

APPEAL NO. 34265

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**WELLS FARGO BANK, N.A.,
Assignee and Successor in Interest
to FLEET NATIONAL BANK,
a national banking association,**

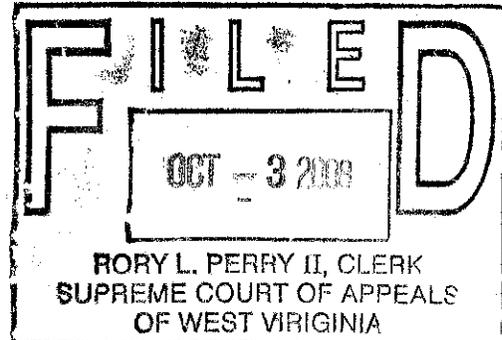
Appellant-Plaintiff,

v.

**UP VENTURES II LLC; IRONWOOD
ACCEPTANCE COMPANY, a Delaware
corporation, PALO VERDE TRADING
COMPANY, LLC, an Arizona limited liability
company; JEFFREY E. HALL and ANNETTE
L. HALL,**

Appellees-Defendants.

**Cabell County Circuit Court
Civil Action No.: 07-C-26
Honorable David M. Pancake**



BRIEF OF APPELLANT

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Dated: October 3, 2008

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

On January 11, 2007, Appellant filed a Complaint in the Circuit Court of Cabell County, asserting that, because it had not been given notice of the right to redeem from the tax sale the property which was to serve as the security for its loan, it had been deprived of due process.

The Appellant contended that, as its interest in the property first arose during the 18-month redemption period and after notice had already been sent to parties identified on the list provided to the Cabell County Clerk prior to the date its deed of trust was recorded, it must be given notice and an opportunity to redeem the property prior to the delivery of a tax deed for the property. If such a notice is not given, the Appellant contended that it was entitled to have the tax deed set aside even after the three-year limitations period has passed, or was entitled to other relief, including permitting of its lien to attach to the interest acquired by the tax sale purchaser and/or its successors in title, as well as recovering from the tax sale purchasers over \$6,000 in real estate taxes which the Appellant paid following the recording of the tax sale deed to the Appellees but before it received notice of the tax sale.

The Appellees, the tax sale purchasers, filed a joint Motion for Summary Judgment. The issues before the Cabell County Circuit Court were

1. Whether West Virginia Code § 11A-4-4(a) required that the Complaint be dismissed as being time barred; and
2. Whether the Plaintiffs were entitled to Notice under the terms of West Virginia Code § 11A-4-4.

The Cabell County Circuit Court, after briefs and a hearing, entered its Order Granting Motion of the Tax Sale Purchaser Defendants for Summary Judgment on October 10, 2007 (the "Final Order").

In addressing these issues the trial court held that

[t]he West Virginia Supreme Court reviewed the three (3) year limitation period set forth in West Virginia Code § 11-4-4(a) in the case of *Shaffer v. Mareve Oil Corp.*, 204 S.E.2d 404, 157 W.Va. 816 (W.Va. 1974), which held that the period of limitations provisions within which a party must institute an action are reasonable time limitations that are not violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States (see Syllabus Point 6). The Court further opined that a rational interpretation of the Legislative intent was that it intended the Statute of Limitations of West Virginia Code § 11-4-4(a) to bar actions to set aside such a tax sale deed for all defects defined therein[.]

(Final Order at 4, ¶ 3.)

Moreover, the Court determined that it need not address the notice and due process issues raised by the Appellant in light of its findings on the limitations issue. (Final Order at 5, ¶ 6.)

Appellant believes that the Court erred in finding that the Appellant's action was time-barred, and erred in failing to consider the Appellant's claim of denial of due process arising out of the failure to receive notice of the right to redeem from sale of the property which was securing its loan.

STATEMENT OF THE FACTS OF THE CASE

The Appellant's predecessor Fleet National Bank, N.A. ("Fleet"), entered into a loan agreement with the Defendants Jeffrey E. Hall and Annette L. Hall (the "Halls"). The Halls borrowed \$84,500 from Fleet, and executed the usual loan documents required for such transactions. Because the Halls were to secure the loan with a first lien upon their residential real

estate located at 1039 Jane Drive, Culloden, West Virginia, among the loan documents they executed was a Deed of Trust for recordation in the Cabell County Clerk's office.

On February 21, 2001, the Halls executed the Deed of Trust, together with the additional loan documents, and the Deed of Trust was recorded on March 8, 2001. The Trust appears of record in the Cabell County Clerk's office in Trust Deed Book 1662, at page 722.

Unbeknownst to Fleet, prior to the time of the recordation of its Deed of Trust, the property which was to be secured by the Trust Deed had become delinquent for the payment of *ad valorem* real estate taxes for the 1998 tax year, and had been the subject of a tax sale conducted by the Sheriff of Cabell County on November 9, 1999. At that sale, the Appellee, Ironwood Acceptance Company ("Ironwood") purchased the delinquent property for the sum of \$1,565.81 and was issued a Certificate of Sale by the Sheriff.

Ironwood prepared a list of those parties entitled to Notice of their right to "redeem" the property from the sale on or about November 16, 2000. On January 17, 2001, Ben A. Bagley, the Cabell County Clerk, prepared the statutory notice to those parties appearing on the list provided to him by Ironwood of their right to redeem sent as required by the provisions of W.Va. Code Ann. § 11A-3-19. However, because its Deed of Trust had not yet been made of record, Fleet was not served with any notice of any kind. Consequently a tax sale deed was issued to Ironwood on May 8, 2001 by Karen S. Cole, Clerk of the County Commission of Cabell County, West Virginia, without Fleet being provided an opportunity to redeem the property from the tax sale.

At the closing of the loan with the Halls, the loan proceeds were disbursed such that the lien of the Hall's prior lender holding a deed of trust upon the property was satisfied. Following the closing, the Halls commenced the making of regular monthly payments upon their

indebtedness to Fleet, as well as an amount to be placed into an escrow account for the payment of real estate taxes and hazard insurance premiums as they came due.

From the escrow account Fleet began to pay, and for a number of years, continued to pay, the real estate taxes due on the property, beginning with the taxes due and payable from the second half of 2001 through the second half of 2006. Fleet did not learn of the tax sale until late fall/early winter of 2006, and promptly filed suit on January 11, 2007 for relief from the tax sale.

The effect of the lack of the Notice of the right to redeem to Fleet, as the holder of the Deed of Trust after it made its loan and recorded its Deed of Trust but before the deed to the tax sale purchaser was either delivered or recorded, was to deprive it of the opportunity to pay the past due taxes, and to thereby prevent finality of the sale and delivery of the deed to the tax sale purchaser.

Under West Virginia law, this tax sale involves "state action" and therefore, the due process clause applies to such sales. Due process requires the government to provide notice that is reasonably calculated, under all the circumstances, to the Appellant as well as an interested party of the pending action, and to afford it an opportunity to protect its interest.

The Final Order of the Cabell County Circuit Court found that the Court "did not need to address the Constitutional issues of notice and Due Process raised by the Plaintiffs" because the claim was time-barred by virtue of the statute of limitations set forth in W.Va. Code Ann. § 11A-4-4(a).

The Appellant is not suggesting that § 11A-4-4(a), which requires that a party institute an action to set aside a tax deed within three years of the sale, be invalidated. Instead, the practical solution, and least intrusive remedy, is to allow *only* the holder of any lien recorded after notice

is certified to the County Clerk to bring suit to have the tax deed set aside even if outside the three-year statute of limitations.

Due process requires that the Appellant's predecessor Fleet, as a "gap" lender during the 18-month redemption period, be given notice and an opportunity to redeem the property prior to the delivery of a tax deed to a purchaser for a tax sale which occurred more than a year prior to its deed of trust being made of record, or to bring an action to set aside the sale if it failed to receive such a notice.

Appellant believes that the Cabell County Circuit Court erred in finding that the Appellant's action was time-barred, and in failing to consider the Appellant's entitlement to due process. Because Fleet was deprived of Due Process in contravention of the Fourteenth Amendment to the Constitution of the United States and the protections contained in Article III, § 10 of the West Virginia Constitution, Appellant prosecutes this Appeal.

ASSIGNMENTS OF ERROR

The Honorable David M. Pancake, Judge of the Cabell County Circuit Court, erred by failing to find that a lender whose lien arose during the 18-month statutory redemption period was entitled to due process in the form of notice of the tax sale, and a right to redeem. The Court compounded those errors by failing to find that in the absence of such notice it was entitled to have the tax sale deed set aside.

The Court also erred by applying W.Va. Code Ann. § 11A-4-4(a) to bar the Appellant from pursuing its action to set aside a tax deed where jurisdictional defects exist in the underlying tax sale. Such a decision deprived the Appellant of its due process rights as guaranteed in the Constitutions of the United States and West Virginia.

Lastly, the Court erred in awarding a Summary Judgment when issues of fact existed.

**POINTS AND AUTHORITIES RELIED UPON
AND A DISCUSSION OF THE APPLICABLE LAW**

**I. THE APPLICABLE STANDARD
OF APPELLATE REVIEW.**

This case is before this Court on appeal from an order of the Circuit Court of Cabell County granting the Appellees' Motion For Summary Judgment. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavey*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

This Court applies the same standard for granting summary judgment as would be applied by a circuit court. Specifically,

"[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. Of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buchannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

Syl. Pt. 2, *Painter, supra*.

"The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. Pt. 3, *Painter, supra*.

This Court accords plenary review to questions of law and statutory interpretations decided by a lower court. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995); *accord*, Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dept. Of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.").

The Appellant believes that, in applying the appropriate standards of review, this Court must find that the ruling of the Circuit Court of Cabell County was in error in granting the Appellees' Motion for Summary Judgment and in dismissing the Appellant's Complaint.

II. DUE PROCESS REQUIRES THAT A LENDER WHOSE LIEN FIRST ARISES DURING THE 18-MONTH STATUTORY REDEMPTION PERIOD (A/K/A THE "GAP PERIOD") IS ENTITLED TO NOTICE OF THE RIGHT TO REDEEM THE PROPERTY FROM SALE AND, ABSENT SUCH NOTICE, MAY HAVE THE DEED SET ASIDE.

If a landowner fails to pay the real estate taxes for the property, the government may, in accordance with specific statutory procedures, seek to sell the property at a public auction to recoup the tax monies due and owing. W.Va. Code Ann. §§ 11A-3-1 et seq. The purchaser at a tax sale is initially given "a certificate of sale for the purchase money." W.Va. Code Ann. § 11A-3-14(a). If, and only if, the purchaser complies with the requirements of W.Va. Code Ann. § 11A-3-19(a), is the purchaser then entitled to a deed for the property.

This statute requires that

[a]t any time after the thirty-first day of October of the year following the sheriff's sale, and on or before the thirty-first day of December of the same year, the purchaser, his or her heirs or assigns, in order to secure a deed for the real estate subject to the tax lien or liens purchased, shall [inter alia] prepare a list of those to be served with notice to redeem and request the clerk to prepare and serve the notice as provided in sections twenty-one and twenty-two of this article[.]

W.Va. Code Ann. § 11A-3-19(a).

One seeking to obtain complete title to property sold for taxes must comply literally with statutory requirements, *State ex rel. Morgan v. Miller*, 177 W.Va. 97, 350 S.E.2d 724 (1986), and the failure to fully comply with the statutory requirements may cause the tax deed to be set aside upon petitioning for such relief, W.Va. Code Ann. § 11A-4-4(b) (the court can set aside a

tax sale deed if it is shown "by clear and convincing evidence" that the purchaser "failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the complaining party").

A. The Relevant Case Law.

A tax sale involves "state action" and, thus, the Due Process Clause applies to such sales. *Plemons v. Gale*, 396 F.3d 569, 572 n.3 (4th Cir. 2005) (applying West Virginia law). "West Virginia statutes . . . require a purchaser to exercise due diligence in identifying and locating parties entitled to notice and . . . allow publication notice only after the exercise of such diligence. [Thus,] West Virginia's statutory notice requirements parallel the requirements of the United States Constitution." *Id.* at 572 (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306 (1950)).

"The underlying purpose of the due process of law clauses of the federal and state constitutions is to guarantee that the rights of persons may be dealt with in judicial proceedings only after due notice and a fair and reasonable opportunity for a hearing in accordance with procedure which has been ordained for the preservation of personal and property rights." *Walter Butler Bldg. v. Soto*, 142 W.Va. 616, 636, 97 S.E.2d 275, 287 (1957); *see also Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."); *Louk v. Haynes*, 157 W.Va. 482, 499, 233 S.E.2d 780, 791 (1976) ("Due process requires that the appearance of justice be satisfied.").

In *Lilly v. Duke*, 180 W.Va. 228, 376 S.E.2d 122 (1988), this Court noted:

There are 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.

Id. Syl. Pt. 1; *accord* Syl. Pt. 1, *Anderson v. Jackson*, 180 W.Va. 194, 375 S.E.2d 827 (1988) (quoting *Lilly*). In *Lilly*, this Court held that a foreclosure sale for unpaid taxes was invalid because the mortgagee was denied due process in that the mortgagee was not given actual notice of the sale and its name was available from the public record.

Although "[d]ue process does not require that a property owner [in fact] receive actual notice before the government may take his property . . . due process [nevertheless] requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (quoting *Mullane*, 339 U.S. at 314).

In sum, *Mullane* and its progeny teach that a party charged with giving notice must be reasonably diligent in doing so. In the case of a tax sale of property, diligence requires that reasonable efforts be made to identify and locate parties with an interest in the property. Once those parties are located, they must be provided notice of the impending sale using a method reasonably calculated, under all of the circumstances, to actually inform them of the sale.

Plemons, 396 F.3d at 574.

Notably, the West Virginia statute is silent as to defining the class of persons "to be served with notice to redeem." W.Va. Code Ann. § 11A-3-19(a). However, case law has made it clear that such class includes, *inter alia*, lienholders in the subject property such as the lender here. *Rollyson v. Jordan*, 205 W.Va. 368, 374-75, 518 S.E.2d 372, 378-79 (1999) (deed of trust note secured by property). Accordingly, the class of persons to which notice to redeem must be sent includes lienholders who establish and/or record their interest in the property *during* the 18-month "gap period" *but after* the purchaser provides the Clerk with its list of those who shall be served with notice.

In the instant case, the Appellant had a lien that was recorded after the list of those to be served with notice to redeem was furnished to the County Clerk. The tax deed was issued to the

tax sale purchaser on May 8, 2001. The Appellant did not receive notice of the tax sale and continued to pay taxes on the property through 2006. When the Appellant learned of the tax sale in the fall/winter of 2006, it promptly filed suit to have the tax deed set aside. The Cabell County Circuit Court determined that the three-year statute of limitations barred the action and that its ruling was not violative of the Appellant's due process rights. This ruling was erroneous in that the Appellant was deprived of the opportunity to assert the lack of due process mandated by the federal panel in *Plemons*.

In *Jones*, the Supreme Court of the United States was confronted with a situation involving a tax sale conducted after the state was alerted that actual notice of the sale had not been delivered to those entitled to be advised of the right to redeem the property from sale. 547 U.S. at 223-24. The state decided to publish notice of the sale in a local newspaper in the weeks prior to the sale but chose not to post notice at the address where the notice had been mailed or take any other steps to try to alert the tax payer of the sale. *Id.* In resolving a conflict among the circuits and state supreme courts, *Id.* at 225, the Supreme Court held that Arkansas's steps were insufficient to satisfy the taxpayers' due process rights under the Fourteenth Amendment, *Id.* at 226-31. Given that notice is deemed "constitutionally sufficient if it was *reasonably calculated* to reach the intended recipient," *id.* at 226 (emphasis added), "it is difficult to explain why due process would" settle for anything less if the government had reason to believe "after notice was sent, but before the taking occurred, that the property owner" would not in fact receive the desired notice, *id.* at 230.

The decision in *Jones* echoes earlier decisions of this Court, which have held that, where no steps were taken to provide notice to the taxpayer of the sale or of the right to redeem except

by publication, the tax sale is a nullity. Syl. Pt. 1, *Anderson*, 180 W.Va. 194, 375 S.E.2d 827 (quoting Syl. Pt. 1, *Lilly*, 180 W.Va. 228, 376 S.E.2d 122).

Similarly, in *Plemons*, the Fourth Circuit Court of Appeals followed virtually every state court which has addressed the issue in requiring follow-up to initial efforts to notify those with property interests and/or rights of redemption. 396 F.3d at 576. These efforts include, at a minimum, reexamination of all available public records. *Id.* at 577. The failure to do so here deprived the Appellant of its right to due process before its property, the security for its loan, was "taken" from it in violation of the West Virginia and United States Constitutions.

In summary, it has been repeatedly noted in the case law that the purchaser must diligently inquire about the possible parties with an interest in the property so that such persons are given the requisite notice, *id.* at 572, and the extent of such diligence is determined by the particular circumstances of the case at hand, *Jones*, 547 U.S. at 224-25. In the instant case, then, it was patently unreasonable to rely solely on the identification of the interested parties of record early on in the 18-month gap period without again checking the record prior to the expiration of the 18-month gap period. *Foehl v. United States*, 238 F.3d 474, 480 (3d Cir. 2001) ("The DEA's failure to check with any of [the four, easily accessible] sources was unreasonable under the circumstances, and its minimal effort to notify plaintiff of the forfeiture cannot fairly be considered to be 'within both letter and spirit of the law.'" (quoting *United States v. One 1936 Model Ford V-8 Deluxe Coach, Motor No. 18-3306511*, 307 U.S. 219, 226 (1939))); *see, e.g., Mullane; Mennonite Bd. of Missions.*

Therefore, due process required that Fleet be notified of the right of redemption from the pending tax sale of the property which was to serve as the security for its loan.

B. Statutory Construction.

An analysis of the statutory scheme through which a landowner's property is subject to sale in order to provide for the collection of taxes due would also result in this Court concluding that lenders such as your Appellant must be given an opportunity to redeem their real estate security from sale.

Obviously, selling a landowner's property, or property in which a lienholder claims an interest, without his or her consent is a major step for the government. *See Jones*, 547 U.S. at 234 ("People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property. But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking.").

To that end, the relevant West Virginia statutory scheme is largely meant to notify the interested parties so that at least one of them will pay the taxes owed to save the property. *Jones v. State Bd. of Educ.*, 218 W.Va. 52, 57, 622 S.E.2d 289, 294 (2005) (the polestar of all statutory construction analysis "is to ascertain and give effect to the intent of the Legislature"). The West Virginia Legislature expressly declared that it enacted Chapter 11A, Article 3 to, inter alia, "provide for the speedy and expeditious enforcement of the tax claims" and "to secure adequate notice to owners of delinquent . . . property [and those with an interest in such property] of the pending issuance of a tax deed[.]" W.Va. Code Ann. § 11A-3-1.

Prior to 1941, Chapter 11 of the Code contained a conclusive presumption and general curative language giving certain validity to tax deeds. After the 1941 revisions the statutes were reworded and the presumption and curative language was included in § 11A-3-28 and § 11A-3-29, with the statute of limitation provisions being set forth in §§ -31 and -32.

Moreover, in order to glean what was intended by § 11A-3-19(a), it is also helpful to examine the statute in the broader context of Article 3 as a whole. *Rollyson*, 205 W.Va. at 374, 518 S.E.2d at 378 ("Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments."). Article 3 of Chapter 11A of the West Virginia Code is almost entirely comprised of various provisions relating to pre-sale and pre-deed notice and opportunity to redeem the property. The titles of the various sections are alone instructive: *See* W.Va. Code Ann. §§ 11A-3-2 ("Second publication of list of delinquent real estate; notice"), 11A-3-4 ("Redemption after second publication and before sale"), 11A-3-9 ("Sheriff's list of sales, suspensions, redemptions and certifications; oath"), 11A-3-13 ("Publication by sheriff of sales list"), 11A-3-19 ("What purchaser must do before he can secure deed," including compiling a list of those entitled to notice by sheriff as per §§ 11A-3-21 and -22), 11A-3-23 ("Redemption from purchase"), 11A-3-28 ("Compelling service of notice or execution of deed").

In the instant case, Appellant's predecessor was ready, willing, and able to satisfy any and all outstanding tax indebtedness of its borrowers, in order that it retain the security for its loan. Indeed, it and its successors continued to pay the taxes that accrued when it received the tax bills, even after the tax deed was recorded. However, because Fleet did not receive notice of the impending tax deed, it was unable to have an opportunity to redeem the property. Consequently, the intent of the statutory scheme was thwarted.

If, however, Fleet had been given appropriate notice of the impending tax deed, then it would have paid all taxes due and owing on the property, thereby providing a "speedy and expeditious enforcement of the tax claims," W.Va. Code Ann. § 11A-3-1, and allowing an interested party to retain ownership and/or fiscal control of the property.

In West Virginia, the long redemption provided for in W.Va. Code Ann. § 11A-3-19(a), militates in favor of more than a "single look" to determine those to whom notice should be given. Thus, while a purchaser's record search on the sale date may well be sufficient with a shorter redemption period, a purchaser's record search on the sale date is not sufficient for the one-and-one-half year redemption period which exists under West Virginia law. *Jones*, 547 U.S. at 230 (due process requires that the government take additional measures to provide notice to interested parties of an impending tax sale when the government has reason to believe "after notice was sent, but before the taking occurred," that the intended recipient would not in fact receive said notice).

If such were not the case, it would encourage tax sale purchasers to perform their record search on the sale date, thereby leaving an 18-month time period in which lenders may become an interested party but fail to be notified of the pending tax deed. *Napier v. Bd. of Educ. of Mingo*, 214 W.Va. 548, 553, 591 S.E.2d 106, 111 (2003) (where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made; that which is necessarily implied in a statute, or must be included in it in order to make the terms actually used have effect, according to their nature and ordinary meaning, is as much a part of it as if it had been declared in express terms).

Thus, requiring a tax sale purchaser to reexamine the land records at some point closer to the close of the redemption in order to provide notice of the right to redeem the property from sale is a reasonable requirement, and doing so would more likely assure that lenders and other stakeholders such as the Appellant are accorded Due Process.

C. Out-Of-State Authority.

Assuming, *arguendo*, that there is no binding West Virginia precedent on this issue, it is appropriate to examine how other jurisdictions have treated the issue. *State ex rel. Cosner v. See*, 129 W.Va. 722, 736, 42 S.E.2d 31, 40 (1947) (where no prior West Virginia decision exists on the particular question at hand, "recourse may be had to the decisions of the appellate courts of other jurisdictions in which somewhat similar [issues] have been considered"); *Edlis, Inc. v. Miller*, 132 W.Va. 147, 167, 51 S.E.2d 132, 141-42 (1948) (while not binding precedent, cases from other jurisdictions "are entitled to great respect and should be regarded as persuasive authority"). The few judicial opinions located that squarely address the issue presented seem to confirm the analysis set forth above.

The facts in *Kildeer Realty v. Brewster Realty*, 826 A.2d 961 (R.I. 2003), are exceedingly analogous to those at issue here. In *Kildeer*, a mortgagee who alleged that it did not receive proper notice filed a petition to vacate a judgment foreclosing its rights or redemption to property acquired by a purchaser in a tax sale. In pertinent part, the then-applicable version of the relevant Rhode Island statute provided that

[i]n case the collector shall advertise for sale any property, real, personal, or mixed, in which any person other than the person to whom the tax is assessed has an interest, it shall not be necessary for the collector to notify the interested party, except *mortgagees of record who shall be notified* by the collector either by registered or certified mail . . . *not less than twenty (20) days before the date of sale*].

Id. at 962 n.3 (emphasis added) (quoting R.I. Gen. Laws § 44-9-11).

The evidence disclosed that because of the languid communication and filing system in place between the city's land records department and the tax assessor's office, and the volume of title searches conducted within six to seven weeks before the statutory twenty-day notification deadline, Brewster Realty's . . . recorded interest was not discovered during the [city's] search and Brewster Realty was not afforded notice of the tax sale.

Id. at 962-63.

[E]ighty-three days after Brewster Realty's interest was recorded, Kildeer purchased the property at tax sale [M]ore than one year after the tax sale and in accordance with [the statute], Kildeer filed in Superior Court a petition to foreclose all rights of redemption to the property. The defendant, Brewster Realty, was named on the petition, and . . . [a] final decree was entered [in favor of Kildeer, the tax purchaser,] foreclosing all rights of redemption to the property.

Id. at 963. On appeal the Supreme Court of Rhode Island held that

Brewster Realty was entitled to notice of the tax sale because . . . [t]he statute in force during the relevant period in 1999 required that notice be provided to all mortgagees of record. *See* [R.I. Gen Laws] § 44-9-11(a). This requirement extended to all recorded interest holders, no matter how recently their interests were recorded, subject to the limitation that notice be given not less than twenty days before the date of sale. Therefore, no matter how recently a deed was recorded, the mortgagee was entitled to notice of the impending tax sale.

Id. at 965.

Likewise, the West Virginia statute requires that mortgagees such as Fleet are given notice and an opportunity to redeem the property which serve as the security for its loan prior to a tax sale of and/or deed for such property. *Plemons*, 396 F.3d at 572-74 (due process requires notice and opportunity to be heard); *Rollyson*, 205 W.Va. at 374-75, 518 S.E.2d at 378-79 (trustee of deed of trust note secured by property entitled to notice of tax deed).

D. Conclusion.

For all the reasons stated herein, due process requires that the Appellant's predecessor, becoming a "gap" lender during the 18-month redemption period, be given notice and an opportunity to redeem the property prior to the delivery of a tax deed for the same. In as much as Appellant's predecessor, Fleet National Bank, was never given notice of the intention to deliver the tax deed or an opportunity to redeem from sale the property that was to serve as security for its loan, the Appellant was deprived of its due process rights.

III. APPLYING W.VA. CODE ANN. § 11A-4-4 TO BAR ACTIONS WHERE JURISDICTIONAL DEFECTS EXIST IN THE TAX SALE IS A DEPRIVATION OF DUE PROCESS.

The West Virginia Legislature, when enacting the statutory scheme for tax collections, has mandated that "[i]n furtherance of the policy declared in [Article 3, W.Va. Code Ann. §11A-3-1], it is the intent and purpose of the Legislature [in Article 4] to provide reasonable opportunities for delinquent tax payers to protect their interests in their lands and to provide reasonable remedies in certain circumstances for persons with interests in delinquent and escheated lands." W.Va. Code Ann. § 11A-4-1. Of particular interest to this Court is § 11A-4-4(a):

If any person entitled to be notified under the provisions of . . . article three of this chapter is not served with the notice as therein required, and does not have actual knowledge that such notice has been given to others in time to protect his interests by redeeming the property, he, his heirs and assigns, may, before the expiration of three years following the delivery of the deed, institute a civil action to set aside the deed[.]

Thus, among other requirements, an interested party must bring suit within three years after delivery of the tax deed in order to have the tax deed set aside.

Did the West Virginia Legislature intend to bar attempts to bring an action after three years on titles which would have been otherwise void because of jurisdictional defects?

Appellant believes that the applicable law answers this inquiry with a resounding "no."

A. The Relevant West Virginia Case Law.

This appeal presents for decision the issue reserved by this Court in *Lilly*. In *Lilly*, this Court discussed due process rights of property owners at length, and cited the United States Supreme Court's invalidation of an Oklahoma statute which barred all contract claims against an estate if they were not filed within two months of a published notice. The cited case, *Tulsa Prof'l*

Collection Servs. v. Pope, 485 U.S. 478 (1988), dealt with a statute which was termed a "non-claim" statute because it automatically barred claims not filed against the estate within the prescribed time.

An argument was made in *Pope* that a "non-claim" statute was analogous to a statute of limitations and, because a statute of limitations involves no state action, it is thus not subject to attack on due process grounds. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). The United States Supreme Court rejected this argument, pointing to the ongoing nature of the state government in the procedure, and concluded:

Where the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature that *Short* indicated was necessary to remove any due process problem. Rather, in such circumstances, due process is directly implicated and actual notice generally is required.

Pope, 485 U.S. at 487 (citations omitted).

Clearly, under *Pope* the West Virginia redemption statutes are only one step in the overall procedure which involves continued state action. *Lilly*, 180 W.Va. at 232 n.10, 376 S.E.2d at 126 n.10.

In *Lilly*, this Court discussed three post-*Mennonite* cases challenging a state tax sale statute, where suit was filed after the initial delinquent tax sale and after the redemption period had ended. *Id.* at 232-33, 376 S.E.2d at 126-27. In each instance, the courts addressing those sales had no difficulty in applying *Mennonite Bd. of Missions* to the original notice deficiency and did not allow the expiration of the redemption period to operate as a bar to a subsequent suit to invalidate the sales. See *McCann v. Scaduto*, 519 N.E.2d 309 (N.Y. 1987); *Seattle-First Nat'l Bank v. Umatilla County*, 713 P.2d 33 (Or. Ct. App. 1986); *In re Upset Sale*, 479 A.2d 940 (Pa. 1984).

This Court then held that where, as here, there existed a constitutional due process violation, a landowner could bring suit to set aside the sale of the property notwithstanding that the limitations period for such an action had passed. *Lilly*, 180 W.Va. at 233, 376 S.E.2d at 127 ("If one's property has been wrongfully taken because of a constitutional due process violation, it is hardly an answer to say that such person cannot bring suit because he now lacks an interest in the property.").¹

In this action, despite the tax sale purchaser's compliance with the provisions of W.Va. Code Ann. § 11A-3-19, not requiring the tax purchaser to undertake an additional search of the records to determine if there exist other parties interested in the real estate sold for nonpayment of taxes in order that they be given notice of the right to redeem the property from sale, is a jurisdictional defect. Curative statutes do not apply to jurisdictional defects because they automatically deprive a former owner of his rights, whereas short statutes of limitation may prevent an attack on such defects in a tax deed since a defaulting landowner is afforded a reasonable time in which to protect his interest. Actions to set aside tax sales which occurred prior to March 6, 1941, the date when applicable statutes were extensively revised by the Legislature, were determined not to be barred by the statute of limitations set forth in the predecessor statute to the present § 11A-4-4 because of a jurisdictional defect in the sale.

Clearly, the bar to Appellant receiving relief before the Cabell County Circuit Court was the statute of limitations of § 11A-4-4(a). Unlike *Lilly*, the bar of W.Va. Code Ann. § 11A-4-4(a) is a state-imposed statute of limitations, depriving Appellant, as a party entitled to

¹"[O]verrul[ing] the holding of Syllabus Point 9 of *Pearson* insofar as it precludes a landowner or other party having an interest in real property from bringing suit to set aside the sale of the property based on a constitutionally defective notice at the sheriff's sale for delinquent taxes." *Id.* at 233, 376 S.E.2d at 127.

protection and notice, *Rollyson v. Jordan, supra*, 205 W.Va. at 374-75, 518 S.E.2d at 378-79, of the opportunity to even assert its claims or to seek alternative relief. Syl. Pt. 3, *Shaffer v. Mereve Oil Corp.*, 157 W.Va. 816, 204 S.E.2d 404 (1974).

The least intrusive remedy to this appeal is to allow *only* the holder of any lien secured by delinquent property recorded after notice is certified to the County Clerk to bring suit to have the tax deed set aside even if outside the three-year statute of limitations.

B. Distinguishing *Shaffer v. Mareve Oil*.

The Court below followed the ruling in *Shaffer* that "[a] rational interpretation of the Legislative intent was that it intended the Statute of Limitations of West Virginia Code § 11-4-4(a) to bar actions to set aside such a tax sale deed for all defects defined therein, including jurisdictional defects." *Id.* at 826, 204 S.E.2d at 410.

In *Shaffer*, this Court stated that "[a] short statute of limitations may validly bar an attack on a jurisdictionally defective or void tax deed [and a] statutory provision prohibiting action to set aside such deeds after a reasonable period of time is constitutional and not violative of the Due Process Clause of the Fourteenth Amendment." *Id.* at 823-24, 204 S.E.2d at 409. To the extent that *Shaffer* purports to preclude Appellant from seeking to redress the violation of its due process rights, it is distinguishable from the instant case.

First, *Shaffer* was decided before the United States Supreme Court's decision in *Mennonite Bd. of Missions. Lilly*, 180 W.Va. at 232, 376 S.E.2d at 126 (distinguishing *Pearson v. Dodd*, 159 W.Va. 254, 221 S.E.2d 171 (1975), on this basis).

In *Mennonite*, suit was not instituted until after the redemption period had expired and the deed to the property had been delivered to the purchaser. Despite the fact that Mennonite, as the mortgagee, had its property interest extinguished under the Indiana statute, the Supreme Court nevertheless found that the lack of personal notice was a due process violation that vitiated the sale.

Id. The *Mennonite Bd. of Missions* rule clearly applies to Fleet in the instant case and it is undisputed that Fleet was never notified of the tax deed or otherwise given an opportunity to redeem the property. 462 U.S. at 798 ("Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale.").

Secondly, the action to set aside the deed in *Shaffer* was commenced 26 years after the tax sale had occurred and the deed delivered to the tax sale purchaser. Here, by contrast, the action to set aside the deed was commenced five and half years after the delivery of the tax sale deed. See also *Shrewsbury v. Horse Creek Coal Land*, 78 W.Va. 182, 88 S.E. 1052 (1916) (under the circumstances presented, where land was sold for taxes in 1898, but cotenant did not learn of sale until 1905, a suit to try tax title in 1909 was not barred by laches).

C. Out-Of-State Authority.

Other courts have since concurred with these holdings despite the application of strict statutes of limitation. See Robert L. Herrick, *Proof of Circumstances Justifying the Setting Aside of Tax Sales of Real Property*, 28 Am. Jur. P.O.F.3d 439, § 7 (Westlaw database updated Jan. 2007) ("[The] statute of limitations is no bar to setting aside a tax sale by challenging constitutionality of a notice provision, when the reason for not timely bringing suit that there was not notice or inadequate notice of tax-sale proceeding.").

For example, in *Braun v. Petty*, 129 S.W.3d 449 (Mo. Ct. App. 2004), the court held that the three-year statute of limitations for filing an action against the tax sale purchaser for recovery of lands sold for taxes did not bar the trustees of a homeowners association that previously held park property for benefit of homeowners from asserting that the tax purchaser's deed was void. The park dedication was found to be a "claim" on the property, entitling the trustees' predecessors

to notice of any tax sale, and the failure of the purchaser to give them notice supported the conclusion that the tax sale deed was a nullity. Therefore the purchaser was found to have no interest in the property, even though the deed had already been recorded.

Similarly, in *Smith v. Brooks*, 714 So. 2d 735 (La. Ct. App. 1998), the Louisiana Court of Appeals, deferring to the supremacy of the Fourteenth Amendment to the United States Constitution as interpreted in *Mennonite Bd. of Missions*, held that the failure to give notice to an interested mortgagee rendered a tax sale an absolute nullity and, thus, the five-year preemptive period of the Louisiana Constitution did not operate to extinguish the mortgagee's successor-in-interest's right to sue to annul the tax sale. *Id.* at 739.

Under similar circumstances, the Court of Appeals of Ohio has held that where a lack of preconfirmation notice to ascertainable mortgagee resulted in a sheriff's sale in violation of the mortgagee's due process rights, a state statute providing that all actions to vacate the sale had to be commenced within 12 months of confirmation was inapplicable. *Foreclosure of Liens for Delinquent Taxes v. Parcels of Land encumbered with Delinquent Tax Liens*, 2003 WL 1795569 (Ohio Ct. App. Apr. 4, 2003) (unpublished) (citing and following *Chapin v. Aylward*, 464 P.2d 177, 182 (Kan. 1970) ("Notwithstanding the purpose and legislative intent of [the statute] to bring about finality and stability to tax titles unless attacked within the twelve-month period, we hold that the provision in question must give way to a situation where the facts clearly establish a denial of due process of law.")).

D. Conclusion.

For all the reasons stated herein, applying W.Va. Code Ann. § 11A-4-4 to bar the Appellant from seeking to set aside a tax deed when its predecessor (Fleet) was never given

notice of the tax deed or an opportunity to redeem the property that was to serve as security for its loan, would itself constitute a deprivation of due process.

**IV. ISSUES OF FACT AND OTHER CLAIMS
EXIST WHICH PRECLUDED TRIAL COURT'S
GRANTING OF SUMMARY JUDGMENT.**

The granting of summary judgment below precluded the Appellant from establishing the facts which would support a number of claims. For example, in its Complaint the Appellant asserted that it believed the unpaid real estate taxes for the year for which the tax sale occurred had been redeemed from sale and paid. Complaint, Count Two.

The Appellant provided support for this belief in the Response and Amended Response it filed to the Appelles' Motion for Summary Judgment. The Response and Amended Response² attached as Exhibits copies of the search screens from the Cabell County Sheriff's Office's live database for the years 1999 through 2001. *See, e.g., Exhibit C to Amended Response Of Wells Fargo Bank, N.A., To Motion For Summary Judgment.*

This Exhibit demonstrated that the taxes for the year 1999, one of the years which had been the subject of the sale for delinquent real estate taxes, were in fact timely paid on November 9, 1999. Moreover, the documents constituting the Exhibit showed the following entry with regard to delinquent taxes: "Prior Delinquents: None." This would make it clear to any title examiner searching the records that there had been no delinquency in the payment of the ad valorem taxes for the year 1998, the other year for which the property was purportedly sold for delinquent real estate taxes.

²The pleadings differed only in that the Amended Response was filed after the note and security interest in the form of the Deed of Trust upon the real estate were assigned to the Appellant, Wells Fargo Bank, N.A., and attached as an additional Exhibit the Assignment to Wells Fargo and the Order substituting Appellant as the Plaintiff below.

In addition, for the tax year 2001, the year in which Appellant's predecessor Fleet caused its deed of trust to be recorded, the records on Exhibit C show that the real estate taxes were timely paid as they came due, and that the property had been "Redeemed" from sale for some prior year's delinquent taxes. Inasmuch as the only delinquency reflected in the tax records is that for the 1998 tax year, it would be clear to any title examiner that the property had been "redeemed" from sale and that no deed had been, nor could be, delivered, and thereby impair its security interest.

However, because of the finding of the Court below that the three year statutory bar imposed by W.Va. Code Ann. § 11A-4-4 precluded any inquiry as to the propriety of the sale, the Appellant was unable to pursue the matters raised in Count Two of its Complaint. Final Order at 4, ¶ 5.

The matters raised in Court Two of its Complaint, as supported by the Exhibits filed with the trial court, if fully developed could lead the trial court to the conclusion that no delinquency existed in the real estate tax payments, and no sale should have occurred. In such an event, the Appellant would be entitled to relief under the provisions of either W.Va. Code Ann. § 11A-4-2 or W.Va. Code Ann. § 11A-4-3(a).

The Appellant also asserted that, since the time of the conducting of the tax sale, it had paid the real estate taxes and therefore was entitled to relief either in the form of the setting aside of the sale or a claim for unjust enrichment. To support its claims the Appellant attached both an Affidavit and documents demonstrating that it had paid \$6,137.16 in real estate taxes to the Sheriff of Cabell County since the Appellees had acquired title to the property. *See, e.g., Exhibits F-H to Amended Response Of Wells Fargo Bank, N.A., To Motion For Summary Judgment.*

The Court imposed the provisions of W.Va. Code Ann. § 11A-4-4 to preclude any inquiry as to these matters which had been raised in Count Three of its Complaint. Final Order, *Id*

In light of, and in combination with, the Due Process issues raised in parts II and III, *supra*, the Appellant believes that this Court should remand this proceeding to the Circuit Court in order to allow it to address these issues.

RELIEF PRAYED FOR

This Court should find that the statutory provision prohibiting action to set aside a tax sale deed with a jurisdictional defect after the expiration of the three year period set forth in W.Va. Code Ann. § 11A-4-4(a) is unconstitutional and violative of the Due Process Clause of the Fourteenth Amendment and the Due Process Clause contained in Article III, § 10 of the West Virginia Constitution.

In the instant case, the Appellant was entitled to a notice to redeem pursuant to W.Va. Code Ann. § 11A-3-19(a). Because the Appellant was not provided with the required notice to redeem, and the Appellant believes that factual issues exist with regard to the existence of unpaid real estate taxes, it is the Appellant's right to have the tax deed issued to the purchaser set aside.

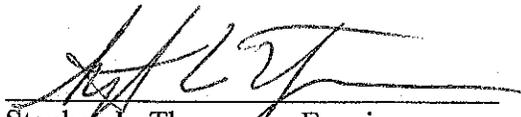
The Appellant is also entitled to factual development upon its payment of real estate taxes following the tax sale and to pursue its claim for the unjust enrichment which was bestowed upon the purchasers of the property at the tax sale.

WHEREFORE, the Appellant prays that the ruling of the Cabell County Circuit Court be reversed and remanded for further proceedings consistent with the legal conclusions stated

herein.

Respectfully submitted,

WELLS FARGO BANK, N.A.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**WELLS FARGO BANK, N.A.,
Assignee and Successor in Interest to
FLEET NATIONAL BANK,
a national banking association,**

Appellant-Plaintiff

v.

**UP VENTURES II LLC; IRONWOOD
ACCEPTANCE COMPANY, a Delaware
corporation, PALO VERDE TRADING
COMPANY, LLC, an Arizona limited liability
company; JEFFREY E. HALL and ANNETTE
L. HALL,**

Appellees-Defendants.

**APPEAL NO. 34265
Cabell County Circuit Court
Civil Action No.: 07-C-26
Hon. David M. Pancake**

CERTIFICATE OF SERVICE

I, Stephen L. Thompson, counsel for Wells Fargo Bank N.A., Assignee and successor in interest to Fleet national Bank N.A., the Appellant herein, certify that service of the Brief of Appellant was made upon the parties listed below by mailing a true and exact copy thereof to

Ronald J. Flora, Esquire
1115 Smith Street
Milton, WV 25541

Mr. and Mrs. Jeffrey E. Hall
6370 Little Seven Mile Road
Huntington, WV 25702

in a properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this 3rd day of October, 2008.



Stephen L. Thompson, Esq. (WVSB #3751)