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UPDATE: THE AMENDED AND REENACTED DELINQUENT AND NONENTERED LAND STATUTES — THE TITLE EXAMINATION RAMIFICATIONS

Robert Louis Shuman[*]

I. INTRODUCTION

During the summer preceding my third year of law school and the fall semester of that year, at the suggestion and/or instigation of then-Professor, soon to be Dean, and now once-again Professor John W. Fisher, II, I performed the research for and prepared the preliminary draft of an article later entitled *The Amended and Reenacted Delinquent and Nonentered Land Statutes—The Title Examination Ramifications.*[1] I co-authored the article with my late grandfather, Robert Lemley Shuman, an icon among Monongalia County lawyers, who had then been practicing law in the real property arena for over half a century.

A lot has transpired in the thirteen years since the publication of that work. First, my grandfather did not actually live to see the work published; he passed away early into the second semester of my third year. Second, a significant amount of material jurisprudence has been handed down from those five

* I would like to expressly acknowledge the editorial assistance of Corey J. Powell, Esq., of Morgantown; Steven M. Prunty, Esq., of Morgantown; Richard E. Ford, Jr., Esq., of Lewisburg; Jonathan Nicol, Esq., of Charleston; H. Charles Carl, III, Esq., of Romney; and Professor John W. Fisher, II, Esq., in the preparation and discussion of this work.

1 Robert L. Shuman & Robert Louis Shuman, 98 W. VA. L. REV. 537 (1996).

elevated seats behind the bench in Charleston in relation to "tax-sale" cases.[2] This work is an attempt to examine the more important of those decisions, in chronological order based upon their issuance, as well as two recent federal decisions, and shed light on how they impact the practitioner in the course of examining, certifying, and/or insuring title to real property. In addition, this work also explores, at its conclusion, some practical considerations for practitioners challenging tax-sale deeds.

II. DECISIONS RELEVANT TO WEST VIRGINIA

A. Rockland Realty Corp. v. Lilly

In 1997, the Supreme Court of Appeals of West Virginia issued a decision in a case styled *Rockland Realty Corp. v. Lilly*.[3] Rockland Realty Corporation ("Rockland") appealed a ruling by the circuit court holding West Virginia Code § 11A-3-58 to be constitutional.[4]

Rockland was the owner of a shopping center known as Bluefield Plaza in Mercer County, West Virginia.[5] In late 1989, after Rockland failed to pay its property taxes, the sheriff of Mercer County offered the tax lien encumbering the shopping center for sale at a sheriff's sale to pay the delinquent taxes for the 1988 tax year.[6] The tax lien was not purchased at the sheriff's sale by any private party, so the sheriff acquired the tax lien on behalf of the State of West Virginia.[7] The State "held" the tax lien until 1994.[8]

In 1994, subsequent to the legislature's substantial amendment and reworking of the statutes relating to the sale of land for nonpayment of taxes and non-entry on the tax rolls, the State Auditor "certified" the tax lien to the deputy commissioner of delinquent and nonentered lands of Mercer County, who offered the tax lien for sale at another public auction.[9] Again, there was no purchaser.[10] Subsequently, under the authority of West Virginia Code § 11A-3-48, the deputy commissioner sought out a private purchaser for the tax lien encumbering Rockland's property.[11] The deputy commissioner entered into an agree-

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2 "We use the term 'tax-sale' as shorthand for the entire process whereby a sheriff or the Auditor sells at auction a property on which no one has paid the real property taxes." Mingo County Redevelopment Auth. v. Green, 534 S.E.2d 40, 42 n.1 (W. Va. 2000).

3 487 S.E.2d 332 (W. Va. 1997).

4 *Id.* at 333.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* at 333-34.

9 *Id.*

10 *Id.*

11 *Id.*

ment with a private party whereby the deputy commissioner agreed that if the applicable tax lien was not redeemed by Rockland then the deputy commissioner would sell and grant the property to the purchaser for $100,000.00.[12] A notice advising Rockland of its right of redemption was then mailed to and received by Rockland.[13] The notice indicated that payment of the amount of $602,167.63 was required to redeem the delinquent taxes and cover associated costs and interest.[14]

Rockland filed suit to enjoin the sale by the deputy commissioner.[15] The circuit court issued a temporary injunction prohibiting the sale with the condition that the injunction would automatically expire on December 15, 1994, unless Rockland paid the redemption amount to the clerk of the circuit court as a bond prior to such date.[16] Rockland failed to make the payment, the injunction terminated, and the deputy commissioner delivered a deed transferring the shopping center to the purchaser.[17]

On appeal, Rockland asserted that West Virginia Code § 11A-3-58 was unconstitutional on the basis that it mandated that moneys paid to redeem delinquent property taxes were to be paid to the purchaser of the tax lien, and not to the State for use in the general school fund.[18] At that time, West Virginia Code § 11A-3-58 stated:

> (a) Where the land has been redeemed . . . and the deputy commissioner has delivered the redemption money to the sheriff . . . the sheriff shall, upon request made of him by the purchaser . . . and upon delivery to the sheriff of the purchaser's receipt for the sale, *pay to the purchaser* . . . the following amounts: (1) . . . (B) the amount of taxes, interest and charges due on the date of the sale, plus the interest at the rate of one percent per month from the date of sale to the date of redemption . . . .[19]

Rockland argued that since the purchaser had only paid $100,000.00 for the tax lien it purchased, the above-referenced statute mandated that the purchaser would receive a windfall of $502,167.63 that should be deposited into the "school fund."[20] In addressing this argument, the court began by pointing out

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12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.* (quoting W. VA. CODE § 11A-3-58 (1994)).

20 *Id.* at 335.

what it noted as "two critical facts."[21] The first was that West Virginia Code § 11A-3-58 was "substantially revised by the Legislature in 1995."[22] The second was that Rockland never attempted to avail itself of the redemption procedures it was challenging.[23] That is, Rockland, in the six years after it failed to pay its 1988 taxes, did not attempt to eliminate the delinquency.[24] Furthermore, the court also noted that even after Rockland challenged the constitutionality of the statute, it still failed, as required by the circuit court, to post a bond in the amount of the delinquency.[25] The court went through a brief discussion of the precedent relative to addressing the constitutionality of statutes and then concluded its discussion by determining that Rockland's issue of constitutionality was a moot question in that Rockland was seeking to invalidate a statute of which it had not attempted to avail itself.[26]

For the purposes of this Article, the significance of *Rockland* is that the court did not even consider *sua sponte* whether the use of a private sale by the deputy commissioner was a constitutionally valid mechanism. In footnote two of the decision, the court noted that Rockland made "repeated allusions" as to the impropriety of a privately negotiated sale versus a public auction, especially one where the negotiated price was more than half a million dollars less than the outstanding tax delinquency.[27] In addressing such "repeated allusions," the court simply acknowledged an interpretation of the Attorney General as to the statute's intent: "the statute commendably allows delinquent properties to be placed into the hands of responsible taxpayers, rather than languish on the tax rolls."[28] However, in the following footnote, the court also expressly acknowledged that Rockland had not challenged the statute, West Virginia Code § 11A-3-48, authorizing the deputy commissioner to effect a private disposition.[29] As a result, if anything useful can be gleaned by a practitioner from *Rockland*, it is that the efficacy of challenging a private sale of a tax lien by a deputy commissioner has not been completely foreclosed by the court and a title examiner should conspicuously disclose such fact to any prospective purchaser he or she might represent.[30]

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21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* at 335-36.

27 *Id.* at 335 n.2.

28 *Id.*

29 *Id.* at n.3.

30 West Virginia Code § 11A-3-48 (2000) provides as follows:

> If any of the lands which have been offered for sale at the public auction provided in section forty-five of this article shall remain unsold following such auction, or if the auditor refuses to approve the sale pursuant to section fifty-one of this article, the deputy commissioner may sell such lands at any time

B. Rollyson v. Jordan

Next, the court rendered an opinion in a case styled *Rollyson v. Jordan*.[31] The appellants, Jack L. Sears, Julia Ann Chapman, and Charlotte Jo Sears ("Sears Heirs"), appealed (a) an order of the circuit court which granted Robert Rollyson ("Rollyson") mandamus relief, and (b) a subsequent order which denied the Sears Heirs' motion to alter or amend the circuit court's earlier order.[32]

Rollyson purchased a tax lien encumbering certain property at a tax-sale held by the Braxton County Sheriff.[33] The tax lien had been offered for sale as a result of the nonpayment of real property taxes by the property's owner, Nix Mining Company ("Nix").[34] Following his purchase, Rollyson filed a notice list with the clerk as required by the provisions of West Virginia Code § 11A-3-19(a)(1). The list identified those parties who were entitled to receive notice of their right to redeem the tax lien before the issuance of a tax deed to Rollyson.[35] Rollyson reported to the clerk that the only party entitled to notice of its right to redeem was Nix.[36] After the notice to Nix was returned as not forwardable, the clerk requested that Rollyson notify Nix of its right to redeem by publication.[37] As a result, Rollyson caused a notice advising Nix of its right to redeem to be published in two local newspapers.[38]

Nix failed to redeem the tax lien within the appropriate timeframe.[39] However, on March 31, 1997, the final day of the redemption period, Rollyson's counsel discovered that additional parties also possessed an interest in the property.[40] Carl Sears and Irene Sears had held a promissory note secured by a deed of trust encumbering the property.[41] As a result of various dispositions, the holders of the note, or at least purported holders of the note, at the time of Rollyson's discovery were Irene Sears, who held at least a one-half (1/2) interest in

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> subsequent to such auction, without any further public auction or additional advertising of such land, to any party willing to purchase such property. The price of such property shall be as agreed upon by the deputy commissioner and purchaser, subject to approval by the auditor as provided in section fifty-one of this article.

31 518 S.E.2d 372 (W. Va. 1999).

32 *Id.* at 374.

33 *Id.* at 375.

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

the note, and the Sears Heirs.[42] Rollyson's counsel notified the clerk of such discovery and the existence of the lienholders and requested guidance as to how to proceed given the prior lack of notice to the lienholders of their right to redeem.[43]

The clerk advised Rollyson to institute a mandamus action to obtain the preparation, execution, and filing of a tax deed in relation to the property.[44] Although Rollyson proposed providing the lienholders with notice of their right to redeem, the clerk refused to issue any additional notices.[45] As a result, Rollyson contacted Irene Sears and notified her of his tax lien purchase.[46] Subsequently, Irene Sears assigned her one-half (1/2) interest in the note to Rollyson.[47]

The Sears Heirs, however, once notified of their right to redeem by Rollyson's wife, refused to relinquish their purported one-half (1/2) interest in the note.[48] Furthermore, in late April or early May 1997, the Sears Heirs even attempted to redeem the tax lien for the amount of the delinquent property taxes.[49] However, the clerk refused to accept their proffered redemption.[50]

In August 1997, Rollyson instituted a mandamus action requesting the circuit court to compel the clerk to execute a tax deed identifying him as the new owner of the property.[51] The Sears Heirs opposed the action.[52] The circuit court found, in part, that Rollyson had substantially complied with the notice provisions of West Virginia Code § 11A-3-19(a)(1); that the Sears Heirs, by virtue of their status as lienholders, were not entitled to the ownership of the property, and that Rollyson should be permitted to pay the balance due and owing on the note held by the Sears Heirs.[53] The Sears Heirs subsequently moved to alter or amend the order of the circuit court and the circuit court denied their motion.[54]

In analyzing the appeal and discussing its rationale, the West Virginia Supreme Court of Appeals first attempted to determine whether the Sears Heirs should have been afforded an opportunity to redeem the tax lien.[55] The court

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42 *Id.* at 375-76.

43 *Id.* at 376.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

noted that West Virginia Code § 11A-3-19 requires a party who has purchased a tax lien at a tax-sale to complete certain prerequisites before he or she may obtain a deed to such property.[56] Among these requirements is the preparation of a list of those to be served with notice of their right to redeem.[57] The court stated that there was some difficulty, "however, in discerning precisely who is entitled to this 'notice to redeem[,]'" and that a "survey of both this statutory provision and the other sections comprising this body of law, concerning the 'Sale of Tax Liens and Nonentered, Escheated and Waste and Unappropriated Lands,' fails to reveal a precise designation of the intended recipients of such notice."[58] After looking to West Virginia Code § 11A-3-23(a) for guidance, the court stated that

> Impliedly, then, those persons who have a right to redeem property which has been sold at a tax sale must be the same individuals who are entitled to receive notice to redeem in connection with the purchaser's application for a tax deed, as contemplated by W. Va. Code § 11A-3-19(a)(1). Were this not the case, an individual's right to redeem, without the statutory notice designed to safeguard such right, would be virtually meaningless and illusory. Accordingly, we hold that the persons entitled to notice to redeem in conjunction with a purchaser's application for a tax deed, pursuant to W. Va. Code § 11A-3-19(a)(1), are those persons who are permitted to redeem the real property subject to a tax lien or liens, as contemplated by W. Va. Code § 11A-3-23(a), which persons include 'the owner' of such property and 'any other person who was entitled to pay the taxes' thereon.[59]

The court then went through a rather protracted analysis that focused on a provision of the deed of trust encumbering the property that afforded the secured party thereunder the right to pay and redeem delinquent taxes.[60] Based on this provision in the deed of trust, and presumably only because of this express provision, the court concluded that the Sears Heirs, because they were parties who were entitled to pay the taxes, in reference to the applicable provision of West Virginia Code § 11A-3-23(a), were likewise parties entitled to notice of their right to redeem.[61]

While I concur with the conclusion, I do not agree with the avenue traveled to get there. The seminal case in modern tax-sale jurisprudence is the deci-

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56 *Id.* at 378.

57 *Id.*; W. VA. CODE § 11A-3-19(a)(2) (1998).

58 *Rollyson*, 518 S.E.2d at 378 (internal citations omitted).

59 *Id.* at 378-79 (internal citations omitted).

60 *Id.* at 379.

61 *Id.* at 380.

sion rendered in *Lilly v. Duke*.[62] In *Lilly*, the very issue confronted by the court was "whether a property owner or a mortgagee may be deprived of his property interest without adequate notice prior to the sale of property at a sheriff's sale for failure to pay taxes."[63] While the focus and facts in *Lilly* were different from those in *Rollyson*, and while *Lilly* was decided before and was actually the impetus behind the 1994 amendment and reenactment of the tax-sale scheme, *Lilly* clearly and definitively stands for the proposition that a lienholder, especially a secured party under a deed of trust, is a party entitled to notice in just those types of circumstances involved in *Rollyson*. In fact, *Lilly* focused on whether a secured party under a deed of trust was entitled to notice prior to disposition of a tax lien at a sheriff's sale, as opposed to whether such a secured party is entitled to notice at the final stages of the tax-sale process, where the right to redeem the tax lien will be forfeited and the property effectively foreclosed upon by enforcement of the tax lien.[64] In analyzing the facts and due process issues in *Lilly*, the court stated as follows:

> Two conclusions may be drawn from *Mennonite* and *Pope*. First, as with the mortgagee in *Mennonite*, the beneficiary of a deed of trust enjoys a protectable interest in the property subject to the trust. We have recognized the substantial property interests involved in a deed of trust—the trustee holding legal title for the beneficiary and the grantor holding an equitable title.
>
> Second, these cases prescribe certain constitutional due process requirements for notice of a tax sale of real property. Where a party having an interest in the property can reasonably be identified from public records or otherwise, due process requires that such party be provided notice by mail or other means as certain to ensure actual notice . . . .[65]

As a result, *Lilly* had already decided the question of whether the Sears Heirs were entitled to notice to redeem. Furthermore, examining the deed of trust itself, for the purpose of determining whether the secured party expressly reserved or retained the right to pay delinquent taxes and/or redeem the same, was a severely flawed point of focus in determining whether the secured party has the right to pay the taxes associated with its security. Generally speaking, the cases, state and federal, that address the issue of whether a party is entitled to notice, whether the notice is a preliminary notice of the potential disposition of the tax lien or a subsequent notice dealing with the forfeiture or foreclosure

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62 376 S.E.2d 122 (W. Va. 1988).

63 *Id.* at 124.

64 *Id.*

65 *Id.* at 125 (internal citations omitted).

of the property itself, approach the notice issue from the standpoint that an interest in the property encumbered by the tax lien, regardless of the nature, whether it be an "ownership" or equity interest or a lien or security interest, entitles its holder to notice. This standpoint presumes, and inherently implies, that the holder of an interest in the subject property has coupled with the interest the right to protect his investment and/or security from forfeiture. Furthermore, West Virginia Code § 11A-3-2(b) acknowledges this in the context of lienholders when it requires the sheriff to send a pre-sheriff's sale notice to each lienholder that has filed a statement referenced in West Virginia Code § 11A-3-3.[66]

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[66] West Virginia Code § 11A-3-2(b) (1995) provides as follows:

> (b) In addition to such publication, no less than thirty days prior to the sale, the sheriff shall send a notice of the delinquency and the date of sale by certified mail: (1) To the last known address of each person listed in the land books whose taxes are delinquent; (2) to each person having a lien on real property upon which the taxes are due as disclosed by a statement filed with the sheriff pursuant to the provisions of section three of this article; (3) to each other person with an interest in the property or with a fiduciary relationship to a person with an interest in the property who has in writing delivered to the sheriff on a form prescribed by the Tax Commissioner a request for such notice of delinquency; and (4) in the case of property which includes a mineral interest but does not include an interest in the surface other than an interest for the purpose of developing the minerals, to each person who has in writing delivered to the sheriff, on a form prescribed by the Tax Commissioner, a request for such notice which identifies the person as an owner of an interest in the surface of real property that is included in the boundaries of such property: *Provided*, That in a case where one owner owns more than one parcel of real property upon which taxes are delinquent, the sheriff may, at his or her option, mail separate notices to the owner and each lienholder for each parcel or may prepare and mail to the owner and each lienholder a single notice which pertains to all such delinquent parcels. If the sheriff elects to mail only one notice, that notice shall set forth a legally sufficient description of all parcels of property on which taxes are delinquent. In no event shall failure to receive the mailed notice by the landowner or lienholder affect the validity of the title of the property conveyed if it is conveyed pursuant to section twenty-seven or fifty-nine of this article.

West Virginia Code § 11A-3-3 (1995) provides as follows:

> (a) Any person claiming a lien against real property shall be deemed to have waived the right to notice provided by section two of this article unless he shall have filed a statement declaring such interest with the sheriff. Such statement shall be filed upon creation of the lien and upon release of said lien and upon any change of the lienholder's postal address since the original filing of such statement.
>
> Such statement shall be sufficient if it is filed at the time the document creating the lien is filed and when said lien is released on a form and in a manner to be prescribed from time to time by the tax commissioner, which form shall include the name of the person charged with taxes for the real property; the tax map and parcel number of the property; the assessor's account number of the property; a description of the interest claimed; and the address to which notice is to be sent: Provided, That it shall be sufficient for purposes of this section if the information required by this section is provided on a sales listing form

In addition, such an analysis is conspicuously absent from other decisions involving the rights of lienholders to notice.[67] Therefore, the *Rollyson* analysis is off-base to the extent that it appears to gear a security interest holder's right to pay or redeem taxes associated with its security to the express retention or reservation of such right in the deed of trust or mortgage.

I also take issue with another aspect of *Rollyson*. In assessing the case, the court noted that

> Rollyson ha[d] effectively become bound by the terms of the deed of trust note as the sale of property subject to a tax lien does not, automatically, relieve the property of its other debt(s) since the purchaser can acquire only the same character of title as that held by those individuals who were entitled to redeem the property. *Thus, when property subject to a deed of trust is sold for the recoupment of delinquent taxes, the property continues to retain its posture as security for the deed of trust note.* Therefore, when Rollyson purchased the subject property at the sheriff's sale, he purchased indirectly from the property's prior owner, Nix, and thus stepped into Nix's shoes for the purpose of removing the property's tax encumbrance. However, the 65.25 acre tract continues to be encumbered by the deed of trust and to provide security for the deed of trust note in which the Sears Heirs claim a one-half interest.[68]

It is the second sentence of such statement that is challenging, in that it is set forth as simple, axiomatic black-letter law.[69] In reaching this conclusion,

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> prescribed in section six, article twenty-two, chapter eleven of this code and filed with the clerk of the county commission at the time of the filing of the document. The statement may be amended at any time by the person claiming the lien, upon such amended form and in such manner as may be prescribed by the tax commissioner: Provided, however, That in counties with a population greater than two hundred thousand any person claiming liens against more than fifty parcels of real estate may file such statement electronically in a similar format as before described designed by the tax commissioner.
>
> (b) At least once a year prior to the first day of July, the sheriff shall publish a notice that any person claiming a lien against taxable real property must file the statement required by this section or such person will be deemed to have waived any right to notice provided by the preceding section. The notice shall be published as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county in which such land is located.

[67] *See Lilly*, 376 S.E.2d 122; Citizens Nat'l Bank of St. Albans v. Dunnaway, 400 S.E.2d 888 (W. Va. 1990).

[68] *Rollyson*, 518 S.E.2d at 379-80 (emphasis added) (internal citations omitted).

[69] This concerning statement or recitation of the law is not summarized in any of the syllabus points of *Rollyson*.

the court cited and quoted, among others, two precedents. First, the court cited *Bennett v. Neff*[70] for the proposition that "[w]hen the purchaser of any real estate sold at a tax sale obtains a deed for such real estate from the clerk of the county court he acquires all the right, title and interest therein that were, at the time of the execution and delivery of the deed, vested in or held by **any person** who was entitled to redeem."[71] Second, the court cited Syllabus Point 2 of *Summers v. Kanawha County*[72] for the following proposition:

> If at the time of [a tax-] sale the land sold be under a mortgage or deed of trust, or if there be any other lien or incumbrance thereon, and such mortgagee, trustee, *cestui que trust*, lienor or incumbrancer shall fail to redeem the same within the time prescribed by law, then all the right, title and interest of such mortgagee, trustee, *cestui que trust*, lienor or incumbrancer, shall pass to and be vested in the purchaser at such tax-sale, and his title to the premises shall in no way be affected or impaired by such mortgage, deed of trust, lien or incumbrance.[73]

Both precedents are actually codified in West Virginia Code § 11A-3-30, which provides, in applicable part, as follows:

> (a) Whenever the purchaser of any tax lien on any real estate sold at a tax sale, his heirs or assigns shall have obtained a deed for such real estate from the clerk of the county commission or from a commissioner appointed to make the deed, he or they shall thereby acquire all such right, title and interest, in and to the real estate, as was, at the time of the execution and delivery of the deed, vested in or held by *any person* who was entitled to redeem, unless such person is one who, being required by law to have his interest separately assessed and taxed, has done so and has paid all the taxes due thereon, or unless the rights of such person are expressly saved by the provisions of section six of this article or section two, three, four or six, article four of this chapter.
>
> The tax deed shall be conclusive evidence of the acquisition of such title. The title so acquired shall relate back to July first of

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70 42 S.E.2d 793 (W. Va. 1947).

71 *Rollyson*, 518 S.E.2d at 379 (citing Bennett v. Neff, 42 S.E.2d 793, 805 (W. Va. 1947)) (emphasis added).

72 26 W. Va. 159 (1885).

73 *Rollyson*, 518 S.E.2d at 381 (citing Syl. Pt. 2, *Summers*, 26 W. Va. 159).

> the year in which the taxes, for nonpayment of which the tax lien on the real estate was sold, were assessed. [74]

By inserting the above language in the decision, the court ventured down a path that need not have been traveled and that it failed to follow to its conclusion. It is submitted that if a secured party under a deed of trust is a party entitled to redeem the tax lien sold at the tax-sale and the statute clearly states that the purchaser acquires "all such right, title and interest, in and to the real estate, as was, at the time of the execution and delivery of the deed, vested in or held by *any person who was entitled to redeem*,"[75] then, the purchaser of the tax lien, assuming all applicable notices were provided, does not acquire the property by way of a deed from the county clerk subject to the lien of a deed of trust encumbering the property, but free and clear of the same as a result of not only acquiring the "owner's" interest but also the lienholder's interest by virtue of such statute. Therefore, the *Rollyson* court, since it commenced down the path to discuss the topic, which was not really relevant to the discussion, should have taken the discussion to its conclusion and noted that had the Sears Heirs received notice of their right to redeem and not redeemed the tax lien, then their security interest in the property would have been foreclosed and passed on to Rollyson along with the interest of Nix.

Footnote 11 of *Rollyson* is also important. The clerk asserted that the Sears Heirs had waived their right to receive notice of their right to redeem because they failed to file with the sheriff a notice of their lienholder interest in the property as provided for in West Virginia Code § 11A-3-3.[76] While the court found no evidence on the record that the Sears Heirs had filed such a lienholder statement, it also found that the failure to file the same was not fatal to their case.[77] The court determined that the provisions of West Virginia Code § 11A-3-3 pertain to a very limited notice scheme designed to inform lienholders of impending sales of tax liens encumbering property which have become delinquent.[78] It also concluded in the footnote that there are no statutory provisions requiring a lienholder to file such a statement as a prerequisite to receiving notice of its redemption rights, and therefore, the failure to file a lienholder statement contemplated by West Virginia Code § 11A-3-3 has no bearing or prejudice on a lienholder's right to receive notice of its right to redeem.[79]

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74 W. VA. CODE § 11A-3-30 (1994) (emphasis added).

75 *Id.* (emphasis added).

76 *Rollyson*, 518 S.E.2d at 380 n.11.

77 *Id.*

78 *Id.*

79 *See also supra* note 66 (reprinting W. VA. CODE §§ 11A-3-2(b) & 11A-3-3).

C. Mingo County Redevelopment Authority v. Green

Mingo County Redevelopment Authority v. Green[80] resulted from a competition between the State Auditor and the Mingo County Redevelopment Authority ("Redevelopment Authority").[81] The case evolved from the collision of a condemnation action by the Redevelopment Authority and a tax-sale by the Auditor.[82]

Irene Green owned an interest in property located in Mingo County.[83] She died intestate, leaving several heirs, none of which paid the property taxes for several years.[84] The Redevelopment Authority decided to acquire the property for development as a housing project and filed a condemnation proceeding.[85] The Redevelopment Authority served its condemnation complaint on the Mingo County Sheriff.[86] However, it did not file a notice of lis pendens with the county clerk in relation to the condemnation action.[87]

During the course of the condemnation action, the tax lien encumbering the property was offered for sale at a sheriff's sale as a result of non-payment.[88] No one purchased the tax lien at the sheriff's sale, so the sheriff "certified" the property to the Auditor.[89] Subsequently, counsel for the Redevelopment Authority contacted an employee of the Auditor's office.[90] That same employee of the Auditor's office later faxed to counsel for the Redevelopment Authority a detailed description of the taxes and fees then owing on the property.[91] However, the taxes remained unpaid and delinquent and ultimately, the auditor's agent, the Mingo County deputy commissioner of delinquent and nonentered lands, sold the tax lien at auction to Vida Maynard.[92]

Subsequent to the deputy commissioner's sale and prior to the issuance and delivery of a deed, the Auditor's office notified the Green heirs of the sale and of the amount they would have to pay to redeem the taxes in order to prevent the deputy commissioner from delivering a deed to the purchaser.[93] Meanwhile, the circuit court entered an order approving the payment by the

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80 534 S.E.2d 40 (W. Va. 2000).

81 *Id.* at 42.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* at 43.

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

Redevelopment Authority of money into the court and granting the Redevelopment Authority "immediate possession" of the property.[94] The tax-sale process and the condemnation process collided when the deputy commissioner granted the property to Vida Maynard's assignee, Maggie Harmon.[95] Within the context of its already pending condemnation action, the Redevelopment Authority moved the circuit court to set aside the tax deed to Ms. Harmon.[96] The circuit court determined that the Auditor should have provided the Redevelopment Authority with notice of the tax-sale and issued an order granting the Redevelopment Authority's motion to set aside the tax deed, by which it voided the deed to Ms. Harmon and ordered any consideration paid at the tax sale to be returned to the purchaser.[97] The Auditor appealed.[98]

On appeal, the Redevelopment Authority claimed that both the Auditor and the sheriff had actual or constructive notice of the Redevelopment Authority's claim to the property and that as a result of this notice they should have halted the tax-sale process and allowed the Redevelopment Authority to condemn the property.[99]

In assessing the facts and applicable law, the court first recognized "that this area of the law ha[d] undergone significant change in the last several years, *with each change increasing the protections afforded the delinquent land owner*."[100] The court then turned to an analysis of a sheriff's duties under the tax-sale statutes.[101] After examining such duties, the court found it to be important and relevant that the Redevelopment Authority had not filed with the sheriff the statement or notice form contemplated by the provisions of West Virginia Code § 11A-3-2, which is the same notice form discussed above in relation to footnote eleven of *Rollyson*.[102] The court noted that even though the Redevelopment Authority had served the sheriff with a copy of the original complaint in the condemnation action, there was no evidence that the Redevelopment Authority had attempted to use the statutorily mandated method of providing notice to the sheriff of its asserted interest in the property.[103]

Because the sheriff's sale did not result in a disposition of the property into private hands, but rather, a "certification" to the Auditor, the court then

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94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* at 44.

98 *Id.*

99 *Id.* at 44-45.

100 *Id.* at 45 (emphasis added). As will be noted *infra*, this policy statement or recognition is a significant point that should be brought to the attention of circuit courts in prosecuting actions to invalidate or set aside tax-sale deeds.

101 *Id.* at 46-47.

102 *Supra* note 66, 77-79 and accompanying text.

103 *Green*, 534 S.E.2d at 47.

turned its focus on the Auditor's and deputy commissioner's roles in the tax-sale process.[104] The court noted that even after a deputy commissioner-sponsored tax-sale, the owner still has an opportunity to redeem the tax lien.[105] Citing West Virginia Code § 11A-3-52(a), the court noted that a purchaser at a tax-sale conducted by a deputy commissioner has an obligation to identify those parties entitled to redeem the tax lien before the purchaser can receive a deed relative to the property.[106] Then, similar to the function of a county clerk under the provisions of Part I of Article 3 of Chapter 11A, the deputy commissioner takes the purchaser's list and issues the requisite notices in relation to the right to redeem.[107]

Essentially, the court was revisiting at least part of the issue addressed in *Rollyson*.[108] That is, the court was asked to focus on whether the Redevelopment Authority had an interest in the property by virtue of its prosecution of the condemnation action and its procurement of an order granting it possession, which interest afforded the Redevelopment Authority the opportunity to redeem the tax lien, and if such an interest and right existed, had it been properly evidenced of record so that the tax lien purchaser was obligated to notify the deputy commissioner that the Redevelopment Authority was entitled to notice of its right to redeem.[109] In framing this query, the court first declared that the only way the Redevelopment Authority could successfully challenge the execution and delivery of the tax deed to the purchaser was to show that the Redevelopment Authority should have been identified on the list of those to be served with notice of their right to redeem prepared pursuant to West Virginia Code § 11A-3-52.[110] Next, it was noted that as of the time of the deputy commissioner's sale, the Redevelopment Authority had not placed constructive notice of its "standing" of record by filing a notice of lis pendens in the county clerk's office, nor had it served the Auditor or deputy commissioner with the complaint in the condemnation action.[111]

The court then turned to the Redevelopment Authority's argument that either the phone calls and letters exchanged between counsel for the Redevelopment Authority and an employee of the Auditor's office or the communications between the Redevelopment Authority and the State Department of Tax and Revenue were sufficient, in lieu of proper notice to the Auditor or proper recordation of a notice of lis pendens.[112] In responding to such argument, the

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104 *Id.* at 47-48.

105 *Id.* at 48.

106 *Id.* (quoting W. VA. CODE § 11A-3-52(a) (1995)).

107 *Id.* at 48-49 (citing W. VA. CODE § 11A-3-55 (1995)).

108 Rollyson v. Jordan, 518 S.E.2d 372 (W. Va. 1999).

109 Mingo County Redevelopment Auth. v. Green, 534 S.E.2d 40, 44-45 (W. Va. 2000).

110 *Id.* at 49.

111 *Id.*

112 *Id.*

court bluntly stated that such telephone calls and written communications could not

> equate . . . with filing proper notice in the courthouse or properly serving the Auditor with a complaint in the condemnation action. While this might have been, and probably was, sufficient to give the Authority actual knowledge of the pendency of the tax collection process, it was not sufficient to convert the Authority into an entity entitled to service of formal notice under the statute.[113]

The court then correctly went on to focus on what knowledge the tax lien purchaser at the deputy commissioner's sale would have of the Redevelopment Authority's interest in the property:

> A purchaser of the property at the Auditor's sale is required to assemble a list of parties who hold some interest in the property. The purchaser must make a diligent search of public records to identify interested parties. If we allow a call to the office to equal notice, then we place upon the Auditor (and presumably every sheriff) the near impossible burden of creating a duplicate system of recordation of property interests for "people who called in," which the purchaser would also have to search to find additional interested parties. This we will not do.[114]

Of important note in the above discussion is the fact that the court did not expand its notion of "public records" to include those beyond the records contained in the sheriff's tax office and the county clerk's office. That is, while there had been no notice of lis pendens filed in the county clerk's office, obviously the complaint in the condemnation action had been filed in the circuit clerk's office, a public office in the very same courthouse. By implication, the court rejected the circuit clerk's office as a repository of "public records" that a tax lien purchaser must search in the course of exercising due diligence.

The court also stated that it was not in agreement with the contention that the Redevelopment Authority's communications with the Department of Tax and Revenue constituted any sort of notice to the Auditor.[115] The court stated that

> [a]s the Department correctly informed counsel for the Redevelopment Authority, there is no direct or departmental connec-

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113 *Id.*

114 *Id.*

115 *Id.*

tion between the offices. We are not inclined to find that communicating with the Department of Tax and Revenue is the legal or practical equivalent of service of notice on the Auditor, or can in any way affect the Auditor's sale of the property.[116]

D. Lexington Land Co. v. Howell

Lexington Land Co. v. Howell[117] was the next decision in chronological order. It resulted from an appeal of an order granting a writ of mandamus.[118]

Lexington Land Company, LLC ("Lexington"), purchased several properties at a sale conducted by a deputy commissioner.[119] The deputy commissioner subsequently issued deeds relative to the properties and Lexington recorded the deeds.[120] Subsequent to recording the deeds, Lexington or its agent filed a so-called "Certificate of Attorney-at-Law" concerning several of the properties, notifying the deputy commissioner that each property was either "the subject of an erroneous assessment, or is otherwise nonexistent."[121] In response, the deputy commissioner and the State Auditor's office informed Lexington that a refund of the purchase money could not be obtained after the deeds had been issued.[122] Lexington then contacted the Kanawha County Sheriff's Office and inquired about obtaining a refund of the purchase money.[123] The sheriff responded that because a deed had already been recorded for each property, "it is the Sheriff's position that West Virginia Code § 11A-3-53 had no further application and there is nothing the Sheriff can do to resolve your problem."[124] As a result of these several denials of its request for a refund, Lexington filed a petition for a writ of mandamus against both the sheriff and the county clerk seeking reimbursement.[125] The sheriff and county clerk were subsequently dismissed from the action, and Lexington was granted leave to amend its petition.[126] Thereafter, Lexington filed an amended petition, naming only the deputy commissioner as a respondent.[127] In relation to the amended petition, the

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116 *Id.*

117 567 S.E.2d 654 (W. Va. 2002).

118 *Id.* at 656.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.* at 656-57.

126 *Id.* at 657.

127 *Id.*

circuit court entered an order granting the writ and directing the deputy commissioner to refund the purchase money.[128]

In framing its discussion, the court stated that the "cynosure of this case is the lower court's interpretation of the statute that governs when a party may receive a refund when it is discovered that property purchased at a Deputy Commissioner's sale is nonexistent or erroneously assessed."[129] The court then noted that at the time of the events in question, the operative statute, West Virginia Code § 11A-3-53 read as follows:

> If, after payment of the amount bid at a deputy commissioner's sale, the purchaser discovers that the property purchased at such sale is the subject of an erroneous assessment or is otherwise nonexistent, such purchaser shall submit the certificate of an attorney-at-law that the property is the subject of an erroneous assessment or is otherwise nonexistent. Upon receipt thereof, the deputy commissioner shall cause the moneys so paid to be refunded. Upon refund, the deputy commissioner shall inform the assessor of the erroneous assessment for the purpose of having the assessor correct said error.[130]

Lexington argued that this section contained no time limit for the submission of the "certificate" and that once a certificate was submitted the deputy commissioner had no option but to refund the purchase money.[131] The deputy commissioner countered that the Legislature had not defined the terms "erroneous assessment," "non-existent," or "certificate of attorney-at-law."[132] The deputy commissioner also contended that the Legislature had not expressly granted the deputy commissioner the authority to command the sheriff to refund the purchase money in such circumstances.[133] Furthermore, the deputy commissioner argued that inherent or implied in the statute was the actual intent of the Legislature to mean: "If, after payment of the amount bid *but before the deputy commissioner issues a deed* . . . such purchaser shall submit a certificate . . . ."[134]

In responding to these competing arguments, the court looked to the plain and simple language of the statute in effect at the time of the occurrences in play and the absence of a timeframe in that language.[135] It also looked to the fact that the Legislature reworked the statute in 2001 to read as follows:

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128 *Id.*

129 *Id.* at 659.

130 *Id.* (citing W. VA. CODE § 11A-3-53 (1994)).

131 *Id.*

132 *Id.*

133 *Id.*

134 *Id.* (emphasis in original).

135 *Id.* at 660.

> If, within forty-five days following the approval of the sale by the auditor, the purchaser discovers that the property purchased at the sale is nonexistent, the purchaser shall submit the abstract or certificate of an attorney-at-law that the property is nonexistent. Upon receipt of the abstract or certificate, the deputy commissioner shall cause the moneys so paid to be refunded. Upon refund of the amount bid at a deputy commissioner's sale, the deputy commissioner shall inform the assessor that the property does not exist for the purpose of having the assessor correct the error. For failure to meet this requirement, the purchaser shall lose all benefits of his purchase.[136]

With this look, the court stated that the "presence of this time limit in the new version throws in to sharp relief the *absence* of any time limit in the old version."[137] And, as a result, the court concurred with the circuit court and concluded that Lexington had "complied with the dictates of the statute at the time . . . [and] had a clear legal right to a refund . . . under the prior version of the statute."[138]

The primary function of including *Lexington* in this work is to draw attention to the fact that West Virginia Code § 11A-3-53 obligates the tax lien purchaser to examine title to the property at issue within forty-five (45) days following the approval of the sale of the tax lien by the Auditor and to notify either the deputy commissioner or Auditor, it is not clear which, within that timeframe of the property's "non-existence" by way of an abstract or certificate from its counsel.

E. Subcarrier Communications, Inc. v. Nield

Subcarrier Communications, Inc. v. Nield[139] was the next decision rendered by the court. In November, 1996, Subcarrier purchased property from Skyline Communications, Ltd., located in Preston County.[140] The deed evidencing the property transfer was placed of record and the appended sales listing form correctly identified Subcarrier's corporate address as 101 Eisenhower Parkway, Roseland, New Jersey.[141] In September, 1997, Subcarrier relocated its office to 139 White Oak Lane, Old Bridge, New Jersey, and by correspondence

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136 *Id.* (citing W. VA. CODE § 11A-3-53 (2001)).

137 *Id.* (emphasis in original).

138 *Id.* at 661.

139 624 S.E.2d 729 (W. Va. 2005).

140 *Id.* at 731.

141 *Id.*

dated November 25, 1997, notified the Preston County Clerk of its change of address and current phone number.[142]

In May 1998, when the 1997 property taxes for the property had not been paid, the Preston County Sheriff mailed a notice of delinquency to Subcarrier at its former, Roseland, New Jersey address.[143] A postal forwarding order was in effect at that time, so Subcarrier received the notice at its new address.[144] Subcarrier responded to the notice by tendering a check in the proper amount and enclosing a letter with the check advising the sheriff of Subcarrier's new address.[145] Additionally, the check tendered in payment of the delinquent taxes bore Subcarrier's new address.[146]

When property tax statements were issued for the 1998 tax year, the sheriff once again mailed Subcarrier's statement to its old Roseland, New Jersey address.[147] Then, in September 1998, the sheriff mailed a notice of delinquency due to Subcarrier's failure to pay the 1998 property taxes.[148] As before, the sheriff mailed the notice to Subcarrier's old Roseland, New Jersey address.[149] By this time, the postal forwarding order had expired and the notice of delinquency was returned to the sheriff's office with a stamp stating "[u]ndeliverable, [f]orwarding order expired."[150]

On November 15, 1999, a tax-sale was conducted by the Preston County Sheriff.[151] Patrick Nield, then the Sheriff of Mineral County ("Sheriff Nield"), purchased the tax lien encumbering the property at the sheriff's sale.[152] Thereafter, in late 2000, Sheriff Nield engaged counsel to research the title to the property and to assist Sheriff Nield in obtaining a tax deed as to the property.[153]

One of the requirements for obtaining a tax deed is to provide notice of the right to redeem pursuant to West Virginia Code §§ 11A-3-19, 11A-3-21, and 11A-3-22. To facilitate proper notice to Subcarrier, Sheriff Nield contacted the West Virginia Secretary of State's office to obtain Subcarrier's current mailing address.[154] The only address on record for Subcarrier was the old, Roseland,

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142 *Id.*

143 *Id.* at 731-32.

144 *Id.* at 732.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

New Jersey, address.[155] Therefore, Sheriff Nield submitted that address in the list of parties entitled to notice of their right to redeem and the county clerk mailed the notice of Subcarrier's redemption right to Subcarrier's old, Roseland, New Jersey address.[156] The notice of the right to redeem sent to Subcarrier was returned stamped "[u]ndeliverable, [f]orwarding order expired."[157] In January 2001, the notice of right to redeem was published pursuant to West Virginia Code § 11A-3-22.[158]

On or about April 12, 2001, Sheriff Nield assigned the tax lien he had purchased to himself, his son Ronald Nield, and John B. Lusk.[159] On the same date, the county clerk issued a tax deed for the property naming Sheriff Nield, Ronald Nield, and John B. Lusk as the grantees.[160] Also on that day, Sheriff Nield went to the property and observed a sign attached to a fence surrounding the telecommunications tower of Subcarrier located on the property which displayed Subcarrier's name, current address, and phone number.[161] Furthermore, the circuit court found that it was undisputed that the sign had been present on the property since at least August 1999.[162] Sheriff Nield then called Subcarrier and informed it that he possessed a tax deed to the property.[163]

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155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* In *Subcarrier,* it was argued at the circuit court level, among other arguments proffered by Subcarrier, that Sheriff Nield failed to exercise due diligence in ascertaining the address of Subcarrier by failing to view the property prior to the issuance of the tax deed. It was asserted that the duty to take a view is a well-established step in the due diligence process in West Virginia, and that Sheriff Nield knew that there was a telecommunications tower installed on the property many months prior to the issuance of the tax deed; however, he made no effort to investigate the tower or view the property until the day the tax deed was issued. On that day, Sheriff Nield discovered the sign on the fence surrounding the property displaying Subcarrier's contact information; a sign that had been in place at the entrance to the property since well before the sheriff's sale and the subsequent issuance of the tax deed. However, it was asserted that he failed or neglected to view and inspect the property prior to acquiring the same by the tax deed, and therefore, he and his assignees were deemed to have had constructive knowledge of Subcarrier's correct address because it would have been easily discoverable and ascertainable had he inspected the property. *Id.* at 731-33.

Syllabus Point 4 of *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, 60 S.E. 890 (W. Va. 1908), provides as follows: "[i]f one has knowledge or information of facts sufficient to put a prudent man on inquiry, as to the existence of some right or title in conflict with that which he is about to purchase, he is bound to prosecute the same, and to ascertain the extent of such prior right; and, if he wholly neglects to make inquiry, or, having begun it, fails to prosecute it in reasonable manner, the law will charge him with knowledge of all facts that such inquiry would have afforded." *Id.* at Syl. Pt. 4.

163 *Subcarrier*, 624 S.E.2d at 732.

In July 2001, Sheriff Nield, Ronald Nield, and John B. Lusk conveyed the property to LN & N Investments, LLC ("LN & N").[164] Sheriff Nield, Ronald Nield, and John B. Lusk were the sole principals of LN & N.[165] In September 2002, Subcarrier filed suit to set aside the tax deed.[166] In June 2003, Subcarrier filed a motion for summary judgment, claiming that there was no question of fact that the defendants had failed to exercise due diligence in obtaining Subcarrier's correct address for providing notice of the right to redeem, and further asserting that the tax deed was voidable as a matter of law pursuant to West Virginia Code Section 11A-3-6(a), which prohibits sheriffs from purchasing tax liens.[167] The circuit court denied the motion, finding that there was a genuine question of material fact outstanding on the issue of whether the defendants had exercised due diligence.[168] The circuit court additionally found that the issue of whether Sheriff Nield was prohibited from purchasing the tax lien was a question of first impression in West Virginia, and held in abeyance its ruling regarding whether the tax lien purchased by Sheriff Nield, and the tax deed issued pursuant thereto, were voidable.[169]

The case was further developed over the next year and Subcarrier renewed its motion for summary judgment in July 2004.[170] By an order entered in October 2004, the circuit court granted summary judgment in favor of Subcarrier based upon its finding that there was no question that the defendants had failed to make a reasonable inquiry that could have and would have revealed the correct mailing address for the notice requirements set forth in West Virginia Code § 11A-3-22.[171] The defendants appealed.[172]

On appeal, the court skirted the whole issue concerning the adequacy of the defendants' attempt to exercise due diligence in determining Subcarrier's correct address and notifying it of its right to redeem. It acknowledged the defendants' argument that

> the sole issue before this court is whether the circuit court erred in granting summary judgment in favor of Subcarrier based upon its determination that the defendants failed to make a reasonable inquiry to discover Subcarrier's correct mailing address

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164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.* at 733.

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

> for the notice requirements set forth in W. Va. Code § 11A-3-22.[173]

However, the court then stated that it "need not reach the issue raised by the defendants, . . . as we find that summary judgment was proper on grounds other than those asserted by the circuit court[,]" and affirmed summary judgment on a basis different from that utilized by the circuit court.[174]

The court framed the dispositive issue as "the question of whether Sheriff Nield was prohibited by W. Va. Code § 11A-3-6(a) from purchasing a tax lien or receiving a tax deed."[175] In answering what it declared to be the dispositive question, the court looked to West Virginia Code § 11A-3-6(a) which stated as follows:

> No sheriff, clerk of the county commission or circuit court, assessor, nor deputy of any of them, shall directly or indirectly become the purchaser, or be interested in the purchase, of any tax lien on any real estate at the tax sale or receive any tax deed conveying such real estate. Any such officer so purchasing shall forfeit one thousand dollars for each offense. The sale of any tax lien on any real estate, or the conveyance of such real estate by tax deed, to one of the officers named in this section shall be voidable, at the instance of any person having the right to redeem, until such real estate reaches the hands of a bona fide purchaser.[176]

The court next stated that it found nothing ambiguous about the statute's prohibition against sheriffs purchasing tax liens or receiving tax deeds.[177] "Under the plain language of W. Va. Code § 11A-3-6(a), '[n]o sheriff,' may purchase a tax lien or receive a tax deed."[178] Sheriff Nield and his compatriots argued that when West Virginia Code § 11A-3-6(a) was read in the context of the other sections comprising Article 3 of Chapter 11A, it was clear that the Legislature intended to prohibit from purchasing a tax lien or receiving a tax deed only the sheriff of the county in which the tax-sale was being conducted.[179] The court concurred that it was proper to consider West Virginia Code § 11A-3-6(a) in light of its surrounding statutes, but disagreed with the defendants' position that such a reading led to the conclusion that "[n]o sheriff," as used in West

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173 *Id.* at 734.

174 *Id.*

175 *Id.*

176 *Id.* (quoting W. VA. CODE § 11A-3-6(a) (1994)) (emphasis removed).

177 *Id.*

178 *Id.* at 735.

179 *Id.*

Virginia Code § 11A-3-6(a), was actually a reference to only the sheriff of a particular county, and proceeded to review the surrounding statutes relating to sheriffs in Article 3.[180] The conclusion from this review was that "W. Va. Code § 11A-3-6(a) is plain in stating that 'No sheriff, . . . shall directly or indirectly become the purchaser, or be interested in the purchase, of any tax lien on any real estate at the tax sale or receive any tax deed conveying such real estate.' There is nothing in this statute to limit its prohibition to only the sheriff conducting the tax sale."[181] As a result, the court held that Sheriff Nield was prohibited from being a purchaser of a tax lien or receiving a tax deed, regardless of the fact that he was the Sheriff of Mineral County and purchased a tax lien at a sale conducted by the Sheriff of Preston County.[182]

In anticipation of this holding, the defendants further asserted that because the property had been sold to LN & N, the deed was no longer voidable and that that LN & N was a bona fide purchaser.[183] This argument was supported by the last provision of West Virginia Code § 11A-3-6(a), which states:

> The sale of any tax lien on any real estate, or the conveyance of such real estate by tax deed, to one of the officers named in this section shall be voidable, at the instance of any person having the right to redeem, until such real estate reaches the hands of a bona fide purchaser.[184]

In response to this assertion, the court initially noted that the statute did not define the term bona fide purchaser.[185] As a result, the court looked to precedent to ascertain a definition.[186] The court noted that "'[a] bona fide purchaser is one who actually purchases in good faith.'"[187] It also recognized that it had previously described a bona fide purchaser as "'one who purchases for a valuable consideration, paid or parted with, without notice of any suspicious circumstances to put him upon inquiry.'"[188] Based on these definitions, the court stated that

> [i]n the instant case, we are presented with the unusual circumstance of a person who, by virtue of his position as sheriff, is prohibited by law from purchasing tax liens or receiving tax

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180 *Id.*

181 *Id.* at 737.

182 *Id.*

183 *Id.*

184 *Id.* (quoting W. VA. CODE § 11A-3-6(a)).

185 *Id.* at 737.

186 *Id.*

187 *Id.* (quoting Syl. Pt. 1, Kyger v. Depue, 6 W. Va. 288 (1873)).

188 *Id.* (quoting Stickley v. Thorn, 106 S.E. 240, 242 (W. Va. 1921)).

> deeds. The question we must answer is whether a corporation may hold such a deed as a bona fide purchaser when the sheriff is a principal of the corporation. Given the foregoing definitions of a bona fide purchaser, we find that such a corporation may not enjoy bona fide purchaser status. It would defy logic and justice to allow a sheriff to own, as the principal of a corporation, that which he is prohibited by law from owning. . . .
>
> Accordingly, we now hold that where a sheriff is among the principals of a corporation, the corporation cannot, for purposes of W. Va. Code § 11A-3-6(a), be deemed a bona fide purchaser of real estate that has been acquired by virtue of a tax deed.[189]

F. Cogar v. Lafferty

Cogar v. Lafferty[190] was the next case handed down by the Supreme Court of Appeals of West Virginia. Syllabus Points 4 and 5 of such decision sum up its precedential value quite well and obviate the need for a lengthy discussion.

Syllabus Point 4 provides that "[p]artners in a West Virginia general partnership as defined by W. Va. Code § 47B-1-1 (2003) are not coowners of partnership property and have no interest in partnership property that entitles them to separate notice of the right to redeem partnership property that has been sold for delinquent taxes."[191]

Syllabus Point 5 provides that "[w]hen property owned by a West Virginia general partnership is sold for delinquent taxes, it is only necessary to serve notice of the right to redeem as set forth in W. Va. Code § 11A-3-19 (1998) upon the partnership."[192]

G. Plemons v. Gale

Plemons v. Gale,[193] while not a state court decision, is probably the decision with the most significance since *Lilly v. Duke*.[194] It has spawned four (4) separate, published opinions and drawn some parameters around the focus of determining whether or not a tax lien purchaser exercised reasonable diligence in attempting to apprise an interested party of its right of redemption prior to the issuance of a tax deed.

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189 *Id.* at 737-38.

190 639 S.E.2d 835 (W. Va. 2006).

191 *Id.* at Syl. Pt. 4.

192 *Id.* at Syl. Pt. 5

193 298 F.Supp.2d 380 (S.D.W. Va. 2004), *vacated*, 396 F.3d 569, *remanded to* 382 F.Supp.2d 826 (S.D.W. Va. 2005).

194 376 S.E.2d 122 (W. Va. 1988); *see also supra* notes 62- 67 and accompanying text.

In its initial permutation, *Plemons v. Gale*[195] commenced in the United States District Court for the Southern District of West Virginia. In assessing the landscape, the court noted at the outset that

> [f]or the court to set aside the defendants' tax sale deed, the plaintiff must prove that the defendants failed to provide her with adequate notice of their intent to acquire the deed to the property. The procedure for giving notice set forth in the West Virginia Code requires, at bare minimum, that the notice given comport with due process.[196]

Plemons and her business partner, Jerry Lipscomb, purchased the property in 1999.[197] Plemons refinanced the debt secured by the property in February 2000.[198] After the refinancing, Plemons believed that the bank was paying the real estate taxes on the property through an escrow account.[199] However, she was mistaken, and neither she nor the bank paid the real estate taxes subsequent to the refinancing.[200] As a result, on November 13, 2000, the Kanawha County Sheriff sold the tax lien encumbering the property to Advantage 99 TD ("Advantage").[201]

After acquiring the tax lien, Advantage conducted a title examination that revealed the identities of parties having an interest in the property.[202] Advantage then tendered a report to the county clerk identifying those parties to be notified of their redemption right and requesting that the clerk prepare and serve notice on such parties.[203] The report prepared by Advantage named both Plemons and her business partner, Jerry Lipscomb, among others, as parties entitled to notice.[204] The report provided three (3) alternative addresses for Plemons.[205]

On January 16, 2002, the clerk issued a notice to redeem to the listed parties.[206] The notice stated that the tax lien encumbering the property had been sold to Advantage and that a deed would be issued to Advantage unless a party

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195 298 F.Supp.2d 380. The case was removed to federal court based on diversity jurisdiction pursuant to 28 U.S.C. § 1332 (2000).

196 *Id.* at 381.

197 *Id.* at 382.

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

redeemed the taxes.[207] The notices were sent to the parties at the addresses listed in Advantage's report by certified mail, return receipt requested.[208] Plemons had resided at the property from August 1999 to May 2001, and from July 2001 to June 2003, she had rented the property to tenants.[209] At the time the clerk mailed the notice to redeem in January 2002, Plemons lived at another address in Charleston.[210]

All notices sent to the address of 913 Echo Road were returned by the post office stamped "No Such Number."[211] The notices sent to Plemons and Lipscomb at 917 Echo Road, the property address, were returned by the post office stamped "Not Deliverable as Addressed Unable to Forward."[212] The tenants of the property did not receive or claim the notices sent to "Occupant" at 917 Echo Road, and the notices sent to "Occupant" were eventually returned by the post office.[213] The notice sent to Plemons at 928 Garden Street was returned stamped as unclaimed and refused.[214] None of the notices sent to Plemons, Lipscomb, or the occupants of the property resulted in a signed acknowledgment of receipt, and all of the notices were eventually returned unclaimed.[215] Of significance, especially in light of the results that yielded upon appeal to the Fourth Circuit Court of Appeals, is the fact that the decision omits any discussion of whether notice was sent to the bank holding the property as collateral.

After the notices were returned to the clerk, Advantage published the notice in the Charleston Gazette and the Charleston Daily Mail on two separate dates.[216] When no party redeemed the taxes constituting a lien on the property by the close of the redemption period, the clerk issued a deed to Advantage and Advantage recorded the deed.[217] On November 22, 2002, Advantage conveyed the property to Douglas Q. Gale by a quitclaim deed which he recorded.[218]

Plemons stated in an affidavit that she had not seen the published notice, and that she was not made aware of the published notice by any other party.[219] Further, Plemons stated that she first learned that the property had been sold for taxes in January 2003.[220] Throughout the notice period, Plemons had been listed

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207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.* at 382-83.

213 *Id.* at 383.

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.*

219 *Id.*

220 *Id.*

in the Kanawha-Putnam telephone directory under "Linda and Michael Buechler."[221] In addition, the property's tenants knew the whereabouts of Plemons.[222] Furthermore, Plemons had continued to make the regularly scheduled mortgage payments to the bank.[223]

In assessing Plemon's motion for summary judgment, the court focused on whether Advantage provided Plemons with adequate notice of her right to redeem by addressing the issue in three parts.[224] First, the court reviewed West Virginia's statutory scheme for tax-sales.[225] Second, the court discussed the requirements of the due process clause of the United States Constitution.[226] Third, the court applied the notice requirements of due process to the situation in which a mailed notice is returned unclaimed.[227]

In discussing West Virginia's statutory scheme for tax-sales, the court noted that the amended versions of Articles 3 and 4 of Chapter 11A of the West Virginia Code place the burden of providing constitutionally adequate notice on the tax lien purchaser.[228] In discussing the list in relation to a notice to redeem required by West Virginia Code § 11-3-19, the court noted that

> [t]he form list submitted by purchasers to the clerk for the purpose of complying with § 11A-3-19 requires purchasers to provide the addresses of the persons on the list. Thus, tax lien purchasers are responsible for identifying and locating parties holding an interest in the property and for ensuring that the clerk mails proper notice to those parties.[229]

The court then noted that West Virginia Code § 11A-3-22 "makes clear that tax lien purchasers must exercise due diligence in identifying and locating parties entitled to notice and that constructive notice is only permissible following the exercise of due diligence."[230]

In focusing on the application of the statutory scheme to the facts in play, the court stated that it was undisputed that Plemons had a right to receive notice of her right to redeem and that Plemons did not acquire actual knowledge that such notice was sent until after the conclusion of the redemption period.[231]

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221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.* at 384.

227 *Id.*

228 *Id.*

229 *Id.* at 385.

230 *Id.*

231 *Id.*

The court also commented that in order to prevail, Plemons had to satisfy the substantive standard for setting aside a tax-sale deed set forth in West Virginia Code § 11A-4-4(b), which requires a plaintiff to prove "'by clear and convincing evidence that [the tax lien purchaser] failed to exercise reasonably diligent efforts to provide notice' to the plaintiff of its intention to acquire the tax-sale deed."[232] With this basis, the court found that West Virginia Code § 11A-4-4(b) "allows a plaintiff to set aside a tax sale deed when she proves by clear and convincing evidence that the tax lien purchaser failed to give constitutionally adequate notice."[233] However, the court also expressly stated that,

> [i]n so finding, the court expresses no opinion as to the propriety of either placing the burden of proof on the plaintiff or requiring that the plaintiff prove failure to give constitutionally adequate notice by clear and convincing evidence. Resolution of these burden of proof issues would require the court to address "questions of a constitutional nature" which are not "necessary to a decision of the case."[234]

Next, the court turned to a discussion of the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution.[235] The conclusion resulting from such discussion was that due process requires property owners to be given adequate notice of their redemption right prior to the issuance of the tax-sale deed.[236]

Finally, the court focused its efforts on defining what constituted adequate notice within the context of the case at hand.[237] After considering the due process standard set forth in *Mullane v. Central Hanover Bank & Trust Co.*[238] and *Mennonite Board of Missions v. Adams*,[239] the court noted that the due process standard articulated in *Mullane* and *Mennonite* focuses the due process inquiry on the actions taken by the party responsible for giving notice.[240] That party must make a reasonably diligent effort to ascertain those entitled to notice and must take steps reasonably calculated to provide actual notice.[241] The court then articulated one of the most poignant comments to appear in any of the decisions related to tax-sale jurisprudence:

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232 *Id.* (quoting W. VA. CODE § 11A-4-4(b) (1994)).

233 *Id.* at 385-86.

234 *Id.* at 386.

235 *Id.*

236 *Id.*

237 *Id.* at 387.

238 339 U.S. 306 (1950).

239 462 U.S. 791 (1983).

240 *Plemons*, 298 F.Supp.2d at 387.

241 *Id.* at 388.

> Under West Virginia law, the tax lien purchaser has the duty to give notice and a countervailing interest in profiting from a property owner's failure to redeem. That is, a tax lien purchaser is unlikely to want a property owner to receive actual notice of her right to redeem as he hopes to make money on his purchase. This circumstance makes it imperative that courts strictly scrutinize efforts of a tax lien purchaser to ensure that they are "such as one desirous of actually informing the absentee" might reasonably adopt.[242]

With the parameters drawn, the court then stated that Advantage had properly identified Plemons as an interested party entitled to notice of her right of redemption and requested that the clerk mail her notice to three separate addresses, including the mailing address of the property, the address for the property listed on the deed, and the address of a rental property owned by Plemons.[243] The court also noted that the notices sent to Plemons were returned unclaimed by the post office and that she had failed to return any of the signed acknowledgments of receipt.[244] Again, no reference was made as to whether the bank involved had received any notice.

Armed with these facts, the court next recognized that courts across the country faced with similar issues had found that, when notice sent by certified mail is returned unclaimed, the reasonable diligence standard requires the party charged with providing notice to make further inquiry to ascertain the intended recipient's proper address.[245] The court stated that

> [s]imply put, the requirements of due process are not satisfied by the mere act of mailing notice to any address. Due process requires that a reasonably diligent effort be made to mail the notice to the intended recipient's correct mailing address. When notice is sent via certified mail and returned unclaimed, the sender has positive knowledge that he sent the notice to the wrong address and that the mailing failed to convey actual notice to the intended recipient. If a reasonably diligent party wanted to provide actual notice and learned that notice sent by mail was returned unclaimed, the party's next logical step would not be to publish a relatively small announcement in the newspaper. Rather, a reasonably diligent party would make further inquiry in hopes of finding the intended recipient's correct address. *Requiring a party to make further inquiry is particu-*

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242 *Id.* (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950)).

243 *Id.*

244 *Id.*

245 *Id.*

larly important when the one charged with the duty to give notice would benefit from the failure of the intended recipient to receive actual notice. Therefore, the court FINDS that when notice sent by certified mail is returned unclaimed, the reasonable diligence standard requires the party charged with giving notice to undertake further inquiry reasonably calculated to ascertain the intended recipient's correct mailing address.[246]

As examples, the court articulated the following:

If the party charged with notice is a state office, the office may be required to check any records it has pertaining to the subject property or the intended recipient for the correct address. If the intended recipient is a large corporation, inquiry to the secretary of state would likely be one of many ways in which a party could satisfy its obligation of further inquiry. If the last known address is an address other than the subject property and service on this address fails, a party giving notice could make further inquiry at the subject property or with neighbors adjacent to the subject property. If notice mailed to one person fails, further inquiry could be made with others holding an interest in the property, such as mortgagees. Where, as here, the intended recipient is a private person, further inquiry could be made by calling the telephone number listed for the private person in the directory for the area in which the subject property is located. As these examples indicate, extraordinary measures are not necessary, and no single method of inquiry is either required or sufficient in every case. Reasonable diligence requires the sort of further inquiry that would be undertaken by a person of ordinary prudence desirous of locating the intended recipient's correct address.[247]

As a result, the court declared that when all of the notices sent to Plemons were returned unclaimed, Advantage knew that she had not received actual notice of the pending tax-sale.[248] At that point, the court concluded that the reasonable diligence standard required Advantage to make further inquiry reasonably calculated to locate Plemons's correct address.[249] It stated that Advantage could have ascertained Plemons's correct address through a number of different means; it could have simply called Plemons on the telephone since she

246 *Id.* at 389 (internal citations omitted) (emphasis added).

247 *Id.* (internal citations omitted).

248 *Id.*

249 *Id.*

was listed in the local telephone directory throughout the notice period, it could have asked the tenants living at the subject property for help locating Plemons, and it could have made inquiry to others holding an interest in the property, such as Plemons's mortgagee.[250] However, the court noted, it need not determine whether any of these actions individually would have satisfied the reasonable diligence standard, because after the mailing notice was returned unclaimed, Advantage took none of the exampled actions and made no further inquiry prior to publishing notice.[251]

Gale appealed the district court's decision. On appeal, the circuit court stated its focus as follows:

> The question before us is what efforts must be made by a party charged with giving notice of irrevocable loss of property via a tax sale, when it is, or should be, apparent from the initial mailings' prompt return that they have failed to provide any notice to the intended recipient.[252]

In answering this question, the circuit court stated that

> [a]dopting the rule that prompt return of mailed notice triggers a duty to make reasonable follow-up efforts would seem to best comport with the instruction in *Mullane* that due process requires efforts 'reasonably calculated' to actually 'apprise interested parties' of the possible deprivation; that is, notice consistent with that of 'one desirous of actually informing the absentee,' rather than efforts that are but a 'mere gesture.'[253]

Furthermore, "when prompt return of an initial mailing makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient."[254] However, the circuit court also noted that a tax sale need not be set aside in every case in which initial attempts at mailed notice have failed and no further mailed notice is sent; recognizing that there may be instances when reasonable follow-up efforts would yield no different address.[255] That is, the circuit court stated a rule mandating follow-up efforts, but then carved out an exception where the follow-up efforts would be an exercise in futility.

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250 *Id.* at 389-90.

251 *Id.* at 390.

252 Plemons v. Gale, 396 F.3d 569, 574 (4th Cir. 2005).

253 *Id.* at 575 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950)).

254 *Id.* at 576.

255 *Id.* at 577.

In applying these standards, the circuit court first looked to the several possible follow-up efforts enumerated by the district court.[256] In relation to the district court's discussion of the fact that Advantage could have consulted the telephone directory, questioned the tenants of the property, or made inquiries of the secured bank in attempting to ascertain Plemons's address as examples of follow-up steps, the circuit court stated that it did not agree that reasonable follow-up compelled such efforts in the circumstances of the case.[257] It reasoned that checking the local telephone directory may be reasonable in a given situation, but that in the case at hand it would have been an exercise in futility because at the time the notices were sent out as well as when they were returned, Plemons was not reachable at the number or address listed in the current directory, and calls to that number were no longer being forwarded to her mobile phone.[258] Furthermore, the circuit court found that reaching out to the tenants of the property seemed an unreasonable burden on the basis that the notice sent to the occupants at the property's mailing address was returned as undeliverable.[259] In addition, the circuit court also concluded that reasonable efforts did not require contacting Plemons's secured lender on the basis that there was no evidence that Plemons enjoyed a special relationship with the bank such that attempting to enlist its help would have led to the discovery of her correct location.[260]

It is submitted that while the use of the telephone directory might have been an exercise in futility, the circuit court's rationale in relation to using the tenants and the bank as conduits to locating Plemons would not have been exercises in futility and were not unreasonably burdensome tasks. First, in relation to contacting the tenants, existing law mandates that a bona fide purchaser in any other transaction go through just such an effort before such purchaser can be protected.[261] A purchaser, to be protected as a bona fide purchaser, is charged with such notice as an inspection of the property and inquiry of its occupants might reveal.[262] Why should a tax lien purchaser not carry an identical obligation? In a sheriff's sale scenario, the tax lien purchaser has more than twelve (12) months between the date of the purchase of the tax lien and the date that the West Virginia Code § 11A-3-19(a) list or schedule must be submitted to the county clerk.[263] What is unreasonably burdensome about requiring the tax lien purchaser to visit the property during that twelve (12) month period to ascertain the location or whereabouts of the owner when purchasers in the ordinary

256 *Id.*

257 *Id.*

258 *Id.*

259 *Id.*

260 *Id.*

261 *Supra* note 162.

262 *Supra* note 162.

263 W. VA. CODE § 11A-3-19(a) (1998).

course carry such burden? Especially when the tax lien purchaser is not paying a negotiated consideration that the owner is actually receiving and benefiting from, but hoisting the property from its owner through a state-sponsored mechanism at a fraction of its true value. Furthermore, such an argument was made to the Circuit Court of Preston County during the course of *Subcarrier*, and not dismissed by the circuit court in that instance.[264] Also, the Supreme Court at least gave some lip service to the idea that such an obligation may exist when it noted in its discussion of the facts underlying *Subcarrier* that Sheriff Nield inspected the property on the date that he received his tax deed and found the property posted with a sign identifying Subcarrier as the owner and providing its contact information.[265]

Second, the secured bank was a party entitled to notice of its right to redeem, although none of the *Plemons* decisions address this issue. The property stood as the bank's security for the repayment of Plemons's loan from the bank. The potential loss of such security through a tax-sale, which would essentially render the loan unsecured, would have given the bank sufficient inducement to have provided Plemons's correct address or at least to have passed along to her the prospect that the property was potentially subject to forfeiture. The bank most-assuredly could have been located and contacted with relative ease. The invocation of a "special relationship" analysis seems more like an attempt to justify a conclusion than a path to be reviewed on the way to the conclusion. Furthermore, the invocation of such analysis runs contrary to the precedent established in *Lilly v. Duke*,[266] where it was stated that:

> In the present case, we believe the plaintiffs' name and address were reasonably ascertainable. While the address did not appear on the face of the deed of trust, a handwritten notation in the margin thereof did provide an address. Furthermore, other identifying information was reasonably available. The deed of trust specifically named Walton S. Shepherd, III, a resident of Kanawha County, as trustee and notice could have been mailed to him in that capacity. *The deed of trust also stated that note payments were to be remitted to the Bank of Sissonville, which was the collection agent for the plaintiffs. A simple inquiry at that bank presumably would have provided the necessary address.*[267]

After having dismissed the district court's examples, the circuit court concluded that "reasonable diligence required Advantage to search all publicly

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264 Subcarrier Communications, Inc. v. Nield, 624 S.E.2d 729, 732 (W. Va. 2005).

265 *Id.* at 731-33.

266 376 S.E.2d 122 (W. Va. 1988); *see also supra* notes 62- 67 and accompanying text.

267 *Lilly*, 376 S.E.2d at 125-26 (emphasis added).

available county records once the prompt return of the mailings made clear that its initial examination of the title to the property had not netted Plemons's correct address."[268] However, it then stated that "[u]nfortunately, the record in this case does not disclose what efforts, if any, Advantage made to search public documents, or whether Plemons's proper address would have been ascertainable from such a search. Thus, we must remand the case to the district court for resolution of these questions."[269]

As a result, the case went back to the district court on remand. Applying the exercise in futility standard established by the circuit court, the district court reversed its earlier decision and granted judgment in favor of the successor in interest of the tax lien purchaser.[270] However, it is the remainder of the decision that is material and significant, and correct.

> I have followed the instruction of the Court of Appeals as set out above and found the facts required to answer the two inquiries it posed. Having done so, I have entered summary judgment in favor of the defendants. *Although I have disposed of this dispute by final order in accordance with the law as announced by the Court of Appeals, I continue this writing to express my respectful, and, I trust, principled disagreement with certain aspects of the Fourth Circuit's opinion.*
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> I am puzzled by each of the two inquiries I was ordered to consider upon remand. First, I am unable to understand why the Court of Appeals believes that a re-examination of the public records is sufficient to satisfy the requirements of due process. Second, I am confused as to how the result of any follow-up examination of the public records would be relevant to a due process analysis.
>
> When the initial notices were returned as undeliverable, Advantage knew that Ms. Plemons had not received actual notice and that her property rights would be extinguished by the impending issuance of the tax deed. In the original summary judgment order, I held that once Advantage knew that Ms. Plemons had not received the notice, due process required Advantage to undertake further inquiry to determine her whereabouts. The appeals panel majority embraced this finding, and noted in its remand order that '[w]hen a party required to give notice knows that a mailed notice has, for some reason, failed to inform a person

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268 Plemons v. Gale, 396 F.3d 569, 578 (4th Cir. 2005).

269 *Id.*

270 Plemons v. Gale, 382 F.Supp.2d 826, 827 (S.D.W. Va. 2005).

holding a property interest of the impending deprivation, the notice does not pass constitutional muster.' The majority further stated that this court 'properly held that the reasonable diligence standard mandated by *Mullane* and its progeny required some follow up effort here.' Instead of finding that Advantage should have expanded its search beyond the public records, however, the Court of Appeals concluded that 'reasonable diligence required Advantage to search all publicly available county records once the prompt return of the mailings made clear that its initial examination to the title of the Echo Road property had not netted Plemons' correct address.'

As the defendants explain in their pending motion for summary judgment, they 'examined records maintained by the Clerk and the Sheriff of Kanawha County in preparing [their] report to the clerk.' This first title examination occurred in December, 2001, and the defendants' initial efforts are clearly explained in the record as it appeared before the Fourth Circuit on appeal. A re-examination of the same county records would have been a mere gesture. As the Supreme Court noted in *Mullane*, 'when notice is a person's due, process which is a mere gesture is not due process.'

I am further puzzled by the second subject of inquiry mandated by the Court of Appeals. I think it immaterial whether the defendants would have actually ascertained Ms. Plemons' address upon a re-examination of the public records. I believe that the only relevant inquiry is to ask what process would be undertaken by a reasonable person under the specific circumstances of the case. *The result obtained does not speak to the reasonableness of the method of inquiry. The question of what process is due is distinct from what the process would actually reveal.* As the Supreme Court noted in *Fuentes v. Shevin*, '[t]o one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process would have led to the same result. . . .'

. . .

Under West Virginia law, this due process inquiry creates a conflict of interest because the party charged with providing this constitutionally required notice is also the tax lien purchaser, who has a countervailing interest in profiting from a property owner's failure to redeem. This conflict of interest makes it imperative that courts strictly scrutinize the efforts of a

tax lien purchaser to ensure that they are 'such as one desirous of actually informing the absentee' might reasonably adopt.

Instead of re-examining the public records and retracing its earlier, fruitless steps, I respectfully assert that Advantage reasonably could have employed several simple, inexpensive and efficient means to determine Ms. Plemons' proper address. I suggested, in my prior order, that Advantage could have simply called Ms. Plemons on the telephone, as she was listed in the local telephone directory throughout the notice period. Advantage could have asked the tenants living at the subject property for help locating Ms. Plemons. Finally, I noted that Advantage could have made inquiry to others holding an interest in the property, such as Ms. Plemons' mortgagee.

In my prior opinion, I ultimately found it unnecessary to reach the question of whether Advantage acted reasonably because after the mailed notice was returned unclaimed, Advantage took no action. Advantage made no further inquiry prior to publishing notice. *Inaction in the face of a constitutional requirement of reasonably diligent efforts could not, I thought, satisfy the requirements of due process.*

According to *Mullane*, *Mennonite*, and the balancing tests set out in well known cases such as *Mathews v. Eldridge*, due process offers flexible protection that must be tailored to the circumstances of each case. In addition to being fact-specific, I think of due process as necessarily contemporary in nature. As Justice Frankfurter noted:

> 'Due Process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula.... Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

> *In the 'time, place, and circumstances' of this case, one who actually wanted to inform Ms. Plemons that her house was to be conveyed because of a failure to pay roughly $3,000 in taxes and fees would not have looked for her in the dusty corners of the Kanawha County record room. In the age of telephones, internet search engines, online newspapers, online people-finders, and readily available credit reports, most people can easily find someone. Thus, if a reasonable person were charged with the duty of locating Ms. Plemons in the relatively small city of Charleston, West Virginia, it is my belief that he would be likely to employ 'Google' to find her name, call information to learn her telephone number, contact her lending bank, or call her ex-husband.* Instead, Advantage searched the public records for Ms. Plemons' address and mailed written notices to two of the addresses contained therein. When the notices were found to be undeliverable, Advantage did nothing further. I continue to believe that those efforts failed to meet the constitutional standards of due process.[271]

This "dissent" by Justice Goodwin, in my opinion, is well-placed, well-founded, and in accordance with the manner in which the Supreme Court of Appeals of West Virginia would have resolved the matter had it not been removed as a result of diversity jurisdiction.

H. Jones v. Flowers

Jones v. Flowers[272] was a 2006 decision of the United States Supreme Court. In 1967, Gary Jones purchased a house at 717 North Bryan Street in Little Rock, Arkansas.[273] He lived in the house with his wife until they separated in 1993.[274] Jones then moved into an apartment in Little Rock, and his wife continued to live in the house.[275] Jones paid his mortgage each month for thirty years, and the mortgage company paid Jones' property taxes. After Jones paid off his mortgage in 1997, the property taxes went unpaid, and the property was certified as delinquent.[276]

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271 *Id.* at 828-31 (emphasis added) (internal citations and footnotes omitted).

272 547 U.S. 220 (2006).

273 *Id.*

274 *Id.*

275 *Id.*

276 *Id.*

In April, 2000, the commissioner of state lands ("Commissioner") attempted to notify Jones of his tax delinquency, and his right to redeem the property, by mailing a certified letter to Jones at the North Bryan Street address.[277]

> The packet of information stated that unless Jones redeemed the property, it would be subject to public sale two years later on April 17, 2002. Nobody was home to sign for the letter, and nobody appeared at the post office to retrieve the letter within the next fifteen days. The post office returned the unopened packet to the Commissioner marked 'unclaimed.'[278]

"Two years later, and just a few weeks before the public sale, the Commissioner published a notice of public sale in the Arkansas Democrat Gazette. No bids were submitted, which permitted the State to negotiate a private sale of the property."[279] Several months later, Linda Flowers submitted a purchase offer.[280] "The Commissioner mailed another certified letter to Jones at the North Bryan Street address, attempting to notify him that his house would be sold to Flowers if he did not pay his taxes. Like the first letter, the second was also returned to the Commissioner marked 'unclaimed.'"[281] Flowers purchased the house.[282] "Immediately after the 30-day period for post-sale redemption passed, Flowers had an unlawful detainer notice delivered to the property. The notice was served on Jones' daughter, who contacted Jones and notified him of the tax-sale."[283]

> Jones filed a lawsuit in Arkansas state court against the Commissioner and Flowers, alleging that the Commissioner's failure to provide notice of the tax-sale and of Jones' right to redeem resulted in the taking of his property without due process. The Commissioner and Flowers moved for summary judgment on the ground that the two unclaimed letters sent by the Commissioner were a constitutionally adequate attempt at notice, and Jones filed a cross-motion for summary judgment.[284]

The trial court granted summary judgment in favor of the Commissioner and Flowers, concluding that the Arkansas tax-sale statute, which set forth the notice

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277 *Id.*

278 *Id.* at 223-24.

279 *Id.* at 224.

280 *Id.*

281 *Id.*

282 *Id.*

283 *Id.* (internal citations omitted).

284 *Id.*

procedure followed by the Commissioner, complied with constitutional due process requirements.[285]

"Jones appealed, and the Arkansas Supreme Court affirmed the trial court's judgment."[286] Jones appealed again.[287] The United States Supreme Court granted certiorari, and held that when mailed notice of a tax-sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so, and reversed the judgment of the Arkansas Supreme Court.[288] In laying out its analysis, the court opened with the following statement:

> We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one 'desirous of actually informing' the owners would simply shrug his shoulders as the letters disappeared and say 'I tried.' Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.
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> By the same token, when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house. Although the State may have made a reasonable calculation of how to reach Jones, it had good reason to suspect when the notice was returned that Jones was 'no better off than if the notice had never been sent.' Deciding to take no further action is not what someone 'desirous of actually informing' Jones

285 *Id.* at 224-25.

286 *Id.* at 225.

287 *Id.*

288 *Id.*

> would do; such a person would take further reasonable steps if any were available.[289]

The Court then turned to the three arguments of the Commissioner as to why reasonable follow-up measures were not required under the circumstances.[290] First, the Commissioner asserted that the notice was sent to an address that Jones had provided and that he had a legal obligation to keep updated.[291] This is strikingly akin to an argument I have heard numerous times in state court actions from the parties attempting to uphold the validity of a tax deed. In response, the Court noted that the Commissioner had not argued that Jones' failure to comply with his statutory obligation to keep his address updated had forfeited his right to constitutionally sufficient notice and it agreed.[292] The Court then stated that while mailing notice to the address that Jones had last provided gave strong support for the contention that the Commissioner had actually sent notice reasonably calculated to reach Jones, that fact alone did not alter the requirement that the Commissioner should have taken follow-up efforts when the notice was promptly returned "unclaimed."[293]

Second, the Commissioner asserted that "after failing to receive a property tax bill and pay property taxes, a property holder is on inquiry-notice that his property is subject to governmental taking."[294] Again, this is also an argument that I have seen raised on more than one occasion by parties attempting to uphold the validity of a tax deed. In response to this assertion, the Court stated that "the common knowledge that property may become subject to government taking when taxes are not paid does not excuse the government from complying with its constitutional obligation of notice before taking private property."[295] In addition, the Court noted that it had previously "stated the opposite: An interested party's 'knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending.'"[296]

Third, the Commissioner argued that "Jones was obliged to ensure that those in whose hands he left his property would alert him if it was in jeopardy."[297] The Court likewise dismissed this argument out-of-hand.[298]

As a result, the Court found that "the State should have taken additional reasonable steps to notify Jones, if practicable to do so."[299] The question be-

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289 *Id.* at 229-30 (internal citations omitted).

290 *Id.* at 231.

291 *Id.*

292 *Id.* at 232.

293 *Id.*

294 *Id.* at 231-32.

295 *Id.* at 232.

296 *Id.* at 232-33.

297 *Id.* at 232.

298 *Id.* at 233.

came, were there any such available steps.[300] In relation to such question, the Court first noted that "if there were no reasonable additional steps the government could have taken upon return of the unclaimed notice letter, it cannot be faulted for doing nothing."[301] Second, it noted that "there were several reasonable steps the State could have taken[; and w]hat steps are reasonable in response to new information depends upon what the new information reveals."[302] In outlining possible follow-up steps, the Court declared that:

> One reasonable step primarily addressed to the former possibility would be for the State to resend the notice by regular mail, so that a signature was not required. . . . Following up with regular mail might also increase the chances of actual notice to Jones if—as it turned out—he had moved. Even occupants who ignored certified mail notice slips addressed to the owner (if any had been left) might scrawl the owner's new address on the notice packet and leave it for the postman to retrieve, or notify Jones directly.
>
> Other reasonable followup measures, directed at the possibility that Jones had moved as well as that he had simply not retrieved the certified letter, would have been to post notice on the front door, or to address otherwise undeliverable mail to 'occupant.' Most States that explicitly outline additional procedures in their tax sale statutes require just such steps. Either approach would increase the likelihood that the owner would be notified that he was about to lose his property, given the failure of a letter deliverable only to the owner in person. That is clear in the case of an owner who still resided at the premises. It is also true in the case of an owner who has moved: Occupants who might disregard a certified mail slip not addressed to them are less likely to ignore posted notice, and a letter addressed to them (even as 'occupant') might be opened and read. In either case, there is a significant chance the occupants will alert the owner, if only because a change in ownership could well affect their own occupancy. In fact, Jones first learned of the State's effort to sell his house when he was alerted by one of the occupants—his daughter—after she was served with an unlawful detainer notice.

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299 *Id.* at 234.

300 *Id.*

301 *Id.*

302 *Id.*

> Jones believes that the Commissioner should have searched for his new address in the Little Rock phonebook and other government records such as income tax rolls. We do not believe the government was required to go this far. As the Commissioner points out, the return of Jones' mail marked 'unclaimed' did not necessarily mean that 717 North Bryan Street was an incorrect address; it merely informed the Commissioner that no one appeared to sign for the mail before the designated date on which it would be returned to the sender. An open-ended search for a new address—especially when the State obligates the taxpayer to keep his address updated with the tax collector, imposes burdens on the State significantly greater than the several relatively easy options outlined above.[303]

In conclusion, *Jones* ratifies the position taken in *Plemons* that follow-up efforts are required when the initial mailing of the notice of the right to redeem is returned as undeliverable in some fashion, and even outlines examples of what those follow-up efforts should entail.

III. ACTIONS TO SET ASIDE TAX DEEDS: FEE-SHIFTING AND PUNITIVE DAMAGES

The reported results of the remand of *Jones* also provide for a rather interesting opportunity for the practitioner. Following the Supreme Court's decision and remand of the case to the Court of Appeals of Arkansas, *Jones* was further remanded back down to the Pulaski County Circuit Court in September 2006.[304] Upon remand, Jones sought his legal fees for prosecuting the action under the provisions of 42 U.S.C. § 1988(b).[305] In relevant part, this federal statute provides as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including at-

303 *Id.* at 234-36 (internal citations omitted).

304 Jones v. Flowers, 373 Ark. 213 (2008).

305 *Id.* at 214.

torney's fees, unless such action was clearly in excess of such officer's jurisdiction.[306]

42 U.S.C. § 1983, in relevant part, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .[307]

The Pulaski County Circuit Court denied Jones' request on the basis that "[t]he first mention of 42 U.S.C. § 1983 was in [Jones's] Status Report filed on November 16, 2006."[308] Jones appealed this lower court ruling, "arguing that an action does not have to be specifically pled under § 1983 for entitlement to attorney's fees under § 1988(b)."[309]

The Court commenced its analysis by acknowledging that

> 42 U.S.C. § 1983 provides a means to allow a plaintiff to obtain relief in federal courts if he can show (1) the deprivation of a right secured by the Constitution or laws of the United States, and (2) that a person acting under color of state law caused the deprivation. A court has discretion to award reasonable attorney's fees for a successful § 1983 action. 42 U.S.C. § 1988(b) (2000).[310]

Next, the Court noted that of those federal courts of appeals that had looked at the question, most had decided "that regardless of whether a plaintiff specifically cites 42 U.S.C. §§ 1983 or 1988 in his original pleadings, a successful constitutional challenge is a proceeding to enforce § 1983 within the meaning of § 1988."[311] As an example, the Court cited *Goss v. City of Little Rock*,[312] a decision in which the Eighth Circuit Court of Appeals held that the "substance of the

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306 42 U.S.C. § 1988(b) (2000).

307 42 U.S.C. § 1983 (2000).

308 *Jones*, 373 Ark. at 214.

309 *Id.* at 214-15.

310 *Id.* at 215.

311 *Id.*

312 *Id.* (citing 151 F.3d 861 (8th Cir. 1998)).

action, rather than the form of the pleading, should determine the applicability of attorney's fees under § 1988(b)."[313]

In response to Jones' argument for legal fees, the State of Arkansas did not assert a direct defense or counter-argument, but rather, raised a purported procedural defect as an indirect defense.[314] The Court brushed off this defense and concluded with the following:

> In sum, the Supreme Court held that the State violated Jones's due process rights under the United States Constitution by failing to take additional reasonable steps to notify him before a tax sale of his property when the initial notice was returned undelivered. Thus, Jones's action was a meritorious civil rights claim. We are persuaded by the overwhelming federal court precedent holding that substance prevails over form when a party fails to specifically plead an action under § 1983. Accordingly, we reverse the trial court's order denying attorney's fees under § 1988(b) and remand the case for proceedings consistent with this opinion.[315]

What *Jones* brings to the forefront of the discussion is a second count that should be included in any complaint seeking to set aside or rescind a tax deed. That is, not only can the former owner of the property purportedly "taken" or "foreclosed" through the state-sponsored and endorsed tax sale mechanism petition a court to have the tax deed set aside based upon one or more of the several grounds found in Article 4 of Chapter 11A, he might also be able to recover compensatory damages, punitive damages, and legal fees for prosecution of the action if he is successful. 42 U.S.C. § 1983 provides that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."[316]

A purchaser at a tax-sale who fails to exercise reasonable diligence in apprising the owner of the "taking" and affording the owner his constitutionally protected due process guarantees is a person who has operated under the color

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313 *Id.*

314 *Id.* at 216-217.

315 *Id.* at 218.

316 42 U.S.C. § 1983 (2000).

of a series of statutes of the State of West Virginia who is open to liability to the owner under § 1983. A successful prosecution of the action to have the tax deed set aside or rescinded then opens the door to an award of compensatory damages, punitive damages, and legal fees to the prosecuting property owner.[317] As a result, not only should a complaint seeking to set aside or rescind a tax deed contain a count directed toward that end, but it should also contain a separate count asserting the liability of the tax lien purchaser under the provisions of § 1983.

The trade of purchasing tax liens at sheriffs' sales has many within its ranks that can be termed "professionals." These "professionals" were the parties that Judge Goodwin was referencing when he so artfully noted that

> [u]nder West Virginia law, the tax lien purchaser has the duty to give notice and a countervailing interest in profiting from a property owner's failure to redeem. That is, a tax lien purchaser is unlikely to want a property owner to receive actual notice of

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317 *See* 42 U.S.C. § 1988b (2000); *see also* Endicott v. Huddleston, 644 F.2d 1208 (7th Cir. 1980) (Damages are available under this section for actions found to have been violative of constitutional rights and to have caused compensable injury.); Cunningham v. City of Overland, 804 F.2d 1066 (8th Cir. 1986) (In § 1983 action, both compensatory and punitive damages are available upon proper proof; principles governing propriety of such damages are derived from common law.); Pizzolato v. Perez, 524 F.Supp 914 (E.D.L.A. 1981) (Damages are available under this section making violation of an individual's civil rights under color of state law actionable for actions found to have been violative of constitutional rights, which such actions are proved to have caused compensable injury.); Coleman v. Rahija, 114 F.3d 778 (8th Cir. 1997) (Compensatory damages in § 1983 action may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation, personal humiliation and mental anguish and suffering.); *id.* (Punitive damages are awarded in § 1983 action to punish defendant for his or her willful or malicious conduct and to deter others from similar behavior.); Baltezore v. Concordia Parish Sheriff's Dept., 767 F.2d 202, (5th Cir. 1985), *cert. denied* 474 U.S. 1065 (Punitive damages may be awarded in a § 1983 action even without a showing of actual loss by plaintiff if the plaintiff's constitutional rights have been violated.); Coleman v. Kaye, 87 F.3d 1491 (3d Cir. 1996) *cert. denied* 519 U.S. 1084 (Punitive damages may be awarded under § 1983 when defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to federally protected rights of others.); Coleman v. Rahija, 114 F.3d 778 (8th Cir. 1997) (Focus, in determining propriety of punitive damages in § 1983 action, is on intent of defendant, and whether defendant's conduct is of sort that calls for deterrence and punishment over and above that provided by compensatory awards.); Lee v. S. Home Sites Corp., 429 F.2d 290 (5th Cir. 1970) (Punitive damages may be imposed if defendant has acted willfully and in gross disregard for rights of complaining party.); Pizzolato v. Perez, 524 F.Supp 914 (E.D.I.A 1981) (Award of punitive damages for violations of those rights secured by this section is appropriate where the violation is willful and in gross disregard for the rights of the complaining party.); Urbano v. McCorkle, 334 F.Supp. 161 (D.C.N.J. 1971), *supplemented* 346 F.Supp. 51, *aff'd* 481 F.2d 1400 (Punitive damages should not be awarded in action brought under this section unless there is showing that proscribed action has been constant pattern or practice of behavior of defendants and that such practice has been willful and in gross disregard for rights of plaintiff.).

her right to redeem as he hopes to make money on his purchase."[318]

Often, at least in the author's personal experience, these "professionals" miraculously "discover" the telephone number or correct address of the property owner soon following the recording of the tax deed, a number or address that eluded them just several months before when providing the county clerk with a list of parties entitled to notice to redeem. Upon finally locating the property owner, these "professionals" also often offer to sell the property back to the "former" owner for considerably more than the amount paid at the sheriff's sale and reject any attempts at belated or after-the-fact redemption.[319] It is submitted that if these "professionals" learn that the "former" owners cannot only prosecute an action to set aside or rescind the tax deed, but also recover compensatory damages, punitive damages, and their legal fees in the process if they are successful, legal fees that often act as a direct deterrence to pursuing a challenge of the tax-sale process in the first instance by the "former" owner, then the efforts to actually exercise reasonable diligence in locating and notifying property owners of their redemption rights might actually go on the rise.

The remand of *Jones* and its bringing into focus the fact that 42 U.S.C. § 1983 can possibly cause a shifting of which side bears the legal fees in a challenge against a tax deed, as well as the possibility of an award of compensatory and punitive damages, also provokes the thought that federal mechanisms toward this end might not be the only unique avenue available. The other avenue requires a digression back to the days when opinions emanating out of Charleston contained such categorizations of defendants as "really stupid defendants," "really mean defendants," and "really stupid defendants who could have caused a great deal of harm by their actions but who actually caused minimal harm."[320]

TXO Production Corp. v. Alliance Resources Corp.[321] is the landmark decision that recognized or acknowledged slander of title as a viable cause of action in West Virginia, and consequently affirmed a $10,000,000.00 punitive damages award, where the compensatory damages only amounted to $19,000.00.[322] In the decision, the Court enunciated the elements of slander of title as being "(1) publication of (2) a false statement (3) derogatory to the plaintiff's title (4) with malice (5) causing special damages (6) as a result of diminished value in the eyes of third parties."[323] In assessing these elements and generally discussing the cause of action, the Court stated that "[a]s a general rule,

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318 Plemons v. Gale, 298 F.Supp.2d 380, 388 (S.D. W.Va. 2004).

319 Although the reported decision does not reflect this, a strangely similar scenario occurred in *Subcarrier*.

320 TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870, 887-88 (W. Va. 1992).

321 419 S.E.2d 870.

322 *Id.* at 875.

323 *Id.* at 879.

courts have found that wrongfully recording an unfounded claim to the property of another is actionable as slander of title."[324] Based on this declaration, it is quite feasible that in the context of a tax-sale, a tax lien purchaser could very well be guilty of slandering the title of the property owner where the tax lien purchaser recorded a tax deed from the county clerk and the purchaser did not exercise reasonable diligence in attempting to actually apprise the owner of his right of redemption. In this instance, the viability of the claim from the property owner's standpoint will most likely rise and fall on the ability to prove malice.

One of the key factors to be assessed in the determination of the existence of the requisite malice is the pattern and practice of the tax lien purchaser in the subject and other tax-sale transactions. In specifically assessing the malice element of the cause of action of slander of title, the Court focused on the pattern and practice of TXO:

> Not only do the details of the August meeting as related by Mr. Robinson suggest malice on the part of TXO, but the facts of Mr. Woods' dealings with Mr. Signaigo also show unsavory and malicious practices by TXO. When examined in the light most favorable to the appellees, the evidence clearly shows that TXO intentionally and maliciously recorded a quitclaim deed that it knew to be without any basis in fact because Mr. Signaigo explicitly told TXO that he had not bought the oil and gas on the Blevins Tract in 1958. Furthermore, the record shows that this was not an isolated incident on TXO's part—a mere excess of zeal by poorly supervised, low level employees—but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power *vis a vis* TXO's superior legal firepower.[325]

As noted above, many of the tax lien purchasers that show up for the annual sheriff's sale in a given county are "professionals," many of which travel a circuit of counties to attend sheriffs' sales in and acquire numerous properties each year across a spectrum of counties. Examining other tax deeds received by a tax lien purchaser and the notice to redeem lists appended to those deeds could provide a relatively decent cross-sample of the pattern and practice of the purchaser in his efforts to exercise reasonable diligence and actually attempt to ensure that owners receive notice of their right of redemption. That is, in the event that it can be shown that not only did the tax lien purchaser fail to exert any true effort to identify and notify the owner in the case at hand but that there is also such a comparable failure on his part in most if not every instance, then a pattern and practice within the context of *TXO* could emerge that could lead to

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[324] *Id.* at 880.

[325] *Id.* at 880-81.

prevailing on a count asserting slander of title. Put another way, if it can be shown through pattern and practice,[326] by utilizing other tax deeds that a tax lien purchaser has obtained, that the purchaser's "countervailing interest in profiting from a property owner's failure to redeem" outstrips his attempts to ensure that property owners receive actual notice of their right to redeem, and thus, the purchaser has recorded a deed that is due process-challenged and effectively "takes" or "forecloses" the property owner's interest or title, as opposed to merely clouding it as was the case in *TXO*, then slander of title becomes an offensive weapon that can lead to punitive damages in an action to set aside or rescind a tax deed.

IV. CONCLUSION

In conclusion, this Article has established that a significant amount of reported decisions have been issued in the past thirteen years in relation to the topic of tax-sale jurisprudence and that the focus or drive of those decisions, with a few noted exceptions, has been to incrementally increase the protections afforded delinquent land owners. In addition, this Article has been an attempt to look at those decisions from a practical standpoint to assist both the title examiner in the course of his title work and the litigator in the course of his prosecuting actions to set aside or invalidate tax-sales. Hopefully, those who read this Article will find it as valuable a resource in those areas as they have found Professor Fisher's article entitled *The Scope of Title Examination in West Virginia: Can Reasonable Minds Differ?*.[327]

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[326] Pattern or practice of behavior can be taken into consideration in determining the availability of punitive damages in the context of an action prosecuted under 42 U.S.C. § 1983. *See* Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971), *supplemented by* 346 F. Supp. 51 (D.N.J. 1972), *aff'd* 481 F.2d 1400 (3rd Cir. 1973).

[327] John W. Fisher, II, 98 W. VA. L. REV. 449 (1996).