NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

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2024-2025 Officers

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COLUMBUS AIR FORCE BASE ADDED TO CFIUS REVIEW

On November 7, 2024, the Committee on Foreign Investment in the United States (CFIUS) issued a Final Rule expanding its authority to review transactions by foreign persons in real estate in the United States to add 59 military and national security facilities to those already listed in 31 CFR 802 Appendix A. The Final Rule added the Columbus Air Force Base in Columbus, Mississippi to Part 2 of Appendix A. This means that transactions with foreign persons involving land located within 100 miles of the Columbus Air Force Base are reviewable by CFIUS.

CFIUS has the authority to impose conditions on and even block sales or leases of land if CFIUS determines that such sales or leases may jeopardize national security. Residential real estate is an exception. The regulations outline a procedure for getting a determination from CFIUS prior to the sale or lease that CFIUS will not challenge the transaction.

The existing locations in Mississippi subject to CFIUS review are the Stennis Space Center in Hancock County, Camp Shelby south of Hattiesburg, and the Meridian Naval Air Station. The Stennis Space Center is in Part 1 of Appendix A, which means that transactions within one mile of the Space Center are reviewable. Camp Shelby and the Meridian Air Naval

Station are in Part 2 of Appendix A, so transactions within 100 miles of those installations remain reviewable by CFIUS.

The new Rule became effective on December 9, 2024, and is not retroactive.

MISSISSIPPI CASES

What Costs Can a Tax Sale Purchaser Recover if the Tax Sale is Voided?

Thoden v. Hallford, 391 So. 3d 1137 (Miss. 2024). Hallford owned land in Jackson County. She failed to pay the ad valorem taxes assessed to the land for 2014, and the land was sold at the tax sale in August 2015. Thoden purchased the land at the tax sale for $500. The Chancery Clerk charged Thoden $133.76 for issuing a tax deed. Thoden made improvements to the land. He also paid the ad valorem taxes assessed to the land for 2015-18 in the total amount of $2,231.06.

In 2018 Hallford filed a complaint in the Jackson County Chancery Court to set aside the tax sale for lack of proper notice. The Chancery Court held that the Chancery Clerk failed to give Hallford the requisite notice of the tax sale and voided the sale. The Chancery Court held that under Section 27-43-3 of the Mississippi Code, Thoden was entitled to a refund of the amount for which he purchased the land, $500, with interest at the rate of 1 ½% per month of $350, or $845. On appeal by Thoden, the Mississippi Supreme Court affirmed the Chancery Court's holding that the tax sale was void. Thoden argued that he was entitled to additional damages for the taxes that he had paid and the improvements that he had made, and that the Chancery Court had not given him an opportunity to present proof of his damages. The Supreme Court remanded the case to the Chancery Court for a determination of the amount of Thoden's damages. *Thoden v. Hallford*, 310 So. 3d 1156 (Miss. 2021).

On remand, Thoden claimed that he was entitled to (a) statutory damages under Section 27-43-3 for the amount for which he purchased the property plus interest at the statutory rate of 1 ½ %, (b) reimbursement of the $133.76 fee charged by the Chancery Clerk for the tax deed plus interest at the statutory rate, (c) reimbursement for the ad valorem taxes that he paid; and (d) reimbursement for the improvements that he made to the property. The Chancery Court found that Thoden was not entitled to reimbursement for taxes paid or improvements made to the property. During the hearing, Hallford introduced evidence showing that Thoden had rented the land to another person for six months at $750 per month for a total of $4500. The Chancery Court held that Thoden was entitled to statutory damages of $980 ($500 paid at the tax sale plus interest of $7.50/month for 64 months or $480.). But the Chancery Court also found that Thoden was unjustly enriched by the rents that he collected and that Hallford was entitled to recover from Thoden the amount of the rents. The Chancery Court held that Hallford was entitled to recover from Thoden a total of $3,520, being the $4,500 rent collected by Thoden less the $980 statutory damages.

On appeal by Thoden, the Mississippi Supreme Court, in an opinion by Justice Ishee, affirmed in part and reversed and rendered in part. The Supreme Court affirmed the award of the

statutory damages but found that the relevant number of months of interest was 79 rather than 64, so that the amount of interest to which Thoden was entitled was $592.50 (7.50/month for 79 months). Thoden was entitled to recover the $133.76 that the Chancery Clerk charged for the tax deed, but not interest on this amount. The Supreme Court affirmed the Chancery Court's finding that Thoden was not entitled to reimbursement for the improvements that he made to the land. On the ad valorem taxes, Justice Ishee wrote for the Supreme Court that while no statutory authority existed for Thoden to be reimbursed for the taxes he paid, Hallford would be unjustly enriched if she was allowed to have her taxes paid for free. The Supreme Court therefore found that Thoden was entitled to reimbursement from Hallford of the taxes that he paid on the land. Finally, the Supreme Court affirmed the Chancery Court's finding that Hallford was entitled to recover the $4,500 that Thoden collected as rent from the land. So at the end of the day, Thoden owed Hallford $1,092.50, being the $4,500 that Thoden had collected as rent, less the following amounts that Thoden was entitled to recover from Hallford: $1,042.68 for Thoden's statutory damages, being the $500 purchase price and interest of $592.50; $133.76 for the clerk's charge for the tax deed; and the $2,231.06 that Thoden paid for the ad valorem taxes.

Note 1: This case is important because the statutes and cases give scant guidance about what amounts the tax sale purchaser is entitled to when a tax sale is set aside. This case is full of gap-fillers.

Note 2: This case appears to be the first time that a court in Mississippi has held that a tax sale purchaser has to pay rents to the owner if the sale is set aside.

Note 3: This case also appears to be the first time that a court in Mississippi has held that that the tax sale purchaser is entitled to recover the taxes that he paid after the sale is set aside. This holding surprised the editor; the most common phrase in cases regarding tax sales is "*caveat emptor*." Since the holding that the tax sale purchaser is entitled to recover taxes paid is based on the equitable doctrine of unjust enrichment, isn't it possible that future courts might find that a tax sale purchaser is not entitled to reimbursement because of different facts?

Note 4: The Supreme Court denied Thoden's claim for reimbursement of improvement based on the doctrine of *caveat emptor* in tax sales. The Court acknowledged that applying *caveat emptor* to the claim for reimbursement of improvements might seem contradictory to the holding that Thoden was entitled to reimbursement for the taxes he paid. The Court explained that the difference was that Hallford had a legal duty to pay the taxes, but no legal duty to make improvements. If a tax sale purchaser makes improvements that are required to be made by law, would the tax sale purchaser be entitled to recover the cost of those improvements?

Note 5: Thoden argued that he was entitled to interest on the $113.76 that he paid to the Chancery Clerk for the tax deed under Section 27-45-3, which provides in relevant part that the tax sale purchaser shall be entitled to "interest on the amount paid by the purchaser at the rate of one and one-half percent (1 1-2%) per month, or any fractional part thereof, and all expenses of the sale and registration,…" The Supreme Court found that the Chancery Clerk's charge for the tax deed was an expense of the sale and registration of the tax deed that Thoden was entitled to recover. But the Supreme Court found that the fact that the word "interest" was tied directly to

the "amount paid", and the location of the commas, meant that Thoden was not entitled to interest on this expense.

Note 6: The reason for the change in the amount of interest on the purchase price is that when Hallford submitted findings of facts and conclusions of law to the Chancery Court, Hallford used the date of submission, December 6, 2021, as the end date for interest to run. The Chancery Court adopted this date in its final order. Thoden was entitled to interest through the date of the Chancery Court's final order, which was March 22, 2022, and the Supreme Court corrected the Chancery Court's calculation.

Parties' Agreement Determines Whether Affixed Equipment is Real or Personal Property

4-Way Electric Services, LLC v. Huntcole, LLC, 366 So. 3d 844 (Miss. 2023)(*en banc*). Huntcole, LLC ("Seller") operated a business of refurbishing electric transformers. Seller and 4-Way Electric Services, Inc. ("Purchaser"), entered into an Asset Purchase Agreement ("APA") in 2014 in which Seller agreed to sell to Purchaser all assets necessary to conduct Seller's businesses as presently conducted. Attached to the Agreement was a schedule of equipment that included all tangible assets used by Seller in its business, including a 20-ton overhead crane and other heavy equipment affixed to the real estate, which equipment was defined in the Asset Purchase Agreement as the Personal Property.

The assets that Purchaser was not purchasing from Seller were defined as Excluded Assets and included the land and building at which Seller operated the business and any "building improvements." Seller and Purchaser agreed that Seller would lease the real property to Purchaser contemporaneously with the sale of the Personal Property.

Three years after the closing, Purchaser began relocating the business to a different building. When Purchaser began moving equipment from the building, Seller objected on the grounds that the crane and other heavy equipment was affixed to the building and therefore was not sold by Seller to Purchaser. Purchaser responded that Seller had sold all of the equipment to Purchaser in 2014 pursuant to the terms of the APA. Seller filed a declaratory judgment action in the Leflore County Circuit Court asking the court to determine that the equipment at issue was building improvements and fixtures that had been excluded from the property sold to Purchaser, alleging conversion and breach of the lease, and seeking compensatory damages, punitive damages and attorneys' fees. Seller filed a motion for summary judgment. Purchaser filed a motion for summary judgment asserting that the APA made clear that the crane and other equipment affixed to the building were sold by Seller to Purchaser.

The Circuit Court granted the Seller's motion for summary judgment. The Circuit Court relied on the common law of real property and fixtures to find that the crane and other affixed equipment were "certainly building improvements, if not in fact fixtures." Since the Purchaser did not own the affixed equipment, the Circuit Court wrote, the Purchaser committed conversion when it removed the equipment from the building and awarded the seller damages.

On appeal, the Mississippi Supreme Court, in an *en banc* opinion by Chief Justice Randolph, reversed the Circuit Court on the issue of ownership of the affixed equipment. Justice Randolph

wrote that the APA specifically characterized the disputed equipment as personal property that was being sold by the Seller to the Purchaser. Since the equipment was owned by the Purchaser, Purchaser did not commit conversion by removing the equipment from the building. As a separate rationale for finding that the Purchaser could remove the affixed equipment, Justice Randolph relied on the doctrine of trade fixtures, which provides that when a lessee installs personal property that becomes affixed to the leased real property, such personal property is considered "trade fixtures" that the lessee can remove at the end of the term.

The Supreme Court affirmed the trial court's judgment that the Seller was entitled to some damages. Purchaser had breached its obligations under the lease to maintain and repair the leased premises by not repairing the damage to the building caused by the removal of the crane. The Supreme Court remanded the case for determination of the appropriate amount of damages for breach of the lease.

Note 1: The holding that the parties to a commercial contract can determine among themselves whether affixed equipment is real or personal property is not new. In most circumstances whether or not affixed personal property has become a part of the real estate is going to be a murky question based on intent, though a large overhead crane attached to the building seems like an extreme example. What is interesting to the editor is the practical problem presented when the purchaser seeks to separate the affixed personal property from the real estate. Unless the parties provide otherwise, the purchaser is going to be responsible for the cost of repairing the damage.

Note 2: The Supreme Court wrote that the treatment of the affixed equipment as real or personal property under the lease could not be used to prove whether the affixed equipment was part of the property sold under the APA, but then relied on the doctrine of trade fixtures, which the editor has always understood to be a leasing doctrine, to determine that the Purchaser had purchased the affixed equipment under the APA. Also, does the doctrine of trade fixtures fit when the lessee, like the Purchaser in this case, did not install the affixed equipment?

Note 3: It would be interesting to know whether the tax assessor assessed the affixed equipment as real or personal property. In the editor's experience, that might depend on whether the crane was part of the original construction of the building (most likely, given its size), in which case the equipment probably would have been treated as real property for ad valorem tax purposes, or added to the building later, in which case the tax assessor probably would have treated the equipment as personal property.

Note 4: When one is purchasing affixed property that the parties are characterizing as personal property including goods that have become affixed to the real estate, would it be prudent to get a deed to the property in addition to a bill of sale to cover all bases? Or would getting a deed raise the question about the validity of the parties' agreement that the affixed property is personal property?

Note 5: The Supreme Court's finding that the Purchaser owned the crane eviscerated the Seller's argument that the Purchaser committed conversion and was liable for compensatory damages for conversion. The Supreme Court then held that Purchaser was liable to the Seller for damages for breach of contract (the obligation to maintain and repair in the lease). Since the Purchaser owned

the crane and other affixed equipment, the Purchaser did not breach the lease by removing the equipment. But damaging the building and not repairing the damage did breach the Purchaser's obligations under the lease to maintain and repair the building. The difference between finding that the Purchaser breached the contract/lease and that the Purchaser committed a tort (conversion) is important because the measure of damages for breach of contract is different than the measure of damages for a tort. The measure of damages for conversion included the cost of replacing the affixed equipment. The measure of damages for breach of contract was the cost to repair the building, which the editor speculates is much less than the cost of replacing equipment removed by the Purchaser.

Landlord Cannot Bring Action for Trespass

Bridge Properties of Lafayette, LLC v. 1000 Jefferson, LLC, 366 So. 3d 930 (Miss. Ct. App. 2023). Bridge Properties owned land and a building located at 1002 Jefferson Avenue in Oxford and leased the property to BankFirst. Alger purchased adjacent land at 1000 Jefferson Avenue and commenced construction on its property. Pursuant to permission from a representative of BankFirst, a contractor for Alger went on the property at 1002 Jefferson Avenue for purposes related to the ongoing construction work on the 1000 Jefferson Avenue property. Bridge filed an action against Alger in the Chancery Court of Lafayette County alleging that Alger had committed trespass by entering the 1002 Jefferson Street property. The Chancery Court granted Alger's motion to dismiss the complaint on the grounds that an out of possession owner does not have standing to bring an action for trespass. On appeal by Bridge, the Court of Appeals, in a decision by Justice Carlton, affirmed. A lease operates as a demise or conveyance of the property for a specific period of time, no right of possession remains in the lessor, and the lessor therefore does not have standing to bring an action for trespass. The Court of Appeals held that Bridge was a "lessor out of possession" and did not have standing to bring the trespass action against Alger.

Note 1: The Court of Appeals made a distinction between a lessor out of possession and a lessor in possession. The editor wishes that the court had elaborated on this distinction. The Chancery Court noted that the lease agreement between Bridge and BankFirst contained restrictions on use and found that this restriction on use did not affect BankFirst's possession. Without more, a lease of land gives the lessee the right to exclusive possession of the land. But suppose that the lease was for a narrow use, like hunting, and or if the lease provided that the lessor has the right to continue to use the leased property for any uses not inconsistent with the lessee's permitted use. Would the lessor in this case be a lessor in possession who could bring a trespass action?

Note 2: A lessor out of possession can still bring an action against a trespasser who commits permanent damage to the lessor's reversionary estate. In this case, the Court of Appeals found that Bridge did not show evidence of permanent damage to its reversionary estate.

Note 3: At the Court of Appeals, Bridge argued that the lease to BankFirst was only for the building located on the land, and not the land surrounding the building, aka the curtilage. The Court of Appeals found that Bridge had not made this argument in the Chancery Court and therefore could not make it for the first time on appeal. The Court of Appeals also referenced testimony on behalf of Bridge that BankFirst had the exclusive right to use parking spaces on the property, which indicated that BankFirst had the right to use land other than the building.

Note 4: In *Matter of Will of Bray*, Miss. Supreme Court No. 2022-CT-00011-SCT (February 1, 2024), 2024 WL 436589, in addressing a Petition for Writ of Certiorari, the Mississippi Supreme Court wrote that the Court of Appeals in *Bridge* and other cases had continued to use "colorable interest" as a basis for determining standing after the Supreme Court had abandoned the "colorable interest" standard, and that the "colorable interest" standard should no longer be used. The editor does not think that the Court of Appeals' use of the "colorable interest" standard in *Bridge* was necessary to its holding in that case, or that the Supreme Court's opinion in *Bray* puts into question the doctrine that an out of possession owner does not have standing to bring an action for trespass. But read *Bray* before relying on *Bridge* and draw your own conclusions.