NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

JUNE 2011

2010 – 2011 REAL PROPERTY SECTION OFFICERS

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MESSAGE FROM THE CHAIR

In January I reported that our Real Property Section had several initiatives on the agenda for the year. I am proud to report that the initiatives have all been completed.

Our Acknowledgment Form revision legislation was introduced, then combined with other related legislation, modified by the House and Senate, then passed. The end result is beneficial for Mississippi real estate practitioners. This was accomplished through the combined efforts of many persons including our Secretary of State Delbert Hosemann, Jim Tohill, Martin Hegwood, Caryn Quilter, Greg Snowden, Brad Jones and Joey Filligane.

Rene' Garner, with the Mississippi Bar, has coordinated three, free, "Lunch and Learn" Seminars for the Section. Approximately 250 attorneys attended the three Seminars, two of which were jointly sponsored with sister Bar Sections-SONREEL and Governmental Law.

As we all know it takes significant time and effort to present on legal matters. We appreciate the efforts of our presenters in sharing their expertise with us: Cheryn Baker and Tom Riley, Assistant Secretaries of State (New LLC Law), David Rueff, John Rice and Ken Harmon (Navigating MDA-Katrina Relief Programs) and Michael Dawkins (Environmental Due Diligence). Bar Section leadership was instrumental in co-sponsoring these programs and I thank Gretchen Zmitrovich, Brett McCall, Ken Farmer and Chris Waddell for their assistance in getting us to the finish line.

Our good friend Rod Clement has continued his outstanding service to the MS Bar and our Real Property Section with his timely and insightful briefs on important legal cases

and legislation in Mississippi. Please let Rod know of our appreciation when you next see him.

The Section again awarded two $1000 Scholarships to exemplary law students showing an aptitude for Real Property Law and with financial need.

Chad Russell has organized an outstanding program for our Annual Meeting in Destin with a regional perspective—"Commercial Real Estate: What's that light at the end of the tunnel?" Our presenters are two well respected commercial real estate attorneys: Jonathan Jennewein, Esq. (FL) and William Rothschild, Esq. (GA).

It has been an honor and privilege to serve as Chair of our Real Property Section. I look forward to seeing you in Destin.

Change to Statute Prohibiting Transfer Fees

In 2010, the Mississippi legislature enacted a bill that became codified as Section 89-1-69 of the Mississippi Code. This statute prohibited any provision in a deed or covenant that required a future transferee of residential land to pay a fee to the declarant. There are certain exceptions, such as for fees payable to an owners' association, a 501(c)(3) entity or a governmental entity. So, for example, a developer can impose subdivision covenants that require that purchasers of lots pay a transfer fee to the subdivision's homeowner's association, the Boy Scouts, or the City of Jackson, or all three of them, but a provision in the covenants that require purchasers to pay a fee to the developer would be void.

Section 89-1-69 as enacted in 2010 applied only to residential subdivisions and residential property. The Mississippi legislature in 2011, in House Bill 575, amended Section 89-1-69 so that it applies to any type of property, not just residential property. The bill becomes effective on July 1, 2011.

Note 1: The best article about the current state of the law regarding transfer fees is one by Wilson Freyermuth, *Putting the Brakes on Private Transfer Fee Covenants*, published in the July/August 2010 edition of the ABA's Probate & Property Magazine.

Note 2: The editor does not understand the reason for this change. The rationale for prohibiting transfer fees in residential transactions is consumer protection. That rationale does not exist when the property is commercial. Unlike residential purchasers, commercial purchasers typically are represented by attorneys and purchase owners title insurance.

Note 3: According to the American Land Title Association, thirty states have adopted statutes prohibiting transfer fees. The editor has read only a few of these statutes, but all of the ones that he has read only apply to residential property.

Note 4: The Mississippi statute as amended continues to have what seems to the editor to be a gaping hole. It only applies to transfer fees imposed on transferees, and so does not appear to invalidate transfer fees that are imposed on transferors.

Note 5: Another question that the statute leaves open is whether it applies to transfer fees in covenants on commercial property already in place at the time the statute being effective on July 1, 2011, or just covenants imposed after July 1, 2011. The same question exists about covenants on residential properties that were already filed prior to July 1, 2010, when the original bill became effective.

NEW ALTA/ACSM SURVEY STANDARDS

The American Land Title Association and the National Society of Professional Surveyors have adopted new Minimum Standard Detail Requirement for ALTA/ACSM surveys. The new standards became effective on February 23, 2011 and replace the 2005 standards. The standards are important because most lenders of commercial property require an ALTA/ACSM survey as a condition of making a loan, and title insurance companies require an ALTA/ACSM survey certified to the title company in order to remove the standard survey exceptions and to get certain endorsements, such as the access endorsement. You can get a copy of the new standards, and a list of the changes, from the website of the National Society of Professional Surveyors at www.nspsmo.org. Information that the new standards require to be shown on the survey include the commitment or policy number of the title commitment or policy upon which the surveyor relied for title, a vicinity map showing the surveyed property in reference to nearby streets, evidence of access to public ways such as curb cuts and driveways, the width of easements, and the date of the field work. The new standards also expressly provide that the survey will be certified to the lender. New Table A optional items include the street address of the property and the location of wetlands areas. The new standards also have a mandatory, exclusive short-form certification. The Standards state expressly that the surveyor can only give the prescribed form of certification, subject to local laws. The requirement is intended to keep lenders from requiring additional certifications and to limit the liability of surveyors. The trade-off for lenders is that the new standards require some of the information that lenders used to include in their supplemental certifications. A survey of land in Mississippi also must meet the Minimum Standards for Surveying of the Mississippi Board of Licensure for Professional Engineers and Surveyors, which can be found at www.pepls.state.ms.us.

Plaintiff in Action to Quiet Title Has No Duty to Update Title After Filing Complaint

American Public Finance, Inc. v. Smith, 45 So. 2d 307 (Miss. Ct. App. 2010). Deep Woods obtained title to land in Harrison County in 1998. The 2001 ad valorem taxes on the property were not paid, so the property was sold for the taxes. After a series of conveyances, the land was purchased by Smith, who filed an action to quiet title to the land in 2007 in the Chancery Court of Harrison County. After the complaint had been

filed, Deep Woods quitclaimed the property to American Public Finance (APF). The deed stated on its face that "no title search was performed prior to the execution of the [deed]". APF did not make an appearance in the pending action to confirm title. Since no defendants made an appearance, in January 2008 the chancery court granted a default judgment confirming title in Smith. In April 2008 APF filed a motion to set aside the judgment. APF claimed that it owned an interest in the land by virtue of its deed from Deep Woods and that it was a bona-fide purchaser for value that took title without notice of the tax sale or the action to quiet title. The chancellor denied APF's motion and held that APF's failure to search title before purchasing the land kept APF from being a bona fide purchaser for value. In addition, the chancellor held that Smith was not required to update the title after he filed his action to confirm. Upon appeal by APF, the Mississippi Court of Appeals, in an opinion by Justice Irving, affirmed. Under the Mississippi Rules of Civil Procedure and common law, all parties with an interest in the land must be joined in an action to confirm title. In this case, Smith had joined all parties who had an interest in the land at the time that the complaint was filed, and this was all that was required. Miss. Code Ann. § 11-17-29, which provides for actions to confirm title, does not impose upon plaintiffs the obligation to update the title after the action to confirm is filed. APF could not be a bona fide purchaser for value because it did not search the title prior to purchasing the land.

Note 1: APF relied on *Aldridge v. Aldridge*, 527 So.2d 96 (Miss. 1988). In that case, a divorce decree required the former wife to pay her former husband $16,000. When she did not make the payment, the former husband filed a complaint and a notice of lis pendens against the property on July 13. The notice of lis pendens was not recorded by the chancery clerk until after July 16. On July 16, the former wife conveyed the property to the Faucettes. The Faucettes' lender had checked title to the property immediately before the conveyance and before the lis pendens was recorded by the clerk. In the action filed by the husband, the chancery court held that the notice of lis pendens gave the former husband a valid lien against the property. On appeal the Mississippi Supreme Court reversed. The Mississippi Supreme Court held that the Faucettes clearly had an interest in the property that was affected by the imposition of the former husband's lien on the property and should have been made parties. The Mississippi Supreme Court in the *American Public Finance* case distinguished its holding in *Aldridge* on the basis that in *Aldridge* the Faucettes were bona-fide purchasers for value, and APF was not a bona fide purchaser for value, because in *Aldridge* the purchasers diligently searched the title before buying the land, and APF did not.

Note 2: Section 11-17-20 of the Mississippi Code provides in relevant part that "If on the final hearing of any such suit, the court shall be satisfied that the complainant is the real owner of the land, it shall so adjudge, and its decree shall be conclusive evidence of title as determined from the date of the decree as against all parties defendant." So theoretically the court could require the plaintiff to confirm that there have been no additional parties who have acquired interests since the complaint was filed, but as a practical matter this is not going to happen. In 99.99% of these tax confirmation suits, none of the defendants appear and the plaintiff gets a default judgment.

Note 3: An interesting comparison to this case is the Mississippi Supreme Court's decision in *In re Wilcher (Wilcher v. Faulker*), 994 So. 2d 170 (Miss. 2008), which was

discussed in the November 2009 edition of the Newsletter. In *Wilcher* purchasers of land took title to land without first searching the title. On the face of their deed was typed "THIS INSTRUMENT PREPARED WITHOUT TITLE EXAMINATION." One issue in that case was whether the purchasers were innocent purchasers for value and could assert equitable defenses. The Court of Appeals held that the purchasers could not assert equitable defenses because they had not searched title to the land before purchasing and thus were not bona fide purchasers for value. *In re Wilcher (Wilcher v. Faulkner)*, 994 So. 2d 187, 189-90 (Miss. Ct. App. 2007). The Mississippi Supreme Court reversed the Court of Appeals. While not expressly saying whether the purchasers were or were not innocent purchasers for value, the Mississippi Supreme Court in *Wilcher* court stated that a search of the land records by the purchasers would not have revealed the unrecorded will at issue in that case, and thus the purchasers were entitled to assert equitable defenses. 994 So.2d at 176.

Note 4: Who buys land without checking the title or at least checking to see if the taxes have been paid? In most counties, including Harrison County, the ad valorem tax records are online. Some counties, like Madison County, post copies of recorded deeds and other instruments online. It would be interesting, and relevant to the bona fide purchaser for value issue, to know whether APF paid Deep Woods fair market value for the property.

Note 5: Didn't APF have constructive notice of the tax deeds?

Note 6: The editor wonders if the courts in the *American Public Finance* and the *Wilcher* cases misapprehended the significance of the language in the deeds in those cases that no title search was performed. These courts seemed to think that adding this language was a crafty way for the buyers to try to improve their relative priority by willful blindness. In the editor's experience, this language is the traditional language inserted by the attorney drafting the deed when his client has asked him to draft a deed without searching the title. In other words, the language is inserted to protect the attorney drafting the deed, not to try to improve the purchaser's priority.