

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

**DECEMBER 2012**

**2011 – 2012 REAL PROPERTY SECTION OFFICERS**

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**MESSAGE FROM THE CHAIR**

I am grateful for the opportunity to serve as this year's Chair of the Real Property Section of the Mississippi Bar. We have a strong section, currently the second largest in the Bar. I trust that each of you will consider recommending Section membership to your fellow attorneys who practice real property law. Also, I would like to express the Section's gratitude and appreciation to Rod Clement, Bradley Arant Boult Cummings, LLP, for his outstanding efforts in preparation of the Section newsletter.

The Executive Committee, which is responsible for the Section Activities, have met several times since the new year began in order to plan and schedule activities for the coming year. Our plans and activities so far include the following:

a. At least two "lunch and learn CLE teleseminars", which will be offered free of charge to Section members. The initial offering is January 10, 2013, and will be conducted by J. D. May and Charles Parrott. This is a joint session with the Business Law Section and will address the increasing volume in Real Estate Related Lender Liability Litigation. Section members should have received notice of the offering. Information on the second teleseminar will be announced in the Spring.

b. The Executive Committee has re-approved scholarships for both Mississippi College School of Law and the University of Mississippi School of Law. Each scholarship is \$1,000, and two students from each school will be selected.

c. Following a canvas of Section members, the Executive Committee considered and then voted to hold our annual Section Meeting at the 2013 Bar Convention jointly with the Business Law Section. Each section will meet for a short business section and then join for a CLE session on a mutually agreeable topic.

d. We will continue the availability of the Section's Listerve, which is free of charge to Section members.

If you have any ideas about Section activities, please share them with me or with any member of the Executive Committee.

David M. Allen, Chair

## RECENT CASES

### Agreements to Toll Statutes of Limitations Can Be Enforceable

*Townes v. Ellis*, 98 So. 3d 1046 (Miss. 2012). Ellis built a home that was first occupied in January 1999. The Towneses purchased the home from the initial purchaser in 2003. In 2004 the Towneses sent Ellis a notice of defects in the home and a demand that Ellis repair the alleged defects. In December 2004 or January 2005, the Towneses and Ellis signed an agreement to toll the statute of limitations under Mississippi's New Home Warranty Act, Miss. Code Ann. § 83-58-1 to -17 ("NHWA"), in order to give Ellis an opportunity to inspect and repair the alleged defects. The NHWA provides that homeowners have six years after the home was first occupied to file suit against the builder for claims covered by the NHWA. In July 2008 the Towneses filed an action against Ellis in the Circuit Court of Hinds County, alleging a breach of the NHWA and other common-law claims. Ellis moved for summary judgment on the grounds that all of the Towneses' claims were barred by the general six-year statute of repose in Miss. Code Ann. § 15-1-41, and that the tolling agreement was void under Miss. Code Ann. § 15-1-5. Section 15-1-5 provides in relevant part that "The limitations prescribed in *this chapter* shall not be changed in any way whatsoever by contract between parties, and any change in such limitations made by any contract stipulations whatsoever shall be absolutely null and void,..." The Towneses argued that the tolling agreement was valid because it did not shorten but extended the statute of limitations; that Section 15-1-5 did not apply to the NHWA because Section 15-1-5 by its terms applied only to statutes of limitations provided in Chapter 15 of the Code and not the NHWA, which was in Chapter 83; and that there should be an equitable tolling of the statute of limitations since the Towneses had relied on Ellis' alleged misrepresentations. The Circuit Court of Hinds County granted Ellis's motion for summary judgment. On appeal, the Mississippi Supreme Court, in an opinion by Justice Lamar, reversed and remanded. The Supreme Court held that all of the Towneses' common-law claims were within the statute of repose in Section 15-1-41, and that under Section 15-1-5, the tolling agreement did not stop the running of the six-year statute of repose on the common-law claims. But the Towneses' claims under the NHWA were governed by the six-year statute of limitations in the NHWA, not by Section 15-1-41. Section 15-1-5 does not apply to the statute of limitations under the NHWA because Section 15-1-5, by its terms, only applies to limitations periods under Chapter 15 of the Code. For statutes of limitations outside of Chapter 15, the parties can agree to toll the statute of limitations. The court listed five factors that determine whether a tolling agreement is enforceable:

(1) it is not prohibited by statute; (2) it contains a definite and reasonable time period; (3) it is formed after the cause of action has accrued, or in the instance of a statute of repose, after the plaintiff has notice of the cause of action; (4) it is not made at the same time as, or as part of, the obligation sued upon; and (5) it is entered into before the expiration of the applicable limitations period.

In this case, the court found that the tolling agreement between the Towneses and Ellis did not have an end date, and therefore was indefinite and void. In regard to the Towneses' claim that Ellis should not be able to assert a time bar based on principles of equitable estoppel and fraudulent concealment, the court found that the fraudulent concealment allegation was without merit because the defects were not concealed and the Towneses knew about the defects before the limitations period had run. But the court found that a genuine issue of fact existed about the equitable estoppel claim, and remanded the case to the circuit court to determine whether Ellis should be equitably estopped to assert that the tolling agreement is unenforceable.

In his concurring opinion, Justice Randolph wrote that Section 15-1-5 was in conflict with other section of Chapter 15 of the Code, and that these statutes could be harmonized by allowing the parties to agree to extend statutes of limitations, but not shorten them. Justice Chandler, concurring in part and dissenting in part, disagreed with the majority's conclusion that a tolling agreement had to have a definite termination date. Justice Chandler would permit the parties to a tolling agreement to agree for the tolling agreement to run for a reasonable time. He would have upheld the tolling agreement between the Towneses and Ellis based on the parties' intent to allow Ellis a reasonable time to inspect and repair.

Note 1: This case seems to the editor to be a significant change in the relevant law, and particularly relevant to options in dealing with defaulted loans.

Note 2. The effect of this case appears to be that if a statute outside of Chapter 15 of the Code provides its own statute of limitations, then a tolling agreement can be entered into for that statute. For example, Mississippi's Uniform Commercial Code provides a six-year statute of limitations on an action for breach of a contract of sale of personal property or an action on a promissory note. Under the *Townes* case, it appears that the parties to a contract of sale of personal property, or a note subject to the UCC, could enter into a tolling agreement. An action for a breach of a contract to sell real estate usually would be governed by the general three-year statute of limitations in Section 15-1-49. So if the contract is for sale of both real and personal property, and an alleged breach occurs, can the parties enter into a valid tolling agreement?

Note 3. Section 15-1-41 is a statute of repose, while Section 15-1-49 is a statute of limitations. Section 15-1-41 provides, in relevant part, that "No action may be brought to recover damages for injury to property, real or personal, arising out of any deficiency in the design, planning, supervision or observation of construction, or construction of an improvement to real property, ...against any person...performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property more than six (6) years after the written acceptance or actual occupancy or use, whichever comes first, of such improvement by the owner thereof." The *Townes* court noted the difference between statutes of limitations and statutes of repose. A statute of repose "cuts off the right of action after a specified period of time measured from the delivery of a product or the completion of work." A statute of limitations, on

the other hand, runs from the time that a cause of action accrues. Statutes of repose operate “regardless of the time of accrual of the cause of action or of notice of the invasion of a legal right.” According to the Mississippi Supreme Court in another case, “. . .the Legislature intended to provide enhanced protection against liability to certain construction industry professionals such as architects and contractors based on the nature of the professions.” *McIntyre v. Farrell Corp.*, 680 So. 2d 858, 865 (Miss. 1996). Section 15-1-41 originally had a ten-year statute of repose, but in 1986, the legislature amended Section 15-1-41 to shorten the period from ten years to six years (good for contractors and engineers). The rationale of the *Townes* case applies to both statutes of limitations and statutes of repose.

Note 4: This case does not change the rule that parties to a contract cannot choose a private statute of limitations. See *Pitt v. Watkins*, 905 So. 2d 553, 558 (Miss. 2005)(clause in home inspection contract that any action must be commenced within one year was “null and void”).

#### Shopping Center Exclusive Not Enforceable Against Other Tenants

*Winn-Dixie Stores, Inc. v. Big Lots Stores, Inc.*, 2012 WL 3292011 (United States District Court for the Southern District of Florida, August 13, 2012). This case addresses the enforceability of a covenant in a lease giving one tenant the exclusive right to sell groceries in shopping centers in five states, including one in Mississippi. Winn-Dixie, owner of grocery stores, brought an action in the United States District Court for the Southern District of Florida seeking injunctive relief and damages against other tenants in shopping centers for violating Winn-Dixie’s exclusive right to sell groceries. In Mississippi, the other tenant who was a defendant was Dollar General. The exclusive for groceries was in the lease between the landlord and Winn-Dixie, but not in the lease between the landlord and the other tenants. The other tenants, however, knew of the exclusive. The district court found, as an initial matter, that in order for the exclusive to be enforceable against the other tenants, the exclusive must be a real property covenant running with the land. The relevant law varied from state to state, so the court addressed whether the exclusive ran with the land in all of the states that were the subject of the action. The court found that under Mississippi law, “a covenant must meet three criteria to run with the land: (1) the covenanting parties must intend that the covenant run with the land; (2) privity of estate must exist between the person claiming the right to enforce the covenant and the person upon whom the burden of the covenant is to be imposed; and (3) the covenant must touch and concern the land in question.” (quoting from *Hearn v. Autumn Woods Office Park Property Owners Ass’n*, 757 So. 2d 155, 158 (Miss. 1999)). The court also quoted the Mississippi Supreme Court defining privity as “that which exists between lessor and lessee, tenant for life and remainderman or reversioner, etc., and their respective assignees, and between joint tenants and coparceners.” (quoting from *Hearn v. Autumn Woods*, 757 So. 2d at 158.) The district court held that privity did not exist between Winn-Dixie and the other tenants, and so Winn-Dixie could not enforce its grocery store exclusive against Dollar General at its Mississippi location.

After the court found that Winn-Dixie’s exclusive were enforceable in other states, the court took up the merits of Winn-Dixie’s case. The exclusive in a typical Winn-Dixie lease provided as follows:

Landlord further covenants and agrees not to permit or suffer any property located within the shopping center be used for or occupied by any business dealing in or which shall keep in stock or sell for off-premises consumption any staple or fancy groceries, meats, fish, vegetables, fruits, bakery goods, dairy products or frozen foods without written permission of the tenant; except the sale of such items in not to exceed the lesser of 500 square feet of sales area or 10% of the square foot area of any storeroom within the shopping center, as an incidental only to the conduct of another business, shall not be deemed a violation hereof.

The court found that the terms “staple or fancy groceries,” “sales area,” “10% of the square footage of any storeroom,” and “incidental only to the conduct of another business” were ambiguous, and that the exclusive could not be enforced.

The court also found that Winn-Dixie had not proved damages. Witness testimony, according to the court, was “too general, vague and speculative” to satisfy the burden of proof. Winn-Dixie also sought to introduce the testimony of an economist who had developed an economic model that showed Winn-Dixie’s damages. The court found that the economist’s model did not was not based on “sufficient empirical evidence to show that Defendants were actually causing Winn-Dixie’s damages” and that the economist’s proof of damages “are not calculable to a reasonable certainty and are too speculative to be granted the relief requested.”

While Winn-Dixie’s proof was not sufficient for Winn-Dixie to be entitled to damages, the court found that in some cases in other states, the proof was sufficient to entitle Winn-Dixie to an injunction prohibiting the violation of the exclusive.

Note 1: This is an unpublished case from a federal district court in Florida, and Winn-Dixie has appealed. So the case probably has little value as a precedent at this point. The editor nevertheless thinks that this case has value because it expressly addresses an issue that is negotiated every day and about which little Mississippi law exists. Anyone who drafts or negotiates exclusives in retail leases will want to read this case.

Note 2: Note that the exclusive is in the lease between Winn-Dixie and its landlords, but Winn-Dixie did not bring an action against the landlords, only the other tenants. Why did Winn-Dixie not bring an action against its landlords, since it was the contract/lease with the landlords that created the exclusives? It is possible that Winn-Dixie has long-term relations with some of the national landlords involved, and does not want to become adverse to them for business reasons. Also, the legal entity that owns a shopping center usually has no other assets, and the center is often cross-collateralized with other shopping centers owned by the same parent, so that any judgment would be junior in priority to a mortgage of that secures a debt greatly in excess of the value of that particular center.

Note 3: The *Winn-Dixie* court found that in other states at issue—Florida, Alabama and Georgia—actual or constructive notice of Winn-Dixie’s exclusives was sufficient for the exclusives to be enforceable against the other tenants in the shopping center, but not in Mississippi, where contractual privity is required in order for the exclusives to be enforceable. Under this court’s interpretation of Mississippi law, then, the fact that other tenants of the

shopping center had actual knowledge that the Winn-Dixie leases contained exclusives did not matter. Likewise, constructive notice of the exclusive is not sufficient.

Note 4: If Tenant 2 has actual or constructive knowledge that Tenant 1's lease contains an exclusive for the sale of widgets in a shopping center, and Tenant 2 nevertheless sells widgets, does Tenant 1 arguably have a cause of action against Tenant 2 for intentional interference with contractual relations?

Note 5: As noted above, the *Winn-Dixie* court relied on *Hearn v. Autumn Woods*, 757 So. 2d 155 (Miss. 1997) in holding that under Mississippi law, privity was required in order for a covenant to run with the land, and that since no privity existed between Winn-Dixie and its competitors, the exclusive in Winn-Dixie's lease was not enforceable against Dollar General. The privity requirement stated in *Hearn*, and the *Vulcan Materials* case relied upon by the *Hearn* court, continue to be cited by Mississippi courts and remains good law. *See, e.g., Long Meadow Homeowners Ass'n*, 89 So. 3d 591, 595-96 (Miss. Ct. App. 2011); *Journeau v. Berry*, 935 So. 2d 1145, 1154-55 (Miss. Ct. App. 2007); *see also Buchman v. BASF Corp.*, 107 Fed. Appx. 378, 383, 2004 WL 1562733 (5<sup>th</sup> Cir. 2004) (quoting *Hearn* in diversity case) .

Note 6: One reason that the Winn-Dixie court found that the language of the exclusive was ambiguous is that many of terms were undefined. We can expect to see exclusivity provisions in the future to come with their own set of excruciatingly detailed definitions.

Note 7: Exclusives can be the lifeblood of a retail tenant. The exclusivity provisions of national retailers can be extremely broad in their scope. For a landlord in a shopping center, giving exclusives to big anchor tenants is a necessary evil that has to be suffered in order for the landlord to have the "credit tenants" that it needs to get financing. But trying to juggle the need to comply with existing exclusives with the need to attract and keep a profitable mix of tenants in the center is a constant challenge for a landlord. For example, suppose a large bookstore chain has a coffee bar for its customers, and gets an exclusive for "items sold by the tenant in its prototypical store". Such an exclusive might prohibit the landlord from having Starbucks as a tenant in the center since coffee is sold in the bookstore. Landlords generally will push back hard against requests for exclusives from smaller tenants because they cannot afford to lose future larger tenants over exclusives for small tenants.

Note 8: The *Winn-Dixie* court seems to be saying that Winn-Dixie could not enforce its exclusive in Mississippi because no direct contractual privity existed between Winn-Dixie and the other tenant. Isn't that reading the requirement for privity too narrowly? Both the *Hearn* case relied upon by the *Winn-Dixie* court, and other Mississippi cases cited in the *Hearn* case, provide that a covenant is enforceable by and against the successors of the original parties. The *Winn-Dixie* case does not state whether a memorandum of lease was filed in Mississippi, but suppose that a memorandum of lease was filed that described Tenant 1's exclusive before Tenant 2 signed its lease in the center. Tenant 1 had contractual privity with the landlord and could enforce the covenant against the landlord. Does Tenant 2, who had constructive notice of the exclusive at the time that its lease came into existence, have broader rights than its landlord?

## Unmarried Joint Tenant Not Entitled to Proceeds of Partition Sale

*Jones v. Graphia*, 95 So. 3d 751 (Miss. Ct. App. 2012). Anthony Graphia and Carolyn Jones, who were romantically involved but not married, purchased a house in Hancock County as joint tenants with rights of survivorship and not as tenants in common. Graphia paid the entire purchase price for the property and all taxes, insurance, utility and property association dues. Romance waned, unfortunately, and litigation over the ownership of the property soon followed. Graphia filed an action in the Chancery Court of Hancock County to partition the property. Graphia argued that since he paid all of the purchase price of the property, Jones would be unjustly enriched if the proceeds of the sale were divided between them equally. Graphia asked the court to make an equitable adjustment and award him all of the purchase price. Jones argued that under the parol evidence rule, the court could not consider testimony about the amount each party had paid for the property, and that as a joint tenant she was entitled to a portion of the proceeds of a sale as joint tenant. The chancellor considered the parties' relative contributions to the purchase price and found that awarding Jones an equal share of the purchase price would unjustly enrich Jones, and awarded the entire purchase price to Graphia. In making the equitable distribution, the court relied on Section 11-21-9, which provides that in a partition, "The court may adjust the equities between and determine all claims of the several cotenants, as well as the equities and claims of encumbrancers." As an alternative ground, the chancellor relied on Section 11-21-33, which recognizes a chancellor's authority to award owelty in a partition action. Owelty allows a court in a partition suit to award money to cotenants in a partition to compensate for unequal contributions or when their respective portions of land are of different value. Jones appealed, and the Mississippi Court of Appeals, in a decision by Justice Griffis joined by five other justices, affirmed. In regard to Jones's argument about the parol evidence rule, Justice Griffis wrote that since the chancellor had the authority to make adjustments to the parties' relative shares of the proceeds of the partition, it was proper for the chancellor to allow testimony about the parties' respective contributions to buying the house.

Justice Carlton, joined by Justice Fair, dissented, and wrote that the chancellor should have only made equitable adjustments arising out of the cancellation of the joint tenancy, and that the chancellor went beyond his authority when he considered which party paid the purchase price. Justice Carlton would have reversed and remanded the case to the chancery court for a different division of the partition proceeds.

Justice Maxwell, joined by Justice Irving, also dissented. Justice Maxwell wrote that while the doctrine of equitable distribution applied to marital property, and to property owned by putative spouses, it did not apply to cohabitants who never attempted a valid marriage. Section 11-21-9, according to Justice Maxwell, does not give chancellors the authority to look beyond title in a partition action, but only gives them jurisdiction over ancillary issues. Justice Maxwell would have reversed and remanded the case for an equal distribution of the partition proceeds.

Note 1: Owelty is a common-law doctrine that allows a court to adjust the shares of the parties to a partition. The classic case is when one cotenant has lived in the family home for many years, paid the taxes and improved it, and then the other cotenants want a partition. In this case, the cotenant that lived in the home is entitled to credit for the taxes he paid and improvements that he made, but will have some deduction for the value of the occupancy. Using the doctrine of

owelty to completely deny one party any share in a partition based on which party paid the purchase price appears to go beyond the traditional uses of this doctrine.

Note 2: Suppose that the parties had taken title to the property as tenants in common rather than joint tenants with right of survivorship. Would the result have been different? It seems to the editor that the result would have been the same in a partition. But the result would be very different if Graphia had died. If Graphia had died, Jones, as the surviving joint tenant with right of survivorship, would have become the sole owner of the property. But if Graphia and Jones had been cotenants rather than joint tenants, and Graphia had died, then Jones would have kept her undivided one-half interest, while Graphia's undivided one-half interest would have passed to Graphia's heirs or devisees.

Note 3: The "putative spouse" doctrine referenced by Justice Maxwell in his dissent is that one party to a void marriage may nevertheless be entitled to an equitable distribution of property accumulated by both parties during the purported marriage when the parties held themselves out as married. *See, e.g., Pickens v. Pickens*, 490 So. 2d 872, 875 (Miss. 1986)(man and woman divorced but continued to live together); *Chrismond v. Chrismond*, 52 So. 2d 624, 629 (Miss. 1951)(marriage was void because man was not divorced from first wife); *Cotton v. Cotton*, 44 So. 3d 371, 377 (Miss. Ct. App. 2010)(marriage was void because woman was not divorced from first husband). The editor will defer to experts in family law on this point, but it appears that a court can make an equitable distribution of property even if the spouse seeking the equitable distribution is not entitled to alimony because of the absence of the marital relationship.

## 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@babc.com](mailto:rclement@babc.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.