NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

September 2023

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MISSISSIPPI LEGISLATION

SB 2073 amends Section 93-19-13 of the Mississippi Code and other statutes to lower the age at which persons can enter into binding contracts affecting real property from twenty-one years to eighteen years of age.

HB 1170 amends Section 63-21-16 to allow the Department of Revenue to electronically note liens and releases of liens on a certificate of title for manufactured housing rather than noting the liens and releases on the face of the certificate of title.

These statutes became effective on July 1, 2023.

FEDERAL REMOTE NOTARY LEGISLATION

Mississippi is one of only six states that do not allow remote notarizations. When the state was under an emergency declaration because of COVID-19, remote notarizations were permitted by the governor's emergency proclamation. But since that proclamation expired, no authority exists for using remote notarizations in Mississippi. Bills have been introduced in the Mississippi legislature to permit remote notarizations, but none have passed so far.

Legislation to permit remote online notarizations has been introduced in the United States Congress. The title of the bills is the "Securing and Enabling Commerce Using Remote and Electronic Notarization Act" or SECURE Act. There are several bills that appear to be identical, but the one that has made it furthest through the legislative process is H.R. 1059. The bill has passed the House of Representatives and has been referred to the Senate Judiciary Committee. The American Land Title Association is supporting H.R. 1059. So it is possible that Mississippi will get remote notarizations by federal law rather than by state law.

You can find more information about H.R. 1059 on Congress's website at https://www.congress.gov/bill/118th-congress/house-bill/1059.

CFIUS AND RESTRICTIONS ON OWNERSHIP OF LAND BY FOREIGN NATIONALS

If you are involved in purchasing land near Camp Shelby in Forrest and Perry Counties, the Meridian Naval Air Station in Meridian, or the Naval Research Laboratory-Stennis Space Center in Hancock County, you need to be aware of the Committee on Foreign Investment in the United States ("CFIUS").

The Defense Production Act of 1950 as amended by the Foreign Investment Risk Reform Modernization Act of 2018 gives the President of the United States the authority to suspend or prohibit any covered real estate transaction when the President believes that a foreign person engaging in the covered real estate transaction might take action that threatens the national security of the United States. *See Ralls Corp. v. Committee on Foreign Investment in the United States*, 758 F. 3d 296 (D.C. Cir. 2014)(CFIUS ordered corporation owned by Chinese nationals to sell windfarm project located near US Navy installation). Review of real estate transactions is vested in the CFIUS. Regulations outlining the authority and jurisdiction of CFIUS are in 31 CFR 802.

The regulations define a covered real estate transaction as one involving land within one mile of certain military installations. Three military installations in Mississippi are listed in the regulations: the Naval Research Laboratory-Stennis Space Center in Hancock County, Camp Shelby in Forrest and other counties, and the Naval Air Station in Meridian. Also, any land within ninety-nine miles offshore of Mississippi is covered (*e.g.*, barrier islands).

The list of exempted transactions includes single-family housing units.

A party to a transaction may file a voluntary notice of the transaction with CFIUS, and CFIUS can determine whether the transaction is a covered real estate transaction. The United States Department of the Treasury has information on its website regarding CFIUS, including a form of application for submitting a voluntary notice of a transaction: https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius.

CFIUS has been in the news recently because of a Chinese company's recent purchase and development of a corn milling facility near the Grand Forks Air Force Base in North Dakota. CFIUS concluded that it did not have jurisdiction over this transaction because the facility was

more than one mile from the base. As a result, the Treasury Department has increased the one-mile distance to ninety-nine miles for certain military installations, but not for the three installations in Mississippi.

CFIUS also applies to certain business acquisitions not involving real estate. For example, an article in the August 12, 2023 online edition of the Wall Street Journal describes CFIUS's review of a sale by DuPont of its sustainable nylon business, which review resulted in CFIUS imposing conditions on the sale: https://www.wsj.com/articles/a-dupont-china-deal-reveals-cracks-in-u-s-national-security-screening-665cb50c?mod=Searchresults_pos1&page=1.

Note 1: The regulations are definition-heavy and very detailed. It appears to the editor that preparing and submitting a voluntary notice of a transaction would be a time-consuming undertaking.

Note 2: The editor's reading of the statutes and CFIUS regulations is that in Mississippi they only apply to the three specified military installations. So presumably there's no problem with a foreign national purchasing land adjacent to Keesler Air Force Base or any other military installation in Mississippi other than the three specified installations.

Note 3: In addition to these federal restrictions, some state legislatures have undertaken to restrict the purchase of land near military installations and in other circumstances by foreign nationals. Florida, South Carolina, Utah, North Dakota and other states have passed such bills, and Texas and Louisiana are considering such bills. The United States Justice Department, the American Civil Liberties Union and groups supporting rights of Asian-Americans have challenged the constitutionality of these state laws. For a scholarly article that reviews the history of state laws limiting the rights of foreign nationals to purchase land, see James Alan Hastings, *Alien Land Laws: Constitutional Limitations on the State Power to Regulate*, 32 Hastings L.J. 251 (1980). Mississippi has not yet adopted such restrictions but see Note 4 below.

Note 4: Mississippi limits purchases of real estate by "aliens" (aka foreign nationals). Section 29-1-75 of the Mississippi Code prohibits nonresident aliens and "any association of persons composed in whole or in part of nonresident aliens" from directly or indirectly purchasing public lands. Section 89-1-23 of the Mississippi Code prohibits a nonresident alien from acquiring more than 320 acres, with some exceptions. Section 89-1-23 does not prohibit the purchase of land by "corporations in which the stock thereof is partially or wholly owned by nonresident aliens." The CFIUS regulations on the other hand apply to corporations and other entities when the equity interests are owned by foreign nationals. Several bills were introduced in the 2023 Mississippi Legislature to further limit the acquisition of land in Mississippi by foreign nationals, but the bills died in committee. *See, e.g*., HB 984 (prohibit purchases of land by China); HB 1275 (prohibit foreign persons from purchasing land at tax sales). The Legislature in HB 280 did authorize a study committee to consider possible restrictions on the purchase of real estate in the state by foreign nationals. According to an article in the online edition of MPB News on August 28, 2023, the study committee has met and elected Secretary of Agriculture Andy Gipson as its chair. https://www.mpbonline.org/blogs/news/new-committee-looks-into-foreignowned-farmland-in-mississippi/. The committee's report to the Legislature is due on December 1, 2023.

Note 5: Another federal statute requires foreign nationals who purchase agricultural lands to file disclosure reports with the Department of Agriculture. This is the Agriculture Foreign Investment Disclosure Act of 1978, 7 U.S.C. § 3501 *et seq*. and regulations beginning at 7 CFR § 781.

Note 6: CFIUS is intended to protect America's highest-value military installations. In case you were wondering where these military installations are located, the Treasury Department helpfully has posted a detailed ARC/GIS map on its CFIUS website that shows the exact location of these military installations, including specific latitude and longitude references for each site: https://mtgis-portal.geo.census.gov/arcgis/apps/webappviewer/index.html?id=0bb1d5751d76498181b4b531987ce263.

CASES

Supreme Court affirms *Loblolly*; foreclosure
of deed of trust does not extinguish HOA covenants

Loblolly Properties LLC v. Le Papillon Homeowner's Association Inc., Miss. Supreme Ct. No. 2021-CT-00767-SCT, 2023 WL 5311529 (August 17, 2023)(*en banc*). This case affirms the Mississippi Court of Appeals' decision that the foreclosure of a deed of trust did not extinguish restrictive covenants filed after the deed of trust. Here is the sequence of relevant events:

2/28/08: Chattel Group executes deed of trust to First State Bank.
12/19/08: Chattel Group files restrictive covenants on lots for benefit of the homeowners' association ("HOA").
2/06/09: Bank forecloses on deed of trust.
2013: Bank litigates with the HOA over whether restrictive covenants encumber land. Agreed judgment states that covenants are valid and enforceable.
1/31/18: Bank sells land to Loblolly. Deed from bank to Loblolly states that conveyance and warranty are subject to "any and all Covenants and Restrictions of record."
2019-20: Loblolly and the HOA litigate over whether 2008 restrictive covenants encumber lots.
2021: The Chancery Court holds that even though covenants may have been extinguished by the foreclosure, the covenants applied to the lots through the deed from the bank to Loblolly.
8/27/22: The Mississippi Court of Appeals affirms the Chancery Court. Miss. Supreme Ct. No. 2021-CA-00767-COA, 2022 WL 4478395 (Miss. Ct. App., Sept. 27, 2022). As described by the Supreme Court, the Court of Appeals "held that the covenants applied to the subject lots because (1) 'First State agreed in post-foreclosure litigation that the covenants applied' and (2) 'Loblolly accepted the property by a special warranty deed that specifically stated the property was bound by any covenants on record.'" Moreover, the Court of Appeals, relying on cases holding that tax sales did not extinguish the HOA's covenants because the covenants increased the value of the property and "ran with the land", held that the foreclosure did not extinguish the covenants. Justice Wilson argued in dissent that under Section 89-5-5 of the Mississippi Code the deed of trust priority had priority over the covenants because the deed of trust was filed before the covenant and therefore had priority over the covenants, and the foreclosure of the deed of trust therefore extinguished the covenants.

8/17/23: The Mississippi Supreme Court, in a 7-2 decision written by Justice Ishee, affirms the Court of Appeals. The Supreme Court fully embraced the reasoning of the Court of Appeals and added discussion about the unique characteristics of homeowners' associations.

Note 1: This case represents an important change in the law regarding priorities of liens. The editor wrote at length in the March 2023 Newsletter about why he thought that the Court of Appeals' decision was an incorrect reading of the relevant law and the dissent was correct, and will not repeat all of those arguments.

Note 2: Much of the discussions in the first parts of the majority opinions of the Court of Appeals and the Supreme Court address what First Bank agreed to in its post-foreclosure litigation with the HOA, and what Loblolly agreed to take subject to in its deed from First Bank. But at the end of the day none of this ink is necessary to the resolution of this case. In the second parts of their opinions, both the Court of Appeals and the Supreme Court hold that as a general matter, foreclosure of a prior deed of trust does not extinguish HOA covenants because the covenants benefit the property and run with the land. In other words, even if no post-foreclosure litigation had occurred between the Bank and the HOA, and even if the deed from the Bank to Loblolly had not contained the boilerplate exception for covenants and restrictions of record, the HOA still would have prevailed because the foreclosure never cut off its covenants. This reasoning is a surprise to the editor. Section 89-5-5 of the Mississippi Code establishes that the priority of liens is determined by order of filing absent actual notice. This statute contains no exceptions for restrictive covenants imposed by HOAs. Neither the Court of Appeals nor the Mississippi Supreme Court addressed or even cited Section 89-5-5; in fact, in describing Judge Wilson's dissent in the Court of Appeals, the Supreme Court stated that the dissent relied on the Restatement of Servitudes and cases from other states and did not mention that the dissent relied primarily on Section 89-5-5. Nevertheless, as a result of this case and prior cases holding that tax sales do not extinguish HOA covenants, it appears that HOA covenants now enjoy a bulletproof, super-priority status under Mississippi real estate law and cannot be extinguished by foreclosure or tax sale.

Note 3: The Supreme Court wrote that HOAs have "unique characteristics" that justify special treatment of their covenants. The editor's reading of this case is that the reasoning applies to covenants imposed on commercial properties as well as residential subdivisions.

Note 4: Both the Court of Appeals and the Supreme Court found it significant to their holdings that the HOA covenants "run with the land." The editor fails to understand the significance of whether the covenants "run with the land." The editor's understanding is that whether servitudes (easements as well as covenants) "run with the land" is relevant in determining whether subsequent owners take subject to the servitudes, but the doctrine has nothing to do with priority of the servitudes over other interests in the land. An easement that "runs with the land" can be terminated by foreclosure of a prior deed of trust as well as an easement that does not run with the land.

Note 5: The winners from this case are homeowners' associations and the developers who control them. Developer control is significant in Mississippi because the developer can draft the covenants so that the developer controls the association as long as the developer owns one lot in the subdivision. The developer can even extend its control beyond the date of its ownership by committing the HOA to long-term contracts with the developer or its affiliates for maintenance or

other services on terms favorable to the developer. In other states the developer is required to turn over control of the HOA to the other owners of lots in the subdivision after the developer has sold a certain percentage of the lots, and the HOA board has the right to terminate contracts entered into by the developer with itself or its affiliates on above-market terms.

Note 6: Losers from this case include lenders who make loans secured by lots subject to subdivision covenants. Some covenants provide that holders of first-priority deeds of trust who foreclose do not have to pay assessments imposed by the covenants, but some, including apparently the covenants in the *Loblolly* case, do not. If the covenants do not contain an exception for lenders, then if the lender forecloses on its deed of trust and purchases the property at the foreclosure sale, the lender will have to pay the subdivision assessments, regardless of whether its deed of trust was recorded before or after the covenants. A construction lender may be able to make its advances subject to approval of the covenants, but if the owner subsequently changes the covenants without the lender's consent, the lender's foreclosure will be subject to the revised covenants, though the lender may have an action for breach of covenant.

Note 7: Does this case change the priority of an HOA's lien for assessments? Mississippi law on HOA liens, how an HOA can enforce its liens, and the priority of the lien, is scant. If, under *Loblolly*, the foreclosure of a prior deed of trust does not extinguish HOA covenants, does that same immunity from foreclosure extend to one who purchases land when an HOA forecloses on its lien? To put it another way, does the purchaser at an HOA lien foreclosure sale essentially take free of the prior deed of trust?

Buyer's failure to close on specified date was not material <br> when contract did not state that time was of the essence

Haidar v. Margetta, 352 So. 3d 206 (Miss. Ct. App. 2022)(*en banc*). Yazmine Haidar and Harold Katz, as buyers, and Chad and Lynette Margetta, as sellers, entered into a contract for the sale by the Margettas of land in Pearl River County to Haidar and Katz. The contract provided that closing would occur "on or before January 7, 2021" but did not provide that time was of the essence. According to the opinion, the buyer's lender delayed the closing until February 2, 2021. On February 1, 2021, the sellers sent a text to the buyers that the sellers would not close. On the same day, the sellers entered into a contract to sell the property to another party. On February 11, the buyers filed a complaint against the sellers in Pearl River County Chancery Court seeking an injunction to prohibit the sellers from selling the property to another party, and for specific performance of the contract between the sellers and the buyers. The sellers filed a motion to dismiss asserting that the complaint failed to state a cause of action because the contract expired on January 7, 2021, the last day for closing according to the contract. The buyers argued that the contract did not expire because the parties had agreed to modify the closing date, and because the contract did not provide that time was of the essence. The Chancery Court granted the sellers' motion to dismiss. On appeal by the buyers the Mississippi Court of Appeals, in an opinion by Justice Wilson joined by five justices and in part and in the result by one justice, reversed and remanded the case to the Chancery Court. Unless time is of the essence, a delay in one party's performance will not be deemed to be a material breach of the contract that allows the other party to terminate; rather, the party whose performance was delayed must close within a reasonable time.

What constitutes a reasonable time to perform is a question of fact. Simply specifying a closing date does not make time "of the essence." Time can be deemed to be of the essence in two ways: first, if the contract expressly states that time is of the essence, and second, if there is a clear intent of the parties that time is of the essence. Since the contract in this case did not state that time was of the essence, the Court of Appeals reviewed the complaint to see if it contained a clear indication by the parties that time was essential to the contract. The buyers had attached copies of text messages between the sellers and the buyers regarding the closing, but these did not establish that time was of the essence. Since the complaint did not establish that time was of the essence, the sellers were not entitled to terminate the contract because the buyers failed to close on the specified date for closing, and the chancellor erred in dismissing the complaint.

In a dissenting opinion, Justice Greenlee argued that the contract established January 7 as the closing date, that there was no provision in the contract for extension of the date, and that under general law, "A contract which specifies the period of its duration terminates on the expiration of such period." Three justices joined in the dissent and one justice joined in part.

Note 1: An underlying principle of law that is not expressly stated in this decision is that a party cannot terminate a contract for breach unless the breach is material. Failing to close on time, by itself, is not considered sufficiently material to support the termination of a contract. The effect of adding a clause that time is of the essence is that the party seeking to enforce the contract does not have to prove that time really is of the essence.

Note 2: The reasoning of this case applies to any contract that has a closing date, not just sales and purchases of real estate.

Note 3: In the majority opinion, the Court of Appeals wrote, "If a buyer fails to close on time, the seller can make time of the essence by giving the buyer clear notice warning that the failure to close on a date certain will result in default and termination of the contract." After the buyers in this case failed to close on the specified date, the sellers could have specified a date by which the buyer had to close or the seller would terminate, sometimes characterized as a "drop dead" date. In this case the sellers and the buyers exchanged text messages about possible closing dates, but the sellers did not make demand that the buyer close by a specific date, nor did the sellers demand additional consideration for extending the closing date.

Note 4: When representing a buyer who is financing the purchase, drafters should think twice about adding a "time is of the essence" clause to the contract. Every closing delay that the editor has seen recently has been due to a delay in the buyer getting its financing finalized. If the contract includes a "time is of the essence" provision, and the buyer does not have a right to extend the closing to finalize its financing, and the buyer has to go back to the seller and ask for an extension of time to finalize its financing, the seller may demand concessions from the buyer, such as requiring the seller to pay additional non-refundable earnest money or changing the date for prorating the taxes, as a condition to granting the extension.

Note 5: The dissent relied in part on *Gunn v. Heggins*, 964 So. 2d 586 (Miss. Ct. App. 2007) for the proposition that "A contract which specifies the period of its duration terminates on the expiration of such period." In the *Gunn* case, the buyer was unable to close on the specified date.

But the buyer paid the seller additional consideration for an extension of the time to close. The buyer later sent the seller a document granting the buyer a second extension of time to close, which the seller did not sign. The trial court in *Gunn* held that the seller was entitled to terminate the contract and entered judgment for the seller. The Court of Appeals in *Gunn* found that the buyer's actions showed that the buyer knew that closing had to occur on the date of the first extension and affirmed the trial court's judgment. The *Haidar* court wrote that the actions of the buyer in *Gunn* showed that the parties considered time to be of the essence.

Note 6: The seller also argued that changing the closing date orally violated the statute of frauds. The Court of Appeals wrote that the buyers were not arguing that the closing date was modified, but that time was not of the essence in the original written contract.

Note 7: The Court of Appeals reversed and remanded to the Chancery Court for proceedings consistent with the opinion. What does this mean? The editor thinks that one question for the Chancery Court to consider is whether the second closing date set by the buyer, February 2, was a reasonable time for the buyers to perform, and that the sellers, who sought to terminate the contract, will have the burden of providing that the date was not reasonable.

Equitable remedies available to vendee even though
contract to purchase is void under statute of frauds

SEL Business Services, LLC v. Lord, 367 So. 3d 147 (Miss. 2023). In November 2019 Dr. William Lord and SEL Business Services, LLC ("SEL") entered into a verbal agreement that Lord would sell to SEL land and a building in Rolling Fork for $60,000. No closing occurred, and no lease was entered into between the parties, but SEL paid the ad valorem taxes and began making improvements to the building, including installing a new HVAC system and rewiring the building. SEL learned that Dr. Lord was negotiating to sell the property to another party and filed an action in the Chancery Court of Sharkey County against Dr. Lord seeking specific performance of their agreement to sell and purchase the property, equitable reimbursement and other equitable remedies. The day after SEL filed its complaint, Dr. Lord sold the property to a hospital for $110,000. The owners of the hospital, Sharkey County and Issaquena County, demanded that SEL vacate the property in one week. SEL added the hospital and the counties as defendants to its existing lawsuit against Dr. Lord. SEL changed its claim from specific performance to one for equitable reimbursement of the money that SEL had put into the building, in the amount of $80,000. Dr. Lord, the hospital and the counties filed motions for summary judgment on the grounds that the verbal contract between SEL and Lord was unenforceable because it violated the statute of frauds, and that any derivative equitable claims also were barred. The Chancery Court granted the motions for summary judgment. On appeal by SEL, the Court of Appeals, in a unanimous decision, affirmed. 359 So. 3d 645 (Miss. Ct. App. 2022). The Court of Appeals relied on the Mississippi Supreme Court's decision in *Barriffe v. Estate of Nelson*, 153 So. 3d 613, 620 (Miss. 2014). In *Barriffe* the Mississippi Supreme Court held that the remedy of an equitable lien on property was not available when a verbal contract to purchase the property was unenforceable because it violated the statute of frauds. The Court of Appeals wrote that *Barriffe* also barred the remedies of equitable estoppel and unjust enrichment. On a petition for writ of certiorari by SEL, the Mississippi Supreme Court, in a unanimous *en banc* decision, affirmed in part and reversed

and rendered in part. The Supreme Court overruled *Barriffe* to the extent that *Barriffe* held that the statute of fraud bars any claim for an equitable lien or other equitable remedy. While the equitable remedy of specific performance is not available when a contract to sell land is void under the statute of frauds, the remedies of equitable liens, equitable estoppel and unjust enrichment are available. The Supreme Court reversed the summary judgment ruling in favor of Dr. Lord and remanded SEL's equitable claims against Dr. Lord to the Chancery Court for further proceedings consistent with the opinion. The Supreme Court affirmed the grant of summary judgment as to the hospital and the counties since SEL had no equitable claims against them.

Note 1: To be clear, no one seriously argued that the verbal contract for the purchase and sale of the land and building was enforceable. SEL gave up this argument after initially asserting it. This case is important because it changes the law regarding available remedies for the plaintiff seeking to enforce a contract to purchase land and whose contract is void because of the statute of frauds. The editor's reading of this case is that any equitable remedy other than specific performance is now available to such a plaintiff.

Note 2: The Supreme Court's decision has not yet been released for publication.

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