood and Kiniyalocts were members of Northlake Development, L.L.C., a Mississippi limited liability company that owned a parcel of land. The operating agreement of Northlake provided that Kiniyalocts had to approve the sale of the land. Unbeknownst to Kiniyalocts, Earwood formed another limited liability company, Kinwood, and, signed a deed that purported to convey the land from Northlake to Kinwood. Kinwood then granted a deed of trust to Bankplus. Kinwood subsequently filed bankruptcy. Kiniyalocts filed an action in the bankruptcy to set aside the deed of trust on the grounds that the deed signed by Earwood was void since Kiniyalocts had not approved the sale, and therefore Kinwood had no title. The bankruptcy court held that the bank's deed of trust was void. The bankruptcy court relied on Miss. Code Ann. Section 79-29-303(1), which provides in relevant part as follows:

> …every member is an agent of the limited liability company for the purpose of conducting its business and affairs, and the act of any member, including, but not limited to, the execution in the name of the limited liability company of any instrument for apparently carrying on in the usual way the business or affairs of the limited liability company of which he is a member, binds the limited liability company, unless the member so acting has, in fact, no authority to act for the limited liability company in the particular matter and the person with whom he is dealing has knowledge of the fact that the member has no such authority.

The bankruptcy court reasoned that Kinwood knew that Earwood had no authority to sign a deed on behalf of Northlake, and therefore the deed and the deed of trust were void. The United States District Court for the Southern District of Mississippi affirmed. *Bankplus v. Kinwood Capital Group*, 430 B.R. 758 (S.D. Miss. 2009). On appeal, the Fifth Circuit, in a decision reported at 614 F.3d 140 (5th Cir. 2010), certified the following question to the Mississippi Supreme Court:

> When a minority member of a Mississippi limited liability company prepares and executes, on behalf of the LLC, a deed to substantially all of the LLC's real estate, in favor of another LLC of which the same individual is the sole owner, without authority to do so under the first LLC's operating agreement, is the transfer of the real property pursuant to the deed (i) voidable, such that it is subject to the intervening rights of a bona fide purchaser for value and without notice, or (ii) void *ab initio, i.e,* a legal nullity?

The Mississippi Supreme Court, in a unanimous *en banc* decision, held that the deed from Northlake to Kinwood was void. While the deed could have been ratified by Northlake, but in this case Northlake did not ratify the deed.

Note 1: The problem, of course, is that LLC operating agreements are not recorded in the land records. So one looking at the public records alone cannot determine for sure whether the persons signing instruments on behalf of LLCs in the chain of title had authority.

Note 2: It appears that the rationale of this case could be applied to set aside a deed, lease, easement or any other conveyance of a real estate interest by a limited liability company. On the other hand, the facts are relatively narrow and uncommon.

Note 3: Expect to see junior creditors and bankruptcy trustees scrutinizing conveyances by limited liability companies more closely.

GENERAL

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