

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

DECEMBER 2019

2019-2020 REAL PROPERTY SECTION OFFICERS

| | |
|------------------|--|
| Chair | Kenneth Farmer |
| Vice-Chair | Andrew Marion |
| Secretary | Barry Bridgforth |
| Members at Large | Alan Windham, Robert Bass, Lisa Reppeto |
| Past Chair | Charles Greer |

TABLE OF CONTENTS

Chair's Message, **page 2**

Mississippi Cases:

- Coal Cannot be Mined, and So Determination of Ownership is Moot, **page 3**
- Owner's Liability Determined by General Negligence Principles Rather Than Premises Liability, **page 5**
- No Easements by Estoppel or Irrevocable Licenses, **page 7**

Cases of Interest from Other Jurisdictions:

- Appurtenant Easement Extinguished in Servient Owner's Bankruptcy, **page 9**
- Landlord and Principals Liable for Tenant Selling Counterfeit Goods, **page 11**

CHAIR'S MESSAGE

As the Chair the Real Property Section of the Mississippi Bar, it is my honor and pleasure to introduce this edition of the section's newsletter. The Real Property Section is one of the largest, and most active, sections of the Mississippi Bar.

Title Standards Board

The Section's Title Standards Board, which is comprised of some 38 real property practitioners and underwriters from across the state, worked diligently through 2018 and 2019 to research and develop what we now call the "Mississippi Title Examination Standards." The Standards became effective August 1, 2019 and all lawyers throughout the state are encouraged to follow the standards in all cases in which they might apply. The Standards are a wonderful reference that should be consulted in both the preparation and examination of title documents. To date, the Section has sold roughly 150 bound copies of the Standards. A free PDF copy is also available for download from the section's web page. If you'd like to download the PDF or order a bound copy, please visit: <https://www.msbar.org/inside-the-bar/sections/real-property/mississippi-title-examination-standards-book/>

I'd like to express my sincere gratitude to all the members of the Board. I'd also like to thank all those Section members that participated in the development of the Standards by answering the Section's call for requests for comments. Without each of you, the completion of this task would not have been possible.

Land Title Association of Mississippi

Because of recent bylaws and policy changes adopted by the Board of Commissioners, the Section can no longer (1) engage in legislative activity, (2) take a position on legislation, (3) make other public statements, or (4) sponsor events, programs or initiatives without prior formal approval of the Board of Commissioners. Given the review process, the Executive Committee agreed to defer any future request for responses on legislation to the Legislative Committee of the newly formed [Land Title Association of Mississippi](#).

The upcoming LTAMS Annual Conference 2020 schedule indicates that it is shaping up to be the "real property" event of the year. LTAMS has graciously agreed to provide member pricing to all section members. To that end, the Executive Committee would like to encourage all Section members to take advantage of member pricing and attend the conference! To learn more about the conference, check out the schedule, or to register to attend, please visit: <https://ltams.org/education/annual-conference-2020/>

Closing Remarks

I want to thank Rod Clement for continuing to donate his time and energy to prepare this wonderful Section Newsletter. Rod has been publishing the Section newsletter since 1989 and always does such an excellent job. I hope that you all have enjoyed them as much as I have. All of the past editions since 2011 are available on the Section's web page (visit here: <https://www.msbar.org/inside-the-bar/sections/real-property/>).

Finally, if you haven't done so already, please go ahead and mark your calendars and plan to attend our Annual Section meeting. It is scheduled for Friday, July 17, from 10:15 AM to 12:15 PM, at the Linkside/Bayside Conference Center at the Sandestin Hilton in Sandestin, Florida.

I consider it my high honor to serve as chair of the Real Property Section, and I am grateful to those who have preceded me in this position for all the efforts they have made in growing the Section into what it is today. It is my sincerest wish that the Section will continue to grow, both in membership and strength, and will continue to serve as both an asset and resource to all members of the Mississippi Bar, as well as our community in general.

If any of you have any questions or suggestions, please contact me.

MISSISSIPPI CASES

Coal Cannot be Mined, and So Determination of Ownership is Moot

Barham v. Mississippi Power Co., 266 So. 3d 994 (Miss. 2019)(*en banc*). Mississippi Power Company ("MPC") bought land in Kemper County and built a power plant on it. The Barham family filed suit in the Circuit Court of Kemper County claiming that they owned lignite (a type of coal) under the surface of the land and seeking a declaratory judgment confirming their ownership of the lignite. The Barhams also asserted claims against MPC based on negligence, inverse condemnation and other common-law causes of action. MPC then filed suit in the Chancery Court of Kemper County to confirm and quiet title to the land and minerals and to enjoin the Barham family from asserting any interest to the lignite. MPC moved to transfer the circuit court action to the chancery court because the Barhams sought to determine ownership of real property, and thus should be in the chancery court. The Circuit Court judge agreed and granted MPC's motion to transfer the case to the chancery court. Once the cases were consolidated in the chancery court, MPC filed a motion for summary judgment on three grounds. First, MPC argued that Mississippi's Surface Coal Mining and Reclamation of Land Act ("Coal Mining Act") prohibited the owners of the lignite from mining the lignite. Second, MPC argued that since the Barhams did not object to MPC building its power plant until after the plant was completed, the Barhams should be equitably estopped from claiming ownership of the minerals. Third, MPC argued that, as surface owner, it owned the lignite as a matter of law. The Coal Mining Act provides in relevant part that before the owner of coal can carry out mining operations, one of two things must occur; either the owner must have a conveyance that expressly grants or reserves the right to

extract coal by surface mining methods, or the written consent of the owner of the surface must be obtained. Since it was undisputed that neither of these circumstances existed, the chancellor granted MPC's motion for summary judgment on this basis and without ruling on the equitable estoppel or ownership issues. On appeal the Mississippi Supreme Court, in an opinion by Chief Justice Randolph and four other justices, affirmed. The Supreme Court found that it was "crystal clear" that the Barhams did not meet either of the statutory conditions for developing the lignite. The Barhams argued that the chancery court erred by not ruling on their claim for a declaratory judgment regarding the ownership of the lignite. The Supreme Court wrote that since the lignite could not be mined, the ownership of the coal was moot, and therefore the chancellor was not in error by failing to make a determination about the ownership of the lignite.

Note 1: The Mississippi Surface Coal Mining and Reclamation Act, Miss. Code Ann. Section 53-9-1 *et seq.*, was enacted in 2008. It provides a comprehensive regulatory scheme for the mining of coal. A separate chapter of the Code, the Mississippi Surface Mining and Reclamation Act, Miss. Code Ann. Sections 53-7-1 *et seq.*, regulates the mining of bentonite, metallic ore, dolomite, phosphate, sand, gravel, stone and chalk. The Mississippi Department of Environmental Quality administers these acts and has issued regulations that supplement the statutes. The purposes of these acts include prohibiting surface mining in areas in which it is inappropriate, minimizing damage to the surface of the land, and ensuring that the surface of the land is restored after mining is completed. It would be interesting to compare the extent of regulation of surface mining with the regulation of the production of oil and gas by the Mississippi Oil and Gas Board. The editor speculates that surface mining is likely more heavily regulated because of the potential greater destruction of the surface in surface mining than in production of oil and gas.

Note 2: These acts carve out exceptions to the common-law rule in Mississippi that "a mineral owner or lessee of the mineral estate, in the absence of any additional rights expressly conveyed or reserved, may use as much of the surface to exercise its right to recover minerals, without liability for surface damages." *EOG Resources, Inc. v. Turner*, 908 So. 2d 848, 854 (Miss. Ct. App. 2005). These acts were enacted in part in anticipation of the mining of coal for the Red Hills Power Plant in Choctaw County, and Mississippi Power's Kemper County coal gasification plant, the plant at issue in this case.

Note 3: Justice Chamberlin, joined by Justice Coleman and in part by Justices Kitchens and King, wrote a dissent. Justice Kitchens, joined by Justice King and in part by Justices Coleman and Chamberlin, concurred with the majority in part and dissented in part. The gist of Justice Chamberlin's and Justice Kitchen's dissents is that the chancery court should have made a determination of the ownership of the lignite. Both parties, and both the circuit court and the chancery court, thought that the ownership of the lignite was the core issue in the lawsuit. Justice Chamberlin further wrote that the Barham family arguably had an inverse condemnation claim, and that this claim and the Barham's other claims should be remanded to the circuit court for a jury trial.

Note 4: One reason that the Court's failure to address the question of the ownership of the lignite at issue in this case is significant is because of an important title issue regarding coal that remains unresolved under Mississippi law: does the reservation of "all minerals" in a deed include coal? See generally L. Michele McCain & Bernard H. Booth, IV, *Lignite Coal: A "Mineral" Under Mississippi Law?*, 28 Miss. College L. Rev. 253 (2009). The rule in Mississippi is that a reservation of "all minerals" by itself does not reserve title to sand and gravel. Sand and gravel have to be specifically reserved. *Witherspoon v. Campbell*, 69 So. 2d 384, 388 (Miss. 1954). Does the same rule apply to reservations of coal? Also, the editor would have liked to find out the basis for MPC's claim that because it was the owner of the surface, it also as a matter of law was the owner of the lignite.

Owner's Liability Determined by General Negligence Principles Rather Than Premises Liability

Johnson v. Goodson, 267 So. 3d 774 (Miss. 2019). Johnson was riding in a golf cart being driven by Goodson on Goodson's land. The golf cart crashed and Johnson was injured. Johnson filed an action in the County Court of the First Judicial District of Hinds County claiming that Goodson had breached his duty of care by operating the golf cart negligently, and thus had caused her injuries. Goodson filed a motion for summary judgment asserting that the cause of action was one of premises liability, that Johnson was a licensee, and that as landowner Goodson only owed Johnson a duty to refrain from willfully, wantonly, knowingly or intentionally injuring her. The County Court granted Goodson's motion for summary judgment. The Circuit Court affirmed the County Court's grant of summary judgment to Goodson. On appeal, the Mississippi Supreme Court, in an opinion by Chief Justice Randolph, reversed. The premises liability standards of negligence only apply when the landowner's negligence is passive. In this case, Johnson alleged that Goodson was actively negligent in the manner in which he drove the golf cart. When the landowner's alleged negligence is active rather than passive, then the traditional standard of negligence applies: did Goodson operate the golf cart in the same manner as a reasonably prudent person would have operated the golf cart in the same circumstances? Chief Justice Randolph wrote, "Goodson cannot be absolved of putative negligence simply because he owned the land on which he was driving. Negligence, if any, is to be determined by the trier of fact." 267 So. 2d at 777. The Supreme Court remanded the case to the County Court for trial.

Note 1: The Supreme Court in the *Johnson* case relied primarily on two cases, *Astleford v. Milner Enterprises, Inc.*, 233 So. 2d 524 (Miss. 1970), and *Hoffman v. Planters Gin Co.*, 358 So. 2d 1008 (Miss. 1978). In *Astleford*, the landowner's truck, driven by the landowner's employee, struck Ms. Astleford, who was on the property visiting a friend who was an employee of the landowner. The *Astleford* court considered the active/passive negligence distinction adopted by other courts and cited authorities discussing the distinction but decided not to adopt it. The court in *Astleford* wrote, "We have not as yet made this differentiation and do not think that we should do so in this case. It is the thinking of this writer, but not necessarily that of the Court, that this area of law merits further study in the light of present day conditions, and it may well be that this Court will in the future abandon the traditional distinctions between trespassers, licensees and invitees, or at least draw a distinction between active and passive negligence insofar as a licensee is concerned." 233

So. 2d at 526. The *Astleford* court held that Ms. Astleford was a licensee, and that the landowner had not breached his duty to refrain from willfully and wantonly injuring her. In *Hoffman*, Hoffman was helping his father shovel seed into an auger at a cotton gin when the boy slipped and was injured by the auger. Hoffman, through his father, filed an action against the gin owner asserting negligence in the Circuit Court of Sunflower County. The trial judge granted the owner's peremptory instruction for the owner, based on Hoffman's status as a licensee or invitee. On appeal the Mississippi Supreme Court reversed and remanded the case to the circuit court. The Supreme Court was persuaded by the authorities cited in the *Astleford* case that the owner's negligence should be measured by the standard of ordinary and reasonable care rather than under premises liability standards. "We think the premises owner is liable for injury proximately caused by his affirmative or active negligence in the operation or control of a business which subjects either licensee or invitee to unusual danger, or increases the hazard to him, when his presence is known and that the standard of ordinary and reasonable care has application." 358 So. 2d at 1013.

Note 2: The Supreme Court in *Johnson* noted in footnote 3 that the facts in the *Hoffman* case occurred on the premises of a business, and that some subsequent cases had interpreted *Hoffman* to apply only to business premises. The Court wrote that the holding of the *Hoffman* case was not limited to business premises, and to the extent that other cases that held that *Hoffman* was limited to business premises, they are overruled.

Note 3: If the landowner's negligence is determined by the general negligence standard rather than by premises liability rules, one practical effect is that it will be much more difficult for the landowner to obtain summary judgment.

Note 4: How does this case fit with the Landowners Protection Act, Miss. Code Ann. § 11-1-66.1, that became effective on July 1, 2019? The Landowners Protection Act limits the landowner's liability for injuries suffered by the landowner's invitees by acts of third parties (e.g., customer mugged in parking lot), not from the landowner's own actions.

Note 5: The editor thinks that there has been a general trend in the law in Mississippi in favor of protecting landowners. Examples include the 2011 referendum limiting the state's power of eminent domain, the Landowners Protection Act, and amendments to the landlord-tenant statutes in 2018 and 2019 to make it easier for landlords to evict tenants. The Mississippi courts generally have protected the rights of owners; one recent example arguably is *Lee v. Keller Williams Realty*, 247 So. 3d 393 (Miss. Ct. App. 2017), in which the Court of Appeals held that a young woman with a child knowingly waived the landlord's implied warranty of habitability and obligation to repair the premises in a residential lease. The *Johnson* case seems to be a step in the opposite direction.

Note 6: One circumstance in which a landowner already is subject to the general standard of negligence rather than premises liability is liability for injuries caused by the owner's animals. A landowner can be liable for injuries caused by his or her animals when there is some proof that the animal has a dangerous propensity that the owner was aware of, and the owner reasonably could

have foreseen that the animal was likely to attack someone, regardless of whether the landowner's negligence is active or passive. *See Olier v. Bailey*, 164 So. 3d 982, 990-91 (Miss. 2015)(owner's geese attacked visitor).

Note 7: In the *Hoffman* case, the Mississippi Supreme Court gave weight to the fact that an auger in a cotton gin was inherently dangerous, and that the manager of the gin was aware of Hoffman's presence near the auger. This factor was not present in the *Johnson* case, unless one considers a golf cart inherently dangerous.

No Easements by Estoppel or Irrevocable Licenses

Girani v. Lovorn, 270 So. 3d 1070 (Miss. Ct. App. 2018). Smith and Stewart owned adjacent lots on a lake. To better access the lake, they constructed a boat ramp with retaining walls. Most of the boat ramp was located on Smith's property, but one retaining wall was located on Stewart's property. In exchange for sharing the costs of constructing the boat ramp, both families used the boat ramp. Smith did not grant Stewart a written easement to use the boat ramp. Girani subsequently bought Stewart's lot, and Lovorn bought Smith's lot. Lovorn told Girani that Girani would have to get Lovorn's permission to use the boat ramp. Girani brought an action in Rankin County Chancery Court and asked the court to find that he had an easement by estoppel to use the boat ramp. Alternatively, Girani asked the court to find that he had an irrevocable license to use the boat ramp. In support of his complaint, Girani argued that he had spent \$25,000 to \$30,000 on improvements to the boat ramp area. After a trial, the chancellor dismissed Girani's requested relief. On appeal by Girani, the Court of Appeals, in an opinion by Justice Tindell, affirmed. An easement is an interest in land that must be in writing. An easement by estoppel, which has been recognized and adopted in other states but not in Mississippi, would be an exception to the requirement for a writing. An easement by estoppel is an "easement which is created when a landlord voluntarily imposes an apparent servitude on his property, and another person, acting reasonably, believes that the servitude is permanent and in reliance upon that belief does something that he would not have otherwise or refrains from doing something that he would have done otherwise." (quoting from *Gulf Park Water Co. v. First Ocean Springs Development Co.*, 530 So. 2d 1325, 1332 (Miss. 1988)). An irrevocable license confers no interest in the land but merely gives one authority to do a particular act on another's land and may be created orally. An irrevocable license is more like an easement than a normal license, which can be revoked at will. The Mississippi Supreme Court has previously declined to recognize easements by estoppel or irrevocable licenses in prior cases. Girani asked the court to modify existing law to prevent injustice in this case. The Court of Appeals declined to do so.

Note 1: This case is of value to the editor because it confirms the limits of existing Mississippi's easement doctrines, and illustrates how easements in Mississippi are different than easements in other states.

Note 2: The cases cited by the Court of Appeals regarding licenses were decided at the time that railroads were being constructed across the country, and the railroad companies tended to build

first and worry about the legal niceties later. In *Beck v. Louisville, New Orleans & Texas Railway Co.*, 3 So. 252 (Miss. 1887), Klein gave the railroad company a verbal license to build a road across his land. A subsequent owner, Beck, brought an action for ejectment. The court found that Klein's oral license was revocable by the new owner. (Since licenses don't run with the land, shouldn't the court have stated that the license granted by Klein terminated when Klein's ownership of the land ended?) The railroad apparently argued that since the road was built pursuant to a license from the prior owner, Klein, the current owner's remedies were limited to an action for damages, and the new owner could not eject the railroad. The Mississippi Supreme Court wrote, "The proposition that a railroad company may build upon the lands of one who does not object, and thereby secure the right of way, subject only to his claim for damages, is not maintainable in this state, whatever may be held elsewhere. A parol license may shield liability for trespass, but it is revocable, and when revoked is no longer a protection. The only way to secure the right of way is by grant from the owner, or by condemnation proceedings, or by the statute of limitations." 3 So. at 176. In *Belzoni Oil Co. v. Yazoo & Mississippi Valley Railroad Co.*, 47 So. 468 (Miss. 1908), the railroad company constructed its line across land pursuant to a written license. The railroad company argued that since it had spent large sums for improvements, the licensor could not revoke the license without refunding the money so expended. The Mississippi Supreme Court wrote that "many of the cases in which the licensor was held estopped, under circumstances of this sort, are from states in which part performance of a contract takes it out of the statute of frauds. That exception this court has distinctly refused to graft upon the statute." 47 So. at 472. The *Belzoni Oil* court also wrote that requiring that rights to use land be in writing "prevents the burdening of lands with restrictions founded on oral agreements easily misunderstood. It gives security and certainty of titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments." *Id.*

Note 3: In their treatise on easements, Professors Bruce and Ely describe three circumstances in which courts have found an easement by estoppel to exist: when a landowner represents that an easement exists when it does not, when a landowner permits improvement of the landowner's property by a person who acts on the mistaken belief that the person holds an easement over the property, and when one conveys an easement over land the grantor does not own and later the grantor acquires title to the property. J. Bruce & J. Ely, *The Law of Easements and Titles in Land*, § 6.1. As noted by the Court of Appeals in the *Girani* case, the Mississippi Supreme Court previously has declined to adopt the doctrine of easement by estoppel. In *Gulf Park Water Co. v. First Ocean Springs Development Co.*, 530 So. 2d 1325, 1332 (Miss. 1988), Gulf Park deeded land that included a lagoon to the owner of a golf course. Gulf Park had been discharging effluents into the lagoon but did not reserve an easement to continue doing this in the deed. After the conveyance, the owner of the golf course brought an action for an injunction to prohibit Gulf Park from discharging effluents into the lagoon. Gulf Park asserted that it had an easement by implication to continue to discharge the effluents into the lagoon, and that it had an easement by estoppel. The court found that no easement by implication existed because, among other reasons, Gulf Park could connect to the city water and sewer system and dispose of the effluent in that manner. The court did not reject the doctrine of easement by estoppel outright but found that that it could not say that the chancellor was manifestly wrong in finding that a balancing of the equities

did not favor creation of an easement by estoppel. The editor's reading of the *Gulf Park* case is that the Mississippi Supreme Court left open the door that it could find the existence of an easement by estoppel on different facts.

Note 4: The Court of Appeals did not address Girani's claim that he was entitled to consideration for the lateral support that the retaining wall provided to the boat ramp. Could Girani now remove the retaining wall that is on his land, which would probably make the boat ramp unusable, or would that breach his duty to provide lateral support for the boat ramp?

CASES OF INTEREST FROM OTHER STATES

Appurtenant Easement Extinguished in Servient Owner's Bankruptcy

Sherwin Alumina Co., L.L.C. v. Port of Corpus Christi Authority (In re Sherwin Alumina Company, L.L.C.), United States Court of Appeals for the Fifth Circuit No. 18-40557 (August 6, 2019). In 1998 the Port of Corpus Christi Authority purchased 1.1 acres of land from Sherwin Alumina Company that was adjacent to Sherwin Alumina's property, together with an easement over Sherwin Alumina's land for a private road, known as La Quinta Road, for access to the 1.1 acres. In 2016 Sherwin Alumina filed Chapter 11 bankruptcy, in the United States Bankruptcy Court for the Southern District of Texas. In the bankruptcy Sherwin Alumina proposed selling its real property, including the land over which Port's easement ran, "free and clear of all liens," other than permitted encumbrances, under Section 363 of the Bankruptcy Code. Drafts of the plan and proposed purchase agreement were circulated for months, and none of the drafts identified the Port's easement over La Quinta Road as a permitted encumbrance. On the morning of the confirmation hearing, February 17, 2017, Sherwin Alumina filed a final confirmation plan that did not list the Port's easement over La Quinta Road as a permitted encumbrance. On February 27 Sherwin Alumina sold the land over which the easement ran to Corpus Christ Alumina, which in turn sold the land to Cheniere. The confirmation order became final and non-appealable on March 3, 2017. Cheniere notified the Port that its easement over LaQuinta Road had been extinguished by the "free and clear" sale in the bankruptcy court. Since the time to appeal the confirmation order had run, the Port filed an adversary complaint in the bankruptcy court collaterally attacking the confirmation order as having been procured by fraud and barred by the state's sovereign immunity, and asserting denial of due process for want of notice. The bankruptcy court denied the Port's fraud and Eleventh Amendment claims. On appeal by the Port, the Fifth Circuit, in an opinion by Judge Higginbotham, affirmed. The Port tried to argue that the "free and clear" sale did not comply with Section 363, but this argument was foreclosed by the Port's failure to file a timely appeal. The Port argued that, under the Eleventh Amendment, the federal courts lack jurisdiction over any lawsuit against a state, and that the bankruptcy court therefore did not have jurisdiction over the easement. The Fifth Circuit wrote that a bankruptcy court can have *in rem* jurisdiction over the property interest of a state, such as the easement over La Quinta Road, without violating the Eleventh Amendment. The Port argued that the last-minute modification of the plan not to list the easement over La Quinta Road as a permitted exception constituted fraud. The Fifth Circuit wrote that this claim failed because there was no misrepresentation; the easement never had been listed

as a permitted encumbrance. The debtor had proposed selling the land free and clear for more than a year before the confirmation hearing, and that filing the final plan without listing the easement as a permitted exception was not a change because easements by their nature are encumbrances.

Note 1: One might be taken aback to learn that a bankruptcy court can terminate the easement of a third party. But in the counter-intuitive, Twilight Zone world of bankruptcy, this is apparently possible and not without precedent. Section 363 of the Bankruptcy Code provides that under certain circumstances the trustee may sell property of the bankruptcy estate “free and clear of any interest in such property of an entity other than the estate.” Any party whose lien may be extinguished must get notice of the sale. In this case, the Port was actively involved in the bankruptcy. The Port had ample notice of the proposed sale. The Port participated in the bidding for part of Sherwin Alumina’s land, and conditioned its bid on obtaining an easement over La Quinta Road, so the Port was aware that there was a risk that the easement could be lost. The Port participated in the hearing on the confirmation order but did not object. So it appears that all of the elements for a Section 363 sale were met. On the other hand, neither the Fifth Circuit’s decision nor any of the briefs cited a case in which Section 363 had been used to extinguish an easement.

Note 2: As part of its Eleventh Amendment argument, the Port argued that the easement was its property and not part of the bankruptcy estate, and the bankruptcy court did not have jurisdiction over its easement. The Fifth Circuit distinguished between having jurisdiction over property rights and jurisdiction over the state. Judge Higginbotham wrote that “Section 363(f) specifically provides that, in exercising core *in rem* jurisdiction over the bankruptcy estate, the court may strip others’ interests—that is property rights—in that *res*. Specifically, Section 363(f) provides that under certain limited circumstances the trustee may sell estate property “free and clear of any interest in such property of an entity other than the estate.”

Note 3: A similar case is *Precision Industries, Inc. v. Qualitech Industries, Inc.*, 327 F. 3d 537 (7th Cir. 2003). In this case, Precision Industries had a ground lease over land owned by Qualitech. Qualitech filed bankruptcy and filed a motion to sell the land free and clear of any interests under Section 363(f). The Seventh Circuit held that the purchaser at the Section 363 sale got title to the land free and clear of Precision’s ground lease. As in the *Sherwin Alumina* case, the owner of the ground lease interest in *Precision Industries* received notice of the Section 363 sale and had been in negotiations with Qualitech’s creditors prior to the sale about a possible assumption of the ground lease.

Note 4: The *Sherwin Alumina* case was decided in part on Texas law that an easement was an “interest” in the debtor’s land. Is there any reason why a bankruptcy court applying Mississippi law would reach a different result? Is it possible that the nature of an easement as being appurtenant to a benefitted property and running with the land might cause a different result? This issue is not discussed in the *Sherwin Alumina* case. In Mississippi, an appurtenant easement cannot be conveyed separately from the benefitted estate. Also, a tax sale of land burdened by an appurtenant easement won’t terminate the easement. See *Hearn v. Autumn Woods*, 757 So. 2d 155 (Miss. 2000). If an appurtenant easement can survive a tax sale, one might wonder, would it survive a Section

363 “free and clear” sale? But the Mississippi Supreme Court in *Autumn Woods* reasoned that the appurtenant easement increased the value of the adjacent land and was thus included in the assessment of the adjacent land. This rationale doesn’t seem to have an equivalent in a Section 363 sale.

Note 5: What happens next? First, the Port has filed motions for rehearing by the panel and a rehearing by the Fifth Circuit *en banc*, so these motions have to run their course. The Texas Pipeline Association has filed an *amicus curia* brief in support of the Port’s petitions for rehearing. The Association’s brief argues that allowing a bankruptcy to extinguish an easement threatens devastating effects on the pipeline industry. Second, the bankruptcy court ruled on the Port’s Eleventh Amendment and fraud claims but held in abeyance the due process claim made by the Port. So if the Fifth Circuit denies rehearing, or permits a rehearing and affirms the panel’s decision, then the case goes back to the bankruptcy court to address the Port’s due process claim. So it could be a long time before there is a final resolution to this particular case. Regardless of the resolution of this particular case, the takeaway for owners of easements and their attorneys is to be aware of this case and to be alert if an owner whose land is burdened by an easement seeks to sell his land free and clear of all liens under Section 363 of the Bankruptcy Code.

Landlord and Principals Liable for Tenant Selling Counterfeit Goods

Luxottica Group, S.P.A. v. Airport Mini Mall, LLC, 932 F.3d 1303 (11th Cir. 2019). Luxottica Group manufactures and holds registered trademarks to luxury goods, including Ray-Ban and Oakley sunglasses. Yes Assets, LLC in 2009 purchased a shopping center near the Atlanta Airport which contained approximately 120 booths leased to individual vendors. Jerome Yeh was an owner of Yes Assets, LLC, which in turn owned the International Discount Mall, an indoor space that contained approximately 125 booths for individual vendors. Yes Assets leased the Mall to Airport Mini Mall, LLC (“AMM”), which was owned by Donald Yeh, Jerome Yeh’s son. Airport Mini Mall then subleased booths in the mall to individual vendors. Jerome Yeh’s daughter, Alice Jamison, managed the mall. The mall was characterized by the Eleventh Circuit and the district courts as a “flea market.” During the time that AMM owned the mall, law enforcement officers executed search warrants on the mall, raided the mall three times and seized counterfeit goods, including thousands of counterfeit Ray-Ban and Oakley sunglasses. In a district court opinion, law enforcement officers reported that upon entry to the mall, “vendors would immediately begin closing up their booths and attempting to flee the premises.” Luxottica had private investigators go to the mall and take pictures of the subtenants selling counterfeit goods. Luxottica sent two cease and desist letters to AMM notifying it that tenants were selling counterfeit sunglasses and identifying the subtenants who were selling the counterfeit goods. Luxottica then brought an action against Yes Assets, AMM, Jerome Yeh, Donald Yeh and Alice Jamison under the Lanham Act, alleging that they were contributorily liable for trademark infringement by the subtenants because they provided services to the subtenants in the form of lighting, water, sewerage, maintenance and repairs, painting, cleaning and parking space for the subtenants and their customers. After a trial in the federal district court for the Northern District of Georgia, a jury found all of the defendants

liable for contributory trademark infringement and assessed damages of \$100,000 for each infringed trademark, totaling \$1.9 million in damages. On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed.

Note 1: The Lanham Act, aka the Trademark Act of 1946, 15 USC Section 1114, provides that any person who sells counterfeit goods with registered marks can be liable for damages to the owner of the mark. In *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982), a case involving the manufacture of drugs, the United States Supreme Court stated that under the Lanham Act, “if a manufacturer or distributor intentionally induces another to infringe a trademark, or it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit.” 456 U.S. at 854. The *Luxottica* court explained the elements of a contributory trademark infringement claim as follows: “A claim for contributory trademark infringement thus has two elements: (1) a person or entity commits direct trademark infringement under the Lanham Act; and (2) the defendant (a) “intentionally induces” the direct infringer to commit infringement, (b) supplies a “product” to the direct infringer whom it “knows” is directly infringing (actual knowledge), or (c) supplies a “product” to the direct infringer whom it “has reason to know” is directly infringing (constructive knowledge).” 932 F. 3d at 1312. In this case, Luxottica presented evidence that the defendants showed willful blindness to their subtenants’ unlawful conduct. The Eleventh Circuit found that willful blindness is a form of constructive knowledge for purposes of the Lanham Act. It also found that the provision of services in the form of providing space, lighting, parking and other services met the standard for contributory liability.

Note 2: One important point in this case is that the individual principals of the landlord entities were liable. It was not necessary for Luxottica to “pierce the corporate veil” of the corporate landlord to get to the individual shareholders as long as Luxottica established the necessary elements of contributory trademark infringement as to the individuals.

Note 3: While the *Luxottica* case was a case of first impression for the Eleventh Circuit, federal appeals courts in other circuits have held that a landlord can be liable when tenants sell counterfeit goods. See *Coach, Inc. v. Goodfellow*, 717 F.3d 498 (6th Cir. 2013)(sale of counterfeit Coach products); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996)(sale of bootleg CDs); *Hard Rock Café Licensing Corp. v. Concession Services, Inc.*, 955 F.2d 1143 (7th Cir. 1992)(sale of counterfeit Hard Rock t-shirts). These cases all involved flea markets, but wouldn’t this same rationale apply to a kiosk at an upscale mall?

Note 4: One takeaway from this case is that retail leases need to require the tenant not to sell counterfeit goods or otherwise violate the Lanham Act, and to give the landlord the power to terminate the lease and dispossess the tenant if the tenant breaches this covenant. But if the lease contains these provisions, and the landlord does not use them, it may be worse for the landlord than not having them. In the *Luxottica* case, the defendants argued that they lacked clear evidence that their subtenants had defaulted, and that absent clear evidence, they could have been sued for

wrongful eviction if they had attempted to evict the subtenants. Circuit Judge Pryor, writing for the Eleventh Circuit, wrote that the leases with the subtenants did not require evidence that the subtenants were selling counterfeit sunglasses, but provided that a verified written complaint that a subtenant was selling counterfeit goods would constitute a breach of the lease and authorize the landlord to dispossess the tenant immediately. The defendants admitted at trial that the search warrants accompanied by a sworn affidavit would qualify as a “verified written complaint” under the subleases. The sublease also provided that a subtenant’s failure to comply with trademark law would constitute a default and permit the landlord to evict the tenant, but the landlord did not do so.

Note 5: This case and the other cases in which federal courts have found landlords and their principals contributorily liable for their tenants’ sale of counterfeit goods give manufacturers a powerful tool. A judgment against the landlord and its principals has more value than a verdict against the people selling counterfeit goods, both in terms of collectability and deterrence.

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 1000, Jackson, Mississippi 39201, or by email to rclement@bradley.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 the client’s legal matters; rather, readers should review the full text of the cases or statutes referred to herein and make their own conclusions. All commentary reflects only the personal opinion of the editor (which is subject to change) and does not represent the position of the Real Property Section, The Mississippi Bar or the editor’s law firm.