

## DELINQUENT AND NON-ENTERED LANDS AND DUE PROCESS

*John W. Fisher, II\**

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### I. INTRODUCTION

Since the earliest days of our State, the collection of delinquent real estate taxes has presented challenges for both the courts and the legislature. This story began shortly after the Revolutionary War, was significantly influenced by decisions made at the time of West Virginia’s statehood, has required a constitutional amendment, and is once again deserving of the court’s attention. Much earlier in my academic career, I wrote an article entitled *Forfeited and Delinquent Lands—The Unresolved Constitutional Issue*.<sup>1</sup> I find it somewhat ironic that a quarter of a century later, I return to plough that field again. As will be discussed *infra*, while the safeguard of “due process” to tax sales is well-established by the courts, the application of that principle to tax sale

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\* William J. Maier, Jr. Dean Emeritus and Robert M. Steptoe and James D. Steptoe Professor of Property Law. The author acknowledges with sincere appreciation the support of the West Virginia University College of Law and the Arthur B. Hodges Faculty Research Fund in the preparation of this article. I also acknowledge with sincere appreciation the research assistance of Lara K. Omph, Senior Managing Editor of the West Virginia Law Review, Volume 114, Class of 2012. Also, my thanks to Robert L. Shuman for his comments and suggestions in the preparation of this article.

<sup>1</sup> John W. Fisher, II, *Forfeited and Delinquent Lands—The Unresolved Constitutional Issue*, 89 W. VA. L. REV. 961 (1987).

presents challenges. As Chief Justice Roberts said in *Jones v. Flowers*, “it is not our responsibility to prescribe the form of service that the [government] should adopt.”<sup>2</sup> “In prior cases, finding notice inadequate, we have not attempted to redraft the State’s notice statute.”<sup>3</sup> In West Virginia, where much of the responsibility for notifying the delinquent taxpayer of the pending loss of his/her property is, by statute, assigned to the tax lien purchaser, the Court’s role in safeguarding due process is critical. This article will briefly note how the early efforts to settle western Virginia created a variety of problems as to land ownership, how the legislature attempted to use the state’s taxing authority to resolve issues of conflicting ownership, and how those efforts shape nearly a century of real estate tax jurisprudence. This historical background will help us to understand the 1994 legislative “reform” and the due process issue it has created.

## II. “A MOST WRETCHED AND EMBARRASSED CONDITION”

The history of forfeited and delinquent lands was traced in the earlier article<sup>4</sup> and will not be repeated herein. However, to put the present issue in perspective, a brief history is helpful and excerpts from Judge Snyder’s opinion in *McClure v. Maitland*<sup>5</sup> provide a good summary.

In the *Maitland* decision, Judge Snyder traced the efforts of Virginia to settle the lands of western Virginia, starting with the establishment of the land office for the Commonwealth of Virginia by act of the General Assembly in May of 1779 (“May 1779 Statute”) to the adoption of the West Virginia Constitution of 1872.<sup>6</sup> As to the initial efforts to settle the western lands of Virginia, he noted: “any person, upon the payment into the treasury of two cents per acre, could obtain from the register of the land office warrants for as much land as he might desire to enter.”<sup>7</sup> A procedure was established for the land to be surveyed within a fixed period of time. The Governor would then issue a grant to the owner of the survey.<sup>8</sup>

Judge Snyder noted:

The result of this loose, cheap and unguarded system of disposing of her public lands was, that in less than twenty years nearly all of them were granted—the greater part to mere

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<sup>2</sup> 547 U.S. 220, 238 (alteration in original) (quoting *Greene v. Lindsey*, 456 U.S. 444, 455 n.9 (1982)).

<sup>3</sup> *Id.*

<sup>4</sup> See generally Fisher, *supra* note 1, at 961–86.

<sup>5</sup> 24 W. Va. 561 (1884).

<sup>6</sup> See *id.* at 563–69.

<sup>7</sup> *Id.* at 564.

<sup>8</sup> *Id.*

adventurers, in large tracts, containing not only thousands but frequently hundreds of thousands of acres in one tract. The grantees were often non-residents and few of them ever saw their lands or expected to improve or use them for purposes other than speculation. The entries and surveys were often made without reference to prior grants, thus creating interlocks and covering land previously granted, so that in many instances the same land was granted to two or more different persons. Sometimes upon one survey actually located others were constructed on paper by the surveyors without even going upon or seeing the lands, thus making blocks of surveys containing thousands of acres none of which were ever surveyed or identified by any marks or natural monuments.<sup>9</sup>

This initial effort to settle and improve the lands in western Virginia proved to be an abysmal failure. Judge Snyder summarized the state of affairs fifty years after the adoption of the May 1779 Statute as follows:

In this utter confusion and embarrassment it was found absolutely necessary to resort to earnest and rigid measures to compel the owners of land to pay their taxes or in default thereof to have their titles entirely vacated and the lands vested in or transferred to actual settlers and those who were willing to improve the lands and pay taxes on them.<sup>10</sup>

Starting in April of 1831, the Virginia General Assembly adopted a series of statutes addressing its forfeited and delinquent lands.<sup>11</sup> In 1837, the General Assembly passed a statute providing for the sale of lands that were forfeited to the Commonwealth.<sup>12</sup> The 1837 statute provided that it was the duty of the circuit superior court for each county west of the Blue Ridge Mountains to appoint a commissioner or commissioners to sell the lands.<sup>13</sup> The last enactment in this series was in March 1846.<sup>14</sup>

Upon West Virginia's statehood, the then statutory scheme of Virginia for the sale of forfeited and delinquent lands was incorporated into the laws of West Virginia as part of both the Constitution of 1863 and the Constitution of 1872 and accompanying statutory provisions.<sup>15</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 566.

<sup>11</sup> *See id.*

<sup>12</sup> *Id.* at 567.

<sup>13</sup> *See id.*

<sup>14</sup> *See id.* at 569.

<sup>15</sup> *See id.* at 572.

As more fully discussed in the previous article,<sup>16</sup> an important aspect of the West Virginia constitutional provision was that before the forfeited and delinquent land could be sold by the state through the deputy commissioners of forfeited and delinquent lands (“deputy commissioner”),<sup>17</sup> the state had to have “absolute title.” The right to redeem granted in the statute after the forfeited and delinquent land was certified by the State Auditor to the deputy commissioner for sale, and the right of the prior owner to any “excess” sum above the taxes, interest, and expenses of the sale were considered as acts of grace on behalf of the State.<sup>18</sup>

In *McClure v. Maitland*, the Supreme Court of Appeals of West Virginia determined that these sales were merely the acts of an agent for the State and, as such, did not constitute a judicial proceeding.<sup>19</sup> While Maitland

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<sup>16</sup> See generally Fisher, *supra* note 1.

<sup>17</sup> State auditors served as commissioners by appointment and each commissioner had deputy commissioners serving under him.

<sup>18</sup> Judge Snyder explained this act of grace as follows:

The preceding, or fourth section of the Constitution, shows that the former owner, by reason of the forfeiture, was divested of every particle of interest in the land and its proceeds, and that he had no more title or right to either than if he had never had any interest in the land. It necessarily follows then that the grant or claim thus conferred upon him, is a simple matter of grace, a gift without any consideration therefore, owing its whole existence to the volition of the grantor, and it is in no sense the recognition of a pre-existing right to, or claim upon the land or its proceeds. It is a mere bounty gratuitously bestowed by the State, which she had the undoubted right to give or withhold. And having this perfect right to give or not to give, the State unquestionably had the right, if she chose to make the gift, to fix not only its *quantum*, but also the form in which it should be received and the manner of its payment. This she has done in explicit terms by fixing the surplus as the *quantum*, the proceeds as the form and the filing of his claim therefore within two years *after* the sale of the land as the manner. It is apparent that the terms, “excess of the sum for which the land may be sold over the taxes,” &c., are employed not to give the former owner an interest in the surplus proceeds as such, but merely as a measure of the *quantum* to which he shall be entitled upon filing his claim within the time prescribed. The whole history as well as the express language of this constitutional provision proves that it was the intention to bestow upon the former owner whatever part of the proceeds of sale might be actually paid or liable to be paid into the State treasury, after the State had sold the land and paid all the taxes, costs, &c., out of the proceeds of the sale; and that it was clearly not intended to give him any interest in the land or its proceeds until a surplus should be ascertained by the proceedings conducted alone by the State through her officers. “Beggars must not be choosers” is a just maxim, and, therefore, it is the duty of the courts to see that the bounty of the State is not used to her detriment by giving to this provision of her Constitution a forced construction and one that could never had been intended. I am, therefore, of opinion that said fifth section of the Constitution did not confer upon the appellant, Maitland, any claim or interest in the land, or any interest or right to participate in the proceedings for its sale, his right to the surplus proceeds not arising until after the sale.

*Maitland*, 24 W.Va. at 580–81.

<sup>19</sup> Additionally, Judge Snyder discussed the following:

had asserted a constitutional right to notice of the proceeding in the circuit court, the court rejected the claim stating, “I do not think this position can be maintained upon any legal ground, because it erroneously assumes that the proceeding is a judicial one and that Maitland, as the former owner, has an interest in or lien on the land or some interest in these proceedings.”<sup>20</sup>

It is fair to assume that the “wretched and embarrassed”<sup>21</sup> state of affairs regarding land titles which led to the statutory provision in Virginia and which became the basis of West Virginia law both dominated and influenced Judge Snyder’s view on this issue. As Judge Snyder explained in his opinion:

In the year 1831, as we have endeavored to show in a former part of this opinion, the land titles in that portion of the

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These authorities indicate that the acts of the court in ordering and confirming sales are merely *ex parte* and not judicial proceedings in the sense that they involve litigation or the determination of a controversy between adverse parties. They are in my opinion more in the nature of administrative and *ex parte* proceedings—such as orders and entries made by courts in transacting the police and fiscal matters of a county—than they are in the nature of judicial controversies. They are merely a mode provided by the State for affecting the sale of lands which are her absolute property. She being a corporate body can act only by agents duly appointed by her. The commissioner and the court are her agents appointed for that purpose. The constitutional and statutory provisions, authorizing and declaring the manner of making these sales, are in effect a power of attorney or commission appointing and conferring upon the court and commissioner the authority to sell them, and the reports of the commissioner and the orders of the court, with the deed of the commissioner to the purchaser, are merely the evidence of the sale and transfer of the title from the State to the purchaser. The State could have established any other agency for the disposal of her lands having no connection with her courts, and sales thus made would be just as effectual to pass her title as those made under this form of proceeding. The Federal government and the commonwealth of Virginia sell their lands through the agency of their respective land offices without any pretense of a judicial proceeding, and no one questions their power to do so.

*Id.* at 579.

<sup>20</sup> *Id.* at 575. Later in the opinion, in distinguishing the sheriff’s sale from the deputy commissioner sale, the court explained:

In the argument for the appellant it was assumed that sales made by commissioners of school lands were in some respects similar to sales of lands by sheriffs for delinquent taxes, and that, therefore, the proceedings must be construed with the same strictness and scrutiny. This is clearly a mistaken view. In the case of such sales by the sheriffs, the lands sold are the property of the owner, the State having no claim thereto beyond her taxes. The sale is the enforcement of the State’s lien for her taxes and nothing more. But in the case of sales by the commissioner of school lands, the lands sold are the absolute property of the State, the former owner having no interest therein whatever. If the sale is irregular or improper in the former case the owner is prejudiced and he has the undoubted right to test the legality of the sale; but in the latter case the former has no interest and cannot, therefore, be prejudiced by the sale, however irregular or improper the proceedings under which it was made.

*Id.* at 581.

<sup>21</sup> *Id.* at 575.

commonwealth of Virginia now embraced within this State were in a most wretched and embarrassed condition. Many owners of large tracts, covering in some cases almost entire counties, would neither pay their taxes nor settle and improve their lands, thus paralyzing the energy and contravening the prosperity of the people and the advancement and population of the State to an almost inconceivable extent. In this emergency and to remedy this calamitous evil the General Assembly of Virginia inaugurated the system of delinquent and forfeiture laws that form the basis of the provisions of our present Constitution on that subject. The whole history of that system shows a most earnest and determined effort on the part of the Legislature, the Judiciary and the people, speaking through our present Constitution, to destroy and annihilate the titles of such delinquent owners, who should, after every reasonable opportunity had been given them to comply with the laws, continue in default, and to protect actual settlers and those not in default. The purpose of the statute passed to enforce this system was not merely to create a lien for the taxes on these delinquent and unoccupied lands, but to effect by their own force and vigor an absolute forfeiture of them and effectually vest the title thereto in the State without the machinery of any proceeding of record or anything in the nature of an inquest of office. Such was intended to be and such was in fact the effect of these statutes.<sup>22</sup>

For the next one hundred years, the Supreme Court of Appeals of West Virginia and the legislature both struggled with various aspects of Judge Snyder's analysis/explanation of our State's procedure to return forfeited and delinquent lands into the hands of a responsible taxpayer.<sup>23</sup>

### III. DUE PROCESS — ROUND 1

While an extended discussion of the forfeited and delinquent lands procedure in effect in West Virginia from statehood until 1993 is not necessary for present purposes, a brief explanation would be useful.<sup>24</sup> In West Virginia, the law imposes a duty on each real property owner to have their land entered

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<sup>22</sup> *Id.* at 575–76.

<sup>23</sup> My earlier article traces those court decisions and legislative actions during that period. *See generally* Fisher, *supra* note 1.

<sup>24</sup> A succinct overview is provided in a student note, see Carla Williams, Note, *Forfeited and Delinquent Lands: Resolving the Due Process Deficiencies*, 96 W. VA. L. REV. 251, 253–55 (1993).

on the land books for taxation purposes<sup>25</sup> and to pay the taxes thereon.<sup>26</sup> Failure to have it entered on the land books resulted in a forfeiture for non-entry,<sup>27</sup> and the failure to pay the taxes resulted in the sale of the real estate for delinquency.<sup>28</sup> The initial sale was by the county sheriff at the “steps” of the courthouse.<sup>29</sup> If a purchaser bid an amount equal to or greater than the total of the taxes, interest, and costs of the sale, and if certain statutorily required procedures were followed<sup>30</sup> in approximately eighteen months, the purchaser was entitled to a deed for the property executed by the clerk of the county commission.<sup>31</sup>

If there was no bid that was equal to or greater than the total of the taxes, interest, and costs, the property was “sold” to the State and certified to the Auditor as the commissioner of forfeited and delinquent lands.<sup>32</sup> After the passage of a proscribed period of time, the property became irredeemable by the former owner, i.e. absolute title vested in the state.<sup>33</sup> After the title became irredeemable in the State, the land was “certified” to a deputy commissioner for forfeited and delinquent lands for the county in which the land was located.<sup>34</sup> While the former owner had the right to redeem after the land was certified to the deputy commission, this was “an act of grace” on behalf of the State.<sup>35</sup> The deputy commissioner filed an *in rem* suit and then offered the land for sale at public auction.<sup>36</sup> If there were no bids, the deputy commissioner could sell the land via a private sale. Upon confirmation of the “purchase price” by the court, the deputy commissioner issued a deed for the property.<sup>37</sup>

The tension that exists between two legitimate concerns that has challenged our courts and the legislation since statehood continues to this day.

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<sup>25</sup> W. VA. CONST. art. 13, § 6; W. VA. CODE ANN. § 11A-4-2 (LexisNexis 1991); W. VA. CODE ANN. § 11A-3-37 (LexisNexis 1991).

<sup>26</sup> W. VA. CONST. art. 13, § 6; W. VA. CODE ANN. § 11A-2-2(a) (LexisNexis 1991).

<sup>27</sup> W. VA. CONST. art.13, § 6; W. VA. CODE ANN. § 11A-3-37 (LexisNexis 1994).

<sup>28</sup> W. VA. CODE ANN. § 11A-2-10 (LexisNexis 1994).

<sup>29</sup> *Id.* §§ 11A-3-4 to -5.

<sup>30</sup> *Id.* §§ 11A-3-19 to -21.

<sup>31</sup> *Id.* § 11A-3-27 (changed to the State Auditor by an amendment in 2010).

<sup>32</sup> *Id.* § 11A-3-6 (until changed by the Constitutional Amendment and statutory rewrite in 1993 and 1994 in W. VA. CODE ANN. § 11A-3-8 (LexisNexis 2010)).

<sup>33</sup> *Id.* § 11A-4-3 (LexisNexis 1991).

<sup>34</sup> *Id.* §§ 11A-4-5, -9.

<sup>35</sup> *Id.* § 11A-4-19; *Pearson v. Dodd*, 221 S.E.2d 171, 267 (W. Va. 1975), *overruled in part by* Syl. pt. 3, *Lilly v. Duke*, 376 S.E.2d 122 (W. Va. 1988) (overruling “Syllabus Point 9 . . . insofar as it precludes a landowner or other party having an interest in real property from bringing suit to set aside the property based on a constitutionally defective notice at the sheriff’s sale for delinquent taxes.”). *Lilly v. Duke* is discussed *infra*.

<sup>36</sup> W. VA. CODE ANN. § 11A-4-10 (LexisNexis 1974).

<sup>37</sup> *See Pearson*, 221 S.E.2d 171.

On the one hand, the State wants to collect “its” taxes from the owner of the property, and if the owner does not pay the taxes, to transfer the property into the hands of a taxpayer who will. On the other hand, an owner should not lose title to his/her property without due process of the law. Thus, the courts began to struggle with what constitutes due process of the law.

#### IV. THE BEGINNING OF THE END OF JUDGE SNYDER’S ANALYSIS

Historically, the notice to the “owner” of the delinquent or non-entered property was by a legal notice published<sup>38</sup> in the local paper.<sup>39</sup> The adequacy of notice by publication in the context of the settlement of trusts was before the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust*.<sup>40</sup> *Mullane* involved a New York statute which permitted banks to “pool” smaller trust funds for management and investment to gain efficiencies.<sup>41</sup> The statute also provided that notice to the beneficiaries of accountings could be given solely by publication in a local newspaper.<sup>42</sup> Upon the filing of the petition for the settlement of accounts in the Surrogate’s Court, a special guardian and attorney was appointed to represent “all persons known or unknown not otherwise appearing who had, or might thereafter, have any interest in the income of the common trust fund.”<sup>43</sup>

The special guardian of the income interest, the “appellant, appeared specially, objecting that notice and the statutory provisions for notice to beneficiaries were inadequate to afford due process under the Fourteenth Amendment.”<sup>44</sup> The United States Supreme Court agreed with the appellant that notice solely by publication did not satisfy due process. In so holding, the Court said:

Against this interest of the State, we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that [“][t]he fundamental requisite of due process of law is the opportunity to be heard.[“] This right to be heard has little reality or worth unless one is informed that the matter is pending and choose for himself whether to appear on default, acquiesce, or contest. . . .

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<sup>38</sup> W. VA. CODE ANN. § 11A-4-12 (LexisNexis 1974).

<sup>39</sup> See generally *Pearson*, 221 S.E.2d 171; Fisher, *supra* note 1.

<sup>40</sup> 339 U.S. 306 (1950).

<sup>41</sup> *Id.* at 307.

<sup>42</sup> *Id.* at 309–10.

<sup>43</sup> *Id.* at 310.

<sup>44</sup> *Id.* at 311.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is 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. . . .

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.<sup>45</sup>

Due process, in the context of tax sales, was first addressed by the United States Supreme Court in *Mennonite Board of Missions v. Adams*.<sup>46</sup> In *Mennonite*, the United States Supreme Court held that since "a mortgagee possesses a substantial property interest that is significantly affected by a tax sale—a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale."<sup>47</sup>

Even though the West Virginia Supreme Court of Appeals had rejected the "due process" argument in a delinquent tax case, *Pearson v. Dodd*,<sup>48</sup> in 1975, our Court, on occasion, did demonstrate a concern for delinquent taxpayers with "sympathetic" facts. Two cases from the early 1980's illustrate this concern. The cases are *Don S. Co. v. Roach*<sup>49</sup> and *Cook v. Duncan*.<sup>50</sup> In reading these cases, it is important to keep in mind that in 1975 the West Virginia Supreme Court of Appeals had decided *Pearson v. Dodd*,<sup>51</sup> rejecting a due process challenge to West Virginia's tax sale procedure, and both of these cases were decided before the United States Supreme Court's decision in *Mennonite*.<sup>52</sup>

It is also fair to assume that our Court may have misinterpreted the United States Supreme Court's *per curiam*<sup>53</sup> decision dismissing the grant of

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<sup>45</sup> *Id.* at 314–15 (citations omitted).

<sup>46</sup> 462 U.S. 791 (1983). The possibility that the West Virginia case of *Pearson v. Dodd*, may have been the case in which the Supreme Court applied due process to "tax sales" is discussed in Fisher, *supra* note 1, at 989–94.

<sup>47</sup> 462 U.S. at 798. The *Mennonite* Court further held that since the mortgagee was reasonably identifiable, notice by newspaper publication and posting in the county courthouse does not satisfy the Due Process Clause of the Fourteenth Amendment. *See id.* at 799–800.

<sup>48</sup> 221 S.E.2d 171 (W. Va. 1975); *see generally* Fisher, *supra* note 1.

<sup>49</sup> 285 S.E.2d 491 (W. Va. 1981).

<sup>50</sup> 301 S.E.2d 837 (W. Va. 1983).

<sup>51</sup> 221 S.E.2d 171.

<sup>52</sup> The "due process" portion of *Pearson v. Dodd* was overruled by the Court in *Lilly v. Duke*, 376 S.E.2d 122 (W. Va. 1988).

<sup>53</sup> The court explained:

certiorari in the appeal of the Supreme Court of Appeals of West Virginia's decision in *Pearson v. Dodd*.

In *Don S. Co. v. Roach*,<sup>54</sup> Donald and Shirley Roach failed to pay the taxes on land and a house which they had purchased in 1973 for \$8,500.00.<sup>55</sup> The land and house were sold by the sheriff for non-payment of taxes.<sup>56</sup> Since no bid to purchase was received at the sheriff's tax sale, the property was purchased by the sheriff on behalf of the State.<sup>57</sup> After the statutory period of eighteen months had passed without the property being redeemed, the property was offered for sale by the Deputy Commissioner of Forfeited and Delinquent Lands for Harrison County.<sup>58</sup> Don S. Company, Inc. purchased the property for \$325, and following the confirmation of the sale by the circuit court, a deed dated June 19, 1979 was executed and delivered to the purchaser.<sup>59</sup> On October 20, 1979, the purchaser notified the Roachs of its intent to take possession of the property and demanded that they vacate. When they refused to vacate, litigation ensued.<sup>60</sup> The Roachs argued that notice solely by means of publication did not satisfy due process requirements.<sup>61</sup> The evidence in the case established Mr. Roach's illiteracy and that Mrs. Roach neither regularly received nor read the local newspaper in which the notice required by the

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The Jurisdictional Statement phrased the due process question presented by the appeal as whether notice by publication of the tax sale was constitutionally deficient, but was unclear whether the challenge was directed to the 1962 sale to the State [the Sheriff's tax sale] or to the 1966 sale [Deputy Commission's sale] to appellee Dodd. At oral argument counsel for appellant made clear, however, that her challenge was not addressed to the procedures for notice attending the 1962 transfer of the interest to the State, Tr. Of Oral Arg. 21–23, but solely to the procedures for notice attending the 1966 sale of the interest by the State to appellee Dodd. Indeed, we were repeatedly informed that the 1962 sale to the State was not even "an issue in this case." But under state law absolute title had vested in the State at the expiration of the 18-month period after the 1962 sale during which appellant might have exercised but did not exercise her right to redeem: § 11A-4-12 expressly provides that in such land sold to the State for nonpayment of taxes . . . (which has) become irredeemable. . . ." Appellant thus has no constitutionally protected property or entitlement interest upon which she may base a challenge of constitutional deficiency in the notice provisions attending the 1966 sale to appellee Dodd. The appeal is therefore dismissed for want of a properly presented federal question.

*Pearson v. Dodd*, 429 U.S. 396, 397–98 (1977) (citations omitted); *see also* Fisher, *supra* note 1, at 986–89.

<sup>54</sup> 285 S.E.2d 491 (W. Va. 1981).

<sup>55</sup> *Id.* at 493.

<sup>56</sup> *Id.* at 492.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 493.

<sup>60</sup> *Id.* at 494.

<sup>61</sup> *See generally id.* at 493–94.

statute should have been published.<sup>62</sup> In holding the tax deed void, the Supreme Court of Appeals of West Virginia stated:

The uncontroverted evidence on the record before us reveals that in the instant case the appellants received no tax ticket or other notice informing them that taxes on their real property were due, or advising them of their duty to pay taxes. We cannot allow the exploitation through law of the weak and ignorant by the rich and powerful, particularly where the price paid by the appellee for the appellant's property is so disproportionately less than the actual value of the real estate. We therefore hold that where a landowner has no notice that real estate taxes are due, and of his duty to pay such taxes, and where there is not evidence of record indicating that notice was published in compliance with statute, a jurisdictional defect arises which renders void the tax deed to the property. We wish to emphasize that we do not here reach the question of the constitutionality of the notice by publication provisions of Chapter 11A, article 3; rather we find that under the particular set of facts revealed by the record in this case, the appellants were deprived of their property without sufficient notice. We do not believe the holding of this case will extend to literate people with knowledge of their duty to pay taxes.<sup>63</sup>

Two years later, and on the same day the United States Supreme Court heard arguments in *Mennonite*, the Supreme Court of Appeals of West Virginia handed down its decision in *Cook v. Duncan*.<sup>64</sup> In *Cook*, Barbara Cook had purchased three lots in Harpers Ferry in 1974 for \$17,200.<sup>65</sup> The mailing address for the lots was Route 3, Harpers Ferry, and that was the address to which tax notices were sent.<sup>66</sup> The three lots were assessed and taxed as a single entity.<sup>67</sup> At all times relevant, Barbara Cook lived in Frederick, Maryland.<sup>68</sup>

Barbara Cook paid the 1974 taxes, and she paid the first half of the taxes for 1975 in person with a check listing her Frederick, Maryland address.<sup>69</sup> The taxes for the second half of 1975 became delinquent, and the tax lien encumbering the lots was sold at the sheriff's sale on November 8, 1976, to

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<sup>62</sup> *Id.* at 496.

<sup>63</sup> *Id.* (citations omitted).

<sup>64</sup> 301 S.E.2d 837 (W. Va. 1983).

<sup>65</sup> *Id.* at 838.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

Dale Duncan for \$450.00.<sup>70</sup> The tax related notices were sent to the Route 3, Harpers Ferry address and returned marked “moved, left no address.”<sup>71</sup> The tax deed was issued on May 26, 1978, and the suit to set aside the tax deed was filed on November 22, 1978.<sup>72</sup> Ms. Cook argued that “the county clerk’s attempt to provide her with notice of her right to redeem the property was insufficient.”<sup>73</sup> On the facts of the case, the Court held that the county clerk failed to exercise the “due diligence” required by the West Virginia Code,<sup>74</sup> and therefore, the tax deed should be set aside. As to the facts in the case, the Court stated:

Once the county clerk was confronted with conflicting evidence regarding Cook’s residency, he should have diligently sought to determine her actual residence. This may have revealed Cook’s Frederick, Md., address. In such an event, publication by notice would have occurred just as it did in the actual case. The crucial difference is that the letter informing the appellant of her right to redeem would have been sent to Frederick, Md., rather than to an address which everyone knew was where Cook did not live. Sending the notice to the Maryland address would have been most likely to apprise the appellant of her right to redeem.

Our interpretation of the county clerk’s duty in this regard necessarily defeats the appellees’ argument that “due diligence” is required only when a person’s residence is unknown. As a threshold matter, the county clerk must use “due diligence” to determine whether the delinquent property owner is a resident or non-resident of West Virginia. If the owner is a resident, then notice of the right to redeem must be provided by personal service. If the county clerk determines the property owner’s residence to be out of state, then service must be by publication and by letter sent to the owner’s specific address discovered during the clerk’s investigation. If after use of “due diligence” the county clerk is unable to determine the owner’s residence, service by publication and a letter sent to the owner’s last known address is permissible. The county clerk’s efforts should be guided by the idea that proper notice of the right to redeem to the property owner is a necessary prerequisite to transfer of title to real property.

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 838.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> W. VA. CODE ANN. § 11-3-24 (LexisNexis 1967).

Our ruling in no way is a defense to the appellant's admitted failure to pay property taxes. We do not condone such action. The appellant knew she owed taxes and had paid them in the past. Her actions, however, do not reduce the necessity of providing adequate notice of her right to redeem. Without the notice required by law, sale of property for taxes is fatally flawed; therefore, all efforts must be directed toward locating the specific residence of delinquent property owners so that they may be notified of pending property transfers.<sup>75</sup>

While it was less than three months after the decision in *Cook v. Duncan*<sup>76</sup> that the United States Supreme Court handed down its decision in *Mennonite*,<sup>77</sup> it took five years before the Supreme Court of Appeals of West Virginia reconsidered its holding in *Pearson v. Dodd*.<sup>78</sup>

In *Lilly v. Duke*,<sup>79</sup> the Court recognized the inherent "due process" problem in the West Virginia constitutional and statutory procedure which ultimately necessitated the repeal of certain sections of Article XIII of the West Virginia Constitution and the rewriting of Articles 3 and 4 of Chapter 11A of the Code.<sup>80</sup> In so holding, it overruled its decision in *Pearson v. Dodd*.<sup>81</sup>

In *Lilly v. Duke*, to pay for the 1980 taxes, the tax lien upon the land in question was sold by the Sheriff of Jackson County.<sup>82</sup> There were no bids for the tax lien at the sheriff's sale on October 19, 1981, so the sheriff "purchased" the lien on behalf of the State.<sup>83</sup> After it was certified to the Auditor as the Commissioner of Forfeited and Delinquent Lands, it was not redeemed, and pursuant to the statute it was certified to the Deputy Commissioner for Forfeited and Delinquent Lands of Jackson County who filed suit on September 12, 1983.<sup>84</sup> At the deputy commissioner auction held on December 9, 1983, Gary H. Duke purchased the tax lien upon the subject tract for fifty dollars.<sup>85</sup> The tax deed was executed by the deputy commissioner and delivered to him on December 28, 1983.<sup>86</sup> The plaintiff, who was a previous owner of and the

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<sup>75</sup> *Cook*, 301 S.E.2d at 842-43.

<sup>76</sup> *Cook v. Duncan* was decided on March 30, 1983.

<sup>77</sup> *Mennonite Board of Missions v. Adams* was decided on June 22, 1983.

<sup>78</sup> 221 S.E.2d 171 (W. Va. 1975).

<sup>79</sup> 376 S.E.2d 122 (W. Va. 1988).

<sup>80</sup> See *infra* Part V.

<sup>81</sup> Syl. pt. 3, *Lilly*, 376 S.E.2d at 123.

<sup>82</sup> *Id.* at 123.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 124.

<sup>86</sup> *Id.*

beneficiary under a deed of trust encumbering the property given by the Taylors, the purchasers of the property in whose names the taxes became delinquent, filed suit on August 2, 1984, to set aside the tax deed.<sup>87</sup> On appeal, the Supreme Court of Appeals of West Virginia set aside the tax deed holding in Syllabus Point 1:

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.<sup>88</sup>

A month later in *Anderson v. Jackson*,<sup>89</sup> the Supreme Court of Appeals of West Virginia again considered the issue of due process in the context of a tax sale. In *Anderson*, the plaintiff was the owner of property as to which the 1975 taxes had gone delinquent for nonpayment.<sup>90</sup> At the sheriff's sale, there were no bids for the tax lien on the property and, therefore, it was "sold" to the State.<sup>91</sup> On October 22, 1979, the tax lien on the property was sold by the deputy commissioner, and the deed was delivered to the purchaser on December 3, 1979.<sup>92</sup> On July 2, 1980, the "previous owner" filed suit to set aside the tax deed. The Supreme Court of Appeals of West Virginia affirmed the circuit court's order setting aside the tax deed stating:

We find, on our review of the record, that no steps were taken to provide notice to the plaintiff other than by publication. As we state in *Lilly*, such notice falls short of due process minimums and, therefore, renders the sheriff's sale a nullity. Since the State did not acquire valid title to the tracts in question, the deed by the deputy commissioner was properly set aside.<sup>93</sup>

Two and one half years after the decision in *Anderson v. Jackson*, the Court considered whether the decision in *Lilly v. Duke* applied retroactively. In *Geibel v. Clark*,<sup>94</sup> the Court held that *Lilly v. Duke* did not apply retroactively

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 122.

<sup>89</sup> 375 S.E.2d 827 (W. Va. 1988).

<sup>90</sup> *Id.* at 828.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> 408 S.E.2d 84 (W. Va. 1991).

before June 22, 1983, the date of the Supreme Court's decision in *Mennonite*. The Court's holding is summarized in Syllabus Point 1 as follows:

*Mennonite Board of Missions v. Adams*, the constitutional due process teachings of which this Court followed in *Lilly v. Duke*, is not to be applied with general retroactive effect to invalidate virtually all sheriffs' tax sales of real property, with mere constructive notice, which were conducted before *Mennonite Board of Missions* was decided on June 22, 1983. General retroactive application of *Mennonite Board of Missions* would have severely disruptive effects on land titles in this state.<sup>95</sup>

The first "notice" case to reach the Supreme Court of Appeals of West Virginia after the *Lilly* and *Anderson* decisions was *Citizens National Bank of St. Albans v. Dunnaway*.<sup>96</sup> In *Dunnaway*, Constance L. Persinger had purchased land in Putnam County in 1975, and it was entered in her name on the land books for tax purposes.<sup>97</sup> She then married Troy E. Dunnaway, and following their marriage, they borrowed money and executed a deed of trust as "Troy E. Dunnaway and Constance L. Dunnaway (formerly Constance L. Persinger)" to secure a note for \$86,644.80 payable to Citizens National Bank.<sup>98</sup> The deed of trust was recorded, but was only indexed under the name of Dunnaway.<sup>99</sup> The Dunnaways failed to pay the 1982 taxes, and the "property" was sold by the sheriff on November 14, 1983.<sup>100</sup> Because there were no bidders, the sheriff "purchased" the "property" on behalf of the State.<sup>101</sup> Subsequently, the "property" was certified to the Deputy Commissioner of Forfeited and Delinquent Lands of Putnam County and sold by the deputy commissioner pursuant to the then existing statutory procedures.<sup>102</sup> Notice by publication as required by statute was followed, and in addition, the deputy commissioner mailed notice to "Constance Persinger" by registered mail to the property.<sup>103</sup> Mrs. Dunnaway was living on the property but did not accept the registered letter. There was no attempt to notify the bank, and the bank was not included in the notice of publication.<sup>104</sup>

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<sup>95</sup> *Id.* at 85–86 (citations omitted).

<sup>96</sup> 400 S.E.2d 888 (W. Va. 1990).

<sup>97</sup> *Id.* at 889.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 890.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 891.

<sup>104</sup> *See id.* at 890–91.

After the circuit court authorized the sale of the “property,” Mr. Hughes purchased the property at the auction held on February 28, 1986, for \$2,000.00.<sup>105</sup> The deed from the deputy commissioner was delivered on March 4, 1986.<sup>106</sup> The instant litigation began when the bank brought suit to set aside the tax deed.<sup>107</sup> The circuit court granted summary judgment for the tax sale purchaser.<sup>108</sup>

In upholding the summary judgment granted for the tax sale purchaser, our Court said:

A thread running through all the United States Supreme Court notice cases, beginning with *Mullane* is the mandate that under the due process clause a *reasonable* effort must be made to provide actual notice of an event that may significantly affect a legally protected property interest. In *Mullane*, the United States Supreme Court stated that, at a minimum, due process requires “that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.” The United States Supreme Court further observed:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is 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.<sup>109</sup>

As to the facts in the instant case, the Court said:

In both *Mennonite Bd. Of Missions* and *Lilly* the mortgage and deed of trust, respectively, were publicly recorded and no question was raised concerning the reasonableness of the efforts needed to identify their interest. In the present case, on the other hand, it is undisputed that the Bank’s deed of trust was publicly recorded but *improperly indexed* so that the existence of the deed of trust *could not be ascertained by reasonably diligent efforts*. Although extraordinary efforts

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 892 (citations omitted).

might have discovered the deed of trust, extraordinary efforts are not constitutionally required.<sup>110</sup>

The Court concluded its decision stating:

In the present case, we hold that the lack of personal notice to the Bank was caused by an improperly indexed deed of trust that could not be located by reasonably diligent efforts, and, therefore, no due process violation exists to vitiate the sale.<sup>111</sup>

## V. REWRITING THE STATUTES

Following the *Lilly v. Duke*<sup>112</sup> decision, the legislature faced a major problem. The Court had correctly held that “due process” required notice before a person’s substantial property interest could be taken by the State.<sup>113</sup> However, Section 4, Article XIII of the West Virginia Constitution required absolute title to be vested in the State before a deputy commissioner could file suit to dispose of forfeited and delinquent lands.<sup>114</sup>

To help find a solution to the problem, the legislature sought the assistance of the West Virginia Law Institute. The magnitude of the problem was demonstrated by the fact that as of October 17, 1990, the Auditor had certified 94,804 “parcels” to deputy commissioners for action.<sup>115</sup> The dilemma was this: the then existing procedure had relied upon notice by newspaper publication as to those 94,804 “parcels,” and the Supreme Court of Appeals of West Virginia had held that such notice did not satisfy “due process.” To identify those who were entitled to notice would require title examinations and then notice to those with a substantial property interest that satisfied “due process.” The “solution” contained in the final report of the West Virginia Law Institute was to recommend the repeal of Sections three, four, and six of Article

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<sup>110</sup> *Id.* at 892–93 (footnotes omitted).

<sup>111</sup> *Id.* at 893 (citations omitted).

<sup>112</sup> 376 S.E.2d 122.

<sup>113</sup> *Id.*

<sup>114</sup> The “Waste and Unappropriated Lands” provision is as follows:

§4. All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the state of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall be proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder.

W. VA. CONST. art. 13, § 4; *see also generally* State v. Farmer Coal Co., 43 S.E.2d 625 (W. Va. 1947).

<sup>115</sup> On file with Law Institute.

XIII of the West Virginia Constitution,<sup>116</sup> and the repeal and re-enactment of Articles three and four of Chapter 11A of the Code. The proposed legislation would “shift” the burden of notifying those with a substantial property interest to the purchaser of the tax lien.<sup>117</sup>

A proposal to amend Article XIII of the West Virginia Constitution by repealing Sections three, four, five, and six was adopted during the 1992 legislative session and placed on the ballot for the election held on Tuesday, November 3, 1992.<sup>118</sup> Following the approval of the constitutional amendment by the voters in that election, the legislature adopted statutes patterned after the West Virginia Law Institute’s proposal. The new statutes were codified as West Virginia Code Chapter 11A, Article 3, Sections 1 through 74, and Article 4, Sections 1 through 7, effective July 1, 1994.<sup>119</sup>

As noted above, the “new” statutes shifted the burden of satisfying “due process” by appropriate notice to the former owner and others with a substantial property interest to the purchaser of the tax lien.<sup>120</sup> Since these statutory provisions made the cost of notice an expense of the purchaser of the tax lien, those costs would only be incurred when there was to be a “transfer” of ownership rights from the “former” owner or the cutting off of a substantial property interest.

While the “new” statutory procedure provided a practical solution, from the State’s vantage point, to the cost of identifying those who should be given notice of the right to redeem and the payment for providing such notice, it did create a serious conflict of interest issue. As Judge Joseph R. Goodwin said in *Plemons v. Gale*:<sup>121</sup>

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

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<sup>116</sup> Although repeal of Section Five of Article XIII of the West Virginia Constitution was not recommended by the West Virginia Law Institute, this section was included in the later legislative resolution.

<sup>117</sup> The portion of the West Virginia Law Institute’s report explaining the goal of the proposed legislation is attached as Appendix 1.

<sup>118</sup> H.J.R. 113, 1992 Reg. Sess. (W. Va. 1992).

<sup>119</sup> For a comparison of the proposed legislation with then-existing statutory procedure, see Williams, *supra* note 24.

<sup>120</sup> See W. VA. CODE ANN. § 11A-3-19, 21–22 (LexisNexis 1994).

<sup>121</sup> 382 F. Supp. 2d 826, 830 (S.D. W. Va. 2005).

they are “such as one desirous of actually informing the absentee” might reasonably adopt.<sup>122</sup>

The task of balancing the competing policies posed by unpaid taxes is not easy. As noted above, on the one hand, if taxes are not being paid as to an owner’s real estate, the State has an interest in “taking” the land from the delinquent owner and “transferring” it to an owner who will pay the taxes. On the other hand, many of those whose taxes become delinquent are basically conscientious, normally taxpaying individuals who, but for unintended circumstances, would have paid the taxes. Due process requires that only when the tax sale purchaser has “satisfied” the due process requirement should such taxpayers lose their property through a tax sale. In such cases, “due process of law” provides the safeguard to prevent someone from “gaming” the system.

#### VI. WHAT CONSTITUTES DUE PROCESS UNDER THE REVISED STATUTES?

As noted above, the Court in *Lilly v. Duke* had recognized that the due process provisions of the United States Constitution and the West Virginia Constitution must be satisfied before a significant property interest can be taken via a tax sale. It also held that notice by publication does not normally satisfy due process. The repeal of Sections three, four, five, and six of Article XIII by the electorate in 1992 made it possible to rewrite Chapter 11A, Articles three and four of the West Virginia Code. The new tax sale procedure, in effect, said there was no taking of a property interest at the time of the tax sale. The taking would only occur after there was a purchaser of the State’s tax lien, with the purchaser both doing the “leg work” and paying the cost of satisfying the due process requirements.<sup>123</sup>

While the Supreme Court of Appeals of West Virginia has not always approached notice issues from a due process analysis, the several notice cases decided since the adoption of the revised statutory procedure have been basically consistent with the result which would have been reached under such an analysis.

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<sup>122</sup> *Id.*

<sup>123</sup> For an excellent discussion of the “new” procedure and the cases thereunder see Robert L. Shuman, *The Amended and Reenacted Delinquent and Nonentered Land Statutes—The Title Examination Ramifications*, 98 W. VA. L. REV. 537 (1996) [hereinafter Shuman, *Ramifications*]; Robert L. Shuman, *Update: The Amended and Reenacted Delinquent and Nonentered Land Statutes—The Title Examination Ramifications*, 111 W. VA. L. REV. 707 (2009) [hereinafter Shuman, *Update*]; Williams, *supra* note 24. Shuman’s *Update* discussed the cases decided by the Supreme Court of Appeals of West Virginia from the passage of the “new” statutes to the publication of the article and provides an excellent discussion of the jurisprudence evolving under the “new” statutes. Therefore, this Article will only be concerned with those cases that provide guidance regarding how the concept of Due Process has evolved since the passage of the “new” statutes.

The first post-statutory rewrite case involving notice was *Rollyson v. Jordan*.<sup>124</sup> In *Rollyson*, the tax lien encumbering the property was sold to Rollyson for unpaid taxes at a sheriff's sale on November 16, 1995.<sup>125</sup> The taxes had become delinquent in the name of the Nix Mining Company.<sup>126</sup> Notice of the right to redeem was mailed to Nix Mining Company and returned as not forwardable.<sup>127</sup> Notice by publication of the right to redeem was made as required by statute. On the last day of the redemption period, March 31, 1997, an unreleased deed of trust dated September 26, 1985, given by an earlier owner in the chain of title, was discovered.<sup>128</sup> For present purposes, the issue was whether the beneficiaries of the 1985 deed of trust and payees of the note were entitled to notice of the right of redemption.<sup>129</sup> Litigation began when some of the payees of the note sought to set aside the tax deed to Rollyson.<sup>130</sup> As Shuman noted,<sup>131</sup> the Court held that the secured parties were entitled to notice by construing Section 11A-3-19(a)(1) of the West Virginia Code<sup>132</sup> and Section 11A-3-23(a) of the West Virginia Code<sup>133</sup> *in pari materia*, holding that

<sup>124</sup> 518 S.E.2d 372 (W. Va. 1999).

<sup>125</sup> *Id.* at 375.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 376.

<sup>130</sup> *Id.*

<sup>131</sup> See Shuman, *Update*, *supra* note 123.

<sup>132</sup> W. VA. CODE ANN. § 11A-3-19 (LexisNexis 1994). What purchaser must do before the deed can be secured.

(a) At any time after October 31 of the year following the sheriff's sale, and on or before December 31 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:

(1) Prepare a list of those to be served with notice to redeem and request the State Auditor to prepare and serve the notice as provided in sections twenty-one [§ 11A-3-21] and twenty-two [§ 11A-3-22] of this article.

*Id.* § 11A-3-19.

<sup>133</sup> *Id.* § 11A-3-23. Redemption from purchase; receipt; list of redemptions; lien; lien of person redeeming interest of another; record.

(a) After the sale of any tax lien on any real estate pursuant to section five [§ 11A-3-5] of this article, the owner of, or any other person who was entitled to pay the taxes on, any real estate for which a tax lien on the real estate was purchased by an individual may redeem at any time before a tax deed is issued for the real estate. In order to redeem, he or she shall pay to the State Auditor the following amounts:

(1) An amount equal to the taxes, interest, and charges due on the date of the sale, with interest at the rate of one percent per month from the date of sale;

(2) All other taxes which have since been paid by the purchaser, his or her heirs or assigns, with interest at the rate of one percent per month from the date of payment;

the beneficiaries were entitled to redeem the taxes, and therefore, entitled to notice to redeem.<sup>134</sup> While agreeing with the result of the Court's decisions, Shuman points out:

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 decision rendered in *Lilly v. Duke*. 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." 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*.<sup>135</sup>

Shuman also is critical of the Court's dictum in the *Rollyson* opinion concerning the impact of the tax sale on existing deeds of trust.<sup>136</sup>

While the case of *Subcarrier Communication, Inc. v. Nield*<sup>137</sup> was decided by holding the statute prohibiting a sheriff from buying tax liens at tax sales applied to tax sales in *all* counties, not just the county in which he/she

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(3) Any additional expenses incurred from January 1 of the year following the sheriff's sale to the date of redemption for the preparation of the list of those to be served with notice to redeem and any written documentation used for the preparation of the list, with interest at the rate of one percent per month from the date of payment for reasonable legal expenses incurred for the services of an attorney who has performed an examination of the title to the real estate and rendered written documentation used for the preparation of the list: *Provided*, That the maximum amount the owner or other authorized person shall pay, excluding the interest, for the expenses incurred for the person shall pay, excluding the interest, for the expenses incurred for the preparation of the list of those to be served required by section nineteen of this article is \$300: *Provided however*, That the attorney may only charge a fee for legal services actually performed and must certify that he or she conducted an examination to determine the list of those to be served required by section nineteen [§ 11A-3-19] of this article; and

(4) All additional statutory costs paid by the purchaser.

*Id.* § 11A-3-23

<sup>134</sup> See *Rollyson*, 518 S.E.2d at 378.

<sup>135</sup> Shuman, *Update*, *supra* note 123, at 713–14 (footnotes omitted).

<sup>136</sup> See *id.* at 717–18.

<sup>137</sup> 624 S.E.2d 729 (W. Va. 2005).

served as sheriff,<sup>138</sup> the facts of the case illustrate the need for a court's oversight of what constitutes "reasonable diligence" in giving notice of a tax sale.

The facts of the cases raise the issue of what a tax lien purchaser should be required to do in order to gain information that would lead to being able to give notice to the property owner.

While the case presented the issue of "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 for the purpose of satisfying the notice requirements set forth in W. Va. Code § 11A-3-22,"<sup>139</sup> the Court affirmed summary judgment on other grounds. The Court held that Nield, the then Sheriff of Mineral County, was precluded by Section 11A-3-6(a) of the West Virginia Code from purchasing the tax lien encumbering the property<sup>140</sup> at a tax sale in any of the counties of West Virginia, i.e. the prohibition was not limited to the county in which he served as sheriff.<sup>141</sup>

In *Cogar v. Lafferty*,<sup>142</sup> the Court held that under the Uniform Partnership Act, Sections 47B-1-1 to 47B-11-5 of the West Virginia Code, the partnership entity that owns the property—not the individual partners—is the owner or party entitled to notice to redeem pursuant to West Virginia Code Section 11A-3-19(a).<sup>143</sup>

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<sup>138</sup> *Id.* at 735.

<sup>139</sup> *Id.* at 734 (W. VA. CODE ANN. § 11A-3-22 (LexisNexis 1994) is entitled "Service of Notice").

<sup>140</sup> W. VA. CODE ANN. § 11A-3-6 (LexisNexis 1994). Purchase by sheriff, State Auditor, deputy commissioner and clerk of county commission prohibited; co-owner free to purchase at tax sale.

(a) A sheriff, clerk of the county commission or circuit court, assessor, State Auditor, or deputy or assistant of any of them, shall not 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 the real estate. Any officer purchasing a tax lien shall forfeit \$1,000 for each offense. The sale of a tax lien on any real estate, or the conveyance of the real estate by tax deed, to one of the officers named in this section is voidable, at the instance of any person having the right to redeem, until the real estate reaches the hands of a bona fide purchaser.

*Id.*

<sup>141</sup> See *Subcarrier Commc'n, Inc.*, 624 S.E.2d at 737. It is suggested that the editor should read the *Subcarrier* opinion or Mr. Shuman's summary of the facts in his article to gain an appreciation of the importance of the "due process" requirement in tax sales cases. See also Shuman, *Update, supra* note 123, at 725–31.

<sup>142</sup> 639 S.E.2d 835 (W. Va. 2006).

<sup>143</sup>

In sum, we now hold that partners in a West Virginia general partnership as defined by W. Va. Code § 47B-1-1 are not co-owners of partnership property and have no interest in partnership property that entitles them to separate

While there are undoubtedly situations when the taxpayer makes a conscious decision that the value of the property does not justify the continued payment of the taxes and permits the taxes to thus become delinquent, there are also situations where the payment of the taxes “slips through the cracks.” Sometimes the lag time between the title transfer and the change of the owner’s name as it appears on the tax rolls<sup>144</sup> may contribute to the delinquency. Sometimes the delinquency may relate to escrow arrangements, a refinancing, or the payment in full of a loan which had an escrow feature for taxes. As the following case illustrates, it is not unusual that the property as to which the taxes go delinquent is improved and occupied, and the taxes go delinquent because of some sort of mix-up.

In *Wells Fargo Bank N.A. v. UP Ventures II, LLC*,<sup>145</sup> the Halls purchased the property at issue in 1995.<sup>146</sup> Their property taxes became delinquent for the 1998 taxes, and the tax lien was sold at the sheriff’s tax sale on November 9, 1999.<sup>147</sup> Ironwood Acceptance Company purchased the tax lien at the sheriff’s tax sale for \$1,565.81.<sup>148</sup> The tax lien purchaser prepared the notice to redeem pursuant to Section 11A-3-19(a) of the West Virginia Code, and notice was mailed on January 17, 2001. The Halls received and signed for the notice to redeem on January 22, 2001.<sup>149</sup> After receiving the notice to redeem, the Halls obtained a loan in the amount of \$84,500, secured by a deed of trust encumbering the property, from Fleet National Bank.<sup>150</sup> Wells Fargo Bank was the successor in interest to Fleet National Bank.<sup>151</sup> The loan was closed and the loan documents were signed on February 21, 2001.<sup>152</sup> The deed of trust was recorded on March 8, 2001. On May 8, 2001, the county

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notice of the right to redeem partnership property that has been sold for delinquent taxes. When 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 upon the partnership.

*Id.* at 839.

<sup>144</sup> W. VA. CODE § 11A-1-2 (LexisNexis 1994). Lien for real property taxes. “There shall be a lien on all real property for the taxes assessed thereon, . . . which lien shall attach on the first day of July, one thousand nine hundred sixty-one, and for each July first thereafter for the taxes payable *for the ensuing fiscal year.*” *Id.* (emphasis added). West Virginia Code § 11-3-1 provides “all property . . . shall be assessed annually as of July 1.” W. VA. CODE ANN. § 11-3-1 (LexisNexis 1994).

<sup>145</sup> 675 S.E.2d 883 (W. Va. 2009).

<sup>146</sup> *Id.* at 884.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 885.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

clerk delivered the tax deed to Ironwood who recorded the deed the same day and then sold the property to Palo Verde Trading Company on August 13, 2001.<sup>153</sup> On September 9, 2003, Palo Verde conveyed the property to U P Ventures, II.<sup>154</sup> The bank paid the real estate taxes on the property beginning in the second half of 2001, and it continued to pay them through the second half of 2006.<sup>155</sup> Sometime in late 2006, Wells Fargo learned of the tax deed and on January 11, 2007, filed suit to set aside the tax deed.<sup>156</sup>

As noted above, the loan was made and closed, and the deed of trust encumbering the property as collateral for the loan was placed on record after the Halls had signed for the notice to redeem on January 22, 2001.<sup>157</sup> Under the statute, Section 11A-3-19(a) of the West Virginia Code, the tax lien purchaser had to prepare the list of those entitled to notice of the right to redeem after October 1 of the year following the sale (in this case after October 1, 2000), and before December 31 of that same year (in this case December 31, 2000).<sup>158</sup> In the instant case, the list had been provided to the clerk on November 16, 2000.<sup>159</sup> In holding that there was no duty on the part of the tax lien purchaser to update or supplement the list of those parties entitled to notice to redeem subsequent to November 16, the Court stated:

We therefore hold that under W. Va. Code § 11A-3-19(a), a tax sale purchaser is required to provide notice to parties who are of record at 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. W. Va. Code § 11A-3-19(a)(1) does not require a tax sale purchaser to supplement this list going forward to discover parties who became of record after the thirty-first day of December of the year following the sheriff's sale, or to provide additional redemption notice before the tax deed is delivered.<sup>160</sup>

As to the three year statute of limitation to challenge the tax sale,<sup>161</sup> the Court stated:

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 884.

<sup>158</sup> W. VA. CODE ANN. §11-3-19(a) (LexisNexis 1967).

<sup>159</sup> 675 S.E.2d at 884.

<sup>160</sup> *Id.* at 888.

<sup>161</sup> W. VA. CODE ANN. § 11A-4-4 (LexisNexis 1994). Right to set aside deed when one entitled to notice is not notified.

(a) If any person entitled to be notified under the provisions of section twenty-two [§ 11A-3-22] or fifty-five [§ 11A-3-55], article three of this

This Court finds that *Shaffer's* ruling with regard to the statute of limitations was not overruled or modified by the *Menonite* or *Lilly* decisions. Consistent with this Court's interpretation of W. Va. Code § 11A-3-32 [1931] in *Shaffer v. Mareve Oil Corp.*, a statute which is substantially similar to W. Va. Code § 11A-4-4(a) [1994], we hold the three-year statute of limitation found in W. Va. Code § 11-4-4(a) [1994] relating to the institution of a civil action to set aside a tax deed does not violate the Due Process Clause of the *West Virginia* and *United States Constitutions*.<sup>162</sup>

The Court rejected an argument by the bank that the statute of limitation should not start to run until the tax lien purchaser goes into actual possession of the property acquired as a result of the tax sale on the basis of its holding in *Shaffer v. Mareve Oil Corp.*<sup>163</sup> While rejecting the argument on the basis of the *Shaffer* decision, the Court did add:

A statute of limitation to set a time limit for instituting a suit to set aside a tax deed is a policy matter for the Legislature to decide. We note that had actual possession of the property by the tax sale purchasers been required before the statute of limitation was triggered, then all of the parties, including the property owners and lienholders, would have had the opportunity to contest the tax sale to set aside the tax deed. Our current statutory scheme permits one to purchase land at a tax sale, and who complies with the notice requirements of W. Va.

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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. No deed shall be set aside under the provisions of this section until payment has been made or tendered to the purchaser, or his heirs or assigns, of the amount which would have been required for redemption, together with any taxes which have been paid on the property since delivery of the deed, with interest at the rate of twelve percent per annum.

(b) No title acquired pursuant to this article shall be set aside in the absence of a showing by clear and convincing evidence that the person who originally acquired such title failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the complaining party or his predecessors in title.

(c) Upon a preliminary finding by the court that the deed will be set aside pursuant to this section, such amounts shall be paid within one month of the entry thereof. Upon the failure to pay the same within said period or time, the court shall upon the request of the purchaser, enter judgment dismissing the action with prejudice.

W. VA. CODE ANN. § 11A-4-4 (LexisNexis 1994).

<sup>162</sup> *Wells Fargo Bank N.A.*, 675 S.E.2d at 889 (internal citations omitted).

<sup>163</sup> 204 S.E.2d 404 (W. Va. 1974).

Code § 11A-3-19(a), to remain silent until the three-year statute of limitation period has run, and then take possession of the property. If the Legislature required tax sale purchasers to take actual possession before the statute of limitations began to run, lawsuits like the one presently before us would not be barred by W. Va. Code § 11A-4-4(a) [1994].<sup>164</sup>

Additionally, the recent decision of *Reynolds v. Hoke*<sup>165</sup> provides important guidance. The underlying facts in *Reynolds* involve property located in Monroe County originally owned by Bill and Rose Reynolds.<sup>166</sup> After the taxes on the property became delinquent for the 2005 taxes, the tax lien was sold at the sheriff's tax sale on October 24, 2006, to Jerry I. Hoke, Sr., for \$3,000.<sup>167</sup> "The Sheriff's certificate of sale given to the purchaser listed 'REYNOLDS BILL ET UX' and 'BEVERLY HAYNES' as the taxpayers on the subject property."<sup>168</sup> The notice to redeem prepared pursuant to Section 11A-3-19(a) of the West Virginia was mailed to Bill and Rose Reynolds and Beverly Haynes, and the published notice to redeem was addressed to "Bill Reynolds and Rose Reynolds, The Unknown Heirs and Creditors of Bill Reynolds and Rose Reynolds."<sup>169</sup> The certified mail containing the notice of the right to redeem that was mailed to Bill and Rose Reynolds and to Beverly Haynes were all signed for by Beverly Haynes.<sup>170</sup> When the property was not redeemed, the Clerk of the County Commission of Monroe County, on April 15, 2008, conveyed the land to the tax lien purchaser, Hoke, by tax deed.<sup>171</sup> On June 23, 2008, the plaintiffs, Anna Reynolds and Earl J. Reynolds, the successors in interest of Beverly Haynes, filed suit to set aside the tax deed.<sup>172</sup>

The plaintiffs' claim to the property was derived from a quitclaim deed executed by Beverly Haynes pursuant to a settlement agreement resolving a lawsuit involving the Estate of Bill Reynolds that had been filed in Boone County.<sup>173</sup> Although the civil action had been filed and settled in Boone County, the quit claim deed had been recorded in Monroe County on June 7, 2006, the situs of the subject property.<sup>174</sup> As noted above, the tax sale occurred

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<sup>164</sup> *Wells Fargo Bank N.A.*, 675 S.E.2d at 890 (citations omitted).

<sup>165</sup> 702 S.E.2d 629 (W. Va. 2011).

<sup>166</sup> *See id.*

<sup>167</sup> *Id.* at 630.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 630–31.

<sup>172</sup> *Id.* at 631.

<sup>173</sup> *Id.* Although it is not clear from the reported decision how Beverly Haynes obtained her interest in the subject property, it is assumed she was an heir of Bill Reynolds.

<sup>174</sup> *Id.*

subsequently on October 24, 2006.<sup>175</sup> The essence of the tax lien purchaser's answer to the suit was that he had complied with the requirements of Section 11A-3-19(a) of the West Virginia Code in as much as plaintiffs were not owners of record of the property.<sup>176</sup> The circuit court bought into the argument of the tax lien purchaser:

Specifically, the circuit court found in its order that pursuant to W. Va. Code § 11A-4-4(b) [1994], the appellants must prove by clear and convincing evidence that the appellee did not exercise reasonably diligent efforts to provide them with notice of their right to redeem the property. According to the circuit court, the appellants were not reasonably identifiable from the records in the clerk's office. The circuit court explained that the appellants' quitclaim deed was not indexed under the name of Bill Reynolds or Rose Reynolds or indexed in such a manner as to allow a title examiner to determine that an interest in lands owned by Bill Reynolds and Rose Reynolds was being conveyed to another person. Furthermore, reasoned the circuit court, there were no probate or other records filed in the clerk's office giving notice to any interested person of the pendency of an estate for Bill Reynolds and Rose Reynolds. Moreover, the circuit court found that the burden is on the person seeking to protect himself or herself against the claims of others to see that all of the prerequisites of a valid and complete recordation are complied with. The circuit court concluded that the appellants failed to do this by not having their quitclaim deed indexed in such a manner as to give constructive notice to third parties of the appellants' interest in the subject property.<sup>177</sup>

In overruling the summary judgment granted by the circuit court in favor of the tax sale purchaser, the Supreme Court of Appeals of West Virginia first borrowed a definition for "reasonable diligence":

Black's Law Dictionary 523 (9th ed.2009) [sic], defines "reasonable diligence" as "[a] fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue." As noted above, the circuit court found that the appellants failed to show a lack of reasonable diligence on the part of the appellee. According to the circuit court, the

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<sup>175</sup> *Id.* at 630.

<sup>176</sup> *See id.* at 631.

<sup>177</sup> *Id.* (footnote omitted).

appellants were not reasonably identifiable from the records in the clerk's office. We disagree with the circuit court.<sup>178</sup>

Next, the Court said:

As set forth above, upon purchasing the tax lien on the subject property, the appellee received a certificate of sale from the sheriff which listed the names of both Bill Reynolds and Beverly Haynes as taxpayers of the property that was delinquent for the taxes. The appellee mailed a notice of the right to redeem the subject property to Bill Reynolds and he searched the public records in the county clerk's office for any deed transfers indexed under the name of Bill Reynolds. The appellee also mailed a notice of the right to redeem to Beverly Haynes. Significantly, the appellee failed to search the public records in the county clerk's office for deed transfers indexed under the name of Beverly Haynes who was listed as a taxpayer on the property in the certificate of sale given to the appellee. If the appellee had done so, he would have discovered the February 8, 2006 quitclaim deed conveying the subject property by Beverly Haynes to the appellants and filed in the county clerk's office on June 7, 2006. Because Beverly Haynes' name appeared as a taxpayer on the certificate of sale received by the appellee upon purchasing the tax lien for the subject property, this Court finds as a matter of law that reasonable diligence required that a search of the public records in the county clerk's office be made to determine whether there were any deed transfers indexed under the name of Beverly Haynes.

Further, the appellants' deed was of record in the county clerk's office during the applicable time period as having received the subject property by quitclaim deed from Beverly Haynes. Consequently, the appellee was charged with exercising reasonable diligence to provide notice to the appellants of their right to redeem the property. Moreover, there is evidence in the record that the sheriff's office assessed the appellants for taxes on the subject property for the year 2007. Specifically, the record contains a statement of taxes due for the year 2007 sent by the Sheriff of Monroe County to the appellants. Pursuant to W. Va. Code § 11A-3-23(a) (1998), "the owner of, or any other person who was entitled to pay the taxes on, any real estate for which a tax lien thereon was purchased by an individual may redeem at any time before a

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<sup>178</sup> *Id.* at 632.

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tax deed is issued for the real estate.” Therefore, also as persons entitled to pay taxes on the property, the appellants can redeem the property.

In sum, this Court finds as a matter of law that reasonable diligence required the appellee to search the public records in the county clerk’s office for any deed transfers indexed under the name of Beverly Haynes in light of the fact that Beverly Haynes’ name appeared as a taxpayer on the certificate of sale issued by the sheriff to the appellee after the appellee purchased the tax lien on the subject property. Because the appellee failed to conduct such a search, we conclude that the appellee failed to exercise reasonably diligent efforts to provide notice of the right of redemption of the subject property to the appellants. Accordingly, we reverse the circuit court’s grant of summary judgment on behalf of the appellee, and we remand this case to the circuit court for proceedings consistent with our holding herein and for the court to permit the appellants to comply with W.Va. Code § 11A-4-4(a) and (c).<sup>179</sup>

Although the Court analyzed the tax lien purchaser’s efforts in the context of the statutory duty of reasonable diligence,<sup>180</sup> the same type of analysis should be used to scrutinize such efforts in the context of determining whether due process was afforded.<sup>181</sup>

## VII. THE *PLEMONS V. GALE* TRILOGY

The three reported decisions in *Plemons v. Gale*<sup>182</sup> illustrate the crux of the issue. As Judge Goodwin notes in his opinion following the remand of the case by the Fourth Circuit Court of Appeals, his original finding and holding was “the defendants made no further efforts to locate Ms. Plemons after the initial notices were returned as undeliverable.”<sup>183</sup> Doing nothing, as we shall see in *Jones v. Flowers*,<sup>184</sup> fails to satisfy due process. What constitutes

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<sup>179</sup> *Id.* at 632–33 (footnotes omitted).

<sup>180</sup> W. VA. CODE ANN. § 11A-4-4(b) (LexisNexis 1994).

<sup>181</sup> *See* Citizens Nat’l Bank of St. Albans v. Dunnaway, 400 S.E.2d 888, 892 (W. Va. 1990) (“A thread running through all the United States Supreme Court notice cases, beginning with *Mullane*, is the mandate that under the due process clause a *reasonable* effort must be made to provide actual notice of an event that may significantly affect a legally protected property interest.”).

<sup>182</sup> 396 F.3d 569 (4th Cir. 2004); 382 F. Supp. 2d 826 (S.D. W. Va. 2005); 298 F. Supp. 2d 380 (S.D. W. Va. 2004).

<sup>183</sup> 382 F. Supp. 2d at 828.

<sup>184</sup> 547 U.S. 220 (2006).

“reasonable efforts,” on the facts of a particular case, is what the court must determine in order to know whether due process has been satisfied. It’s important to keep this point in mind in reading Ms. Plemon’s trial.

In January of 2003, Linda Plemons learned that property she had purchased with Jerry Lipscomb, her business partner, had been sold for taxes.<sup>185</sup> Ms. Plemons had refinanced the property in February 2000, and she thought the bank was to pay the real estate taxes through an escrow account.<sup>186</sup> In fact, neither the bank nor Ms. Plemons was paying the taxes, and on November 13, 2000, the Sheriff of Kanawha County sold the tax lien on the property at the sheriff’s tax sale to Advantage 99TD.<sup>187</sup> Pursuant to the statutory requirement, the tax sale purchaser provided the names and addresses for those to receive notice to redeem to the clerk of the county commission.<sup>188</sup> The notices were mailed to the names and addresses provided by certified mail, and all of the notices were returned as not delivered.<sup>189</sup> After the notices were returned to the clerk, notice to redeem was published in two local newspapers on two separate occasions during April 2002.<sup>190</sup> When the parties did not redeem, the clerk issued the tax deed for the property to Advantage, and Advantage recorded the deed.<sup>191</sup> On November 22, 2002, Advantage sold the property by a quitclaim deed to Douglas Q. Gale, which was also recorded.<sup>192</sup> Ms. Plemons filed suit in the Circuit Court of Kanawha County to set aside the tax deed, and the defendants removed the case to the federal court on the basis of diversity jurisdiction.<sup>193</sup>

Following removal to the federal court, Judge Goodwin granted the plaintiff’s motion for summary judgment.<sup>194</sup> Recognizing the inherent conflict of interest of the tax lien purchased, Judge Goodwin held:

Section 11A-4-4 of the West Virginia Code allows an interested party to set aside a tax sale deed if that party proves by clear and convincing evidence that the tax sale purchaser

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<sup>185</sup> *Plemons*, 298 F. Supp. 2d at 383.

<sup>186</sup> *Id.* at 382.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 381–82.

<sup>190</sup> *Id.* at 383.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *See id.* at 381–83. This summary of facts should be sufficient for present purposes. However, a reading of the three reported decisions in *Plemons v. Gale* and the discussion in Mr. Shuman’s updated article is strongly recommended. *See Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2004); *Plemons v. Gale*, 382 F. Supp. 2d 826 (S.D. W. Va. 2005); *Plemons v. Gale*, 298 F. Supp. 2d 380 (S.D. W. Va. 2004); *see also* Shuman, *Update, supra*, note 124.

<sup>194</sup> *Plemons*, 298 F. Supp.2d at 390.

failed to give constitutionally adequate notice. In the tax sale context, notice is constitutionally adequate when the purchaser makes a reasonably diligent effort to provide the interested party with actual notice prior to the issuance of a tax sale deed. When notice sent by certified mail is returned unclaimed, the reasonable diligence standard requires the purchaser to make further inquiry reasonably calculated to locate the interested party's correct address. After all notices mailed to Ms. Plemons were returned unclaimed, Advantage failed to make any further inquiry as to her correct address. Therefore, the court **FINDS** that Ms. Plemons has proven by clear and convincing evidence that Advantage failed to provide her with constitutionally adequate notice, and that, under § 11A-4-4, she is entitled to set aside the tax sale deed now held by Advantage's successor in interest, Douglas Q. Gale. Pursuant to West Virginia Code § 11A-4-4, the court **ORDERS** that Gale's deed to the subject property be set aside after Ms. Plemons tenders payment of the amount required for redemption, the amount of any taxes paid on the subject property since the transfer of the deed, and interest at the rate of twelve percent per annum. The court **GRANTS** the plaintiff's Motion for Summary Judgment . . . .<sup>195</sup>

On appeal, the Fourth Circuit Court of Appeals agreed that upon the return of the certified mail undelivered that some follow up was necessary stating:

As all of these cases recognize, initial reasonable efforts to mail notice to one threatened with loss of property will normally satisfy the requirements of due process. However, 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

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<sup>195</sup> *Id.* As to the burden of proof which the court had discussed earlier in the decision, the court explained:

Therefore, the court **FINDS** that § 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. In 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." As is discussed in detail below, Ms. Plemons has proven by clear and convincing evidence that the defendants' attempt to provide her with notice fails to satisfy the requirements of due process.

*Id.* at 385–86 (citations omitted) (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)).

address before constructive notice will be deemed sufficient. “A reasonable person presented with a letter that has been returned to sender will ordinarily attempt to resend it if it is practicable to do so.” Thus, the district court properly held that the reasonable diligence standard mandated by *Mullane* and its progeny required some followup effort here.<sup>196</sup>

While the Fourth Circuit Court of Appeals agreed that the return of undelivered certified mail necessitated some follow-up, it disagreed with the district court as to the type of follow-up required.

The Fourth Circuit Court of Appeals’ view of what needed to be done was summed up as follows:

Accordingly, reasonable diligence required Advantage to search all publicly available county records once the prompt return of the mailings made clear that its initial examination of the title to the Echo Road property had not netted Plemons’ correct address. Unfortunately, the record in this case does not disclose what efforts, if any, Advantage made to search public documents, or whether Plemons’ 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.<sup>197</sup>

Upon remand, the district court followed the directions of the Fourth Circuit and concluded:

The defendants have recently re-examined the publicly available county records in preparation for their pending motion for summary judgment. The defendants’ motion contends that Ms. Plemons’ correct address, namely, 405 Quarry Pointe, has never appeared in the public records, and Ms. Plemons does not dispute this assertion. Accordingly, I conclude that her address was not “ascertainable” by a search of the public records after the mailings were returned as undeliverable. I therefore **FIND** that no genuine issue of material fact remains and **GRANT** the defendants’ motion for summary judgment.<sup>198</sup>

While following the mandate of the Fourth Circuit to resolve the case, Judge Goodwin added:

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<sup>196</sup> *Plemons*, 396 F.3d at 576, 579 (4th Cir. 2004) (quoting *Small v. United States*, 136 F.3d 1334, 1337 (D.C. Cir. 1998)).

<sup>197</sup> *Id.* at 578.

<sup>198</sup> *Plemons v. Gale*, 382 F. Supp. 2d 826, 828 (S.D. W. Va. 2005).

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.<sup>199</sup>

As Judge Goodwin noted:

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 the due process.<sup>200</sup>

It is important to keep in mind that both the district court and the circuit court of appeals in *Plemons* agreed that upon the return of the certified mail undelivered, some additional action, beyond notice by publication, was necessary. The difference was as to what additional steps needed to be taken.

A year after the *Plemons* decision was resolved on remand, the United States Supreme Court addressed essentially the same issue in *Jones v. Flowers*.<sup>201</sup> The *Jones* case involved the sale of Jones's property for the nonpayment of taxes under Arkansas law.<sup>202</sup> Jones had purchased the property in 1967 and paid the mortgage, which included an escrow for taxes, for thirty years.<sup>203</sup> For thirty years, the mortgage company paid the taxes.<sup>204</sup> In 1993, Jones and his wife separated.<sup>205</sup> She remained in the house, and he moved out and into an apartment.<sup>206</sup> In 1997, when the mortgage was paid off, the taxes became delinquent.<sup>207</sup> In April 2000, the Commission of State Lands mailed notice of his tax delinquency by certified mail to Jones at the address of the

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<sup>199</sup> *Id.* at 828–29. It is suggested the reader pay particular attention to pages 829–31 of the opinion.

<sup>200</sup> *Id.* at 831.

<sup>201</sup> 547 U.S. 220 (2006).

<sup>202</sup> *See id.*

<sup>203</sup> *Id.* at 223.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

house.<sup>208</sup> The letter was returned “unclaimed.”<sup>209</sup> Pursuant to the Arkansas statute, two years later the Commission of State Lands published notice of a public sale, and when no bids were submitted, the State negotiated a private sale of the property.<sup>210</sup>

Again, a certified letter was mailed to Jones at the house address stating that the property would be sold to the purchaser, Flowers, if he did not pay his taxes.<sup>211</sup> Again, this letter was returned marked “unclaimed.”<sup>212</sup> Immediately after the thirty day period of post-sale redemption passed, Flowers had an unlawful detainer notice delivered to the property.<sup>213</sup> This notice was served on Jones’s daughter who then notified him of the tax sale.<sup>214</sup> Jones filed suit seeking to set aside the tax deed on the basis that his property had been taken without due process.<sup>215</sup> The trial court granted summary judgment in favor of the Commissioner and Flowers, and the summary judgment was upheld by the Arkansas Supreme Court.<sup>216</sup>

The Court stated the issue as “whether the Due Process Clause requires the government to take additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered.”<sup>217</sup>

In answer, the Court stated:

We hold 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. Under the circumstances presented here, additional reasonable steps were available to the State. We therefore reverse the judgment of the Arkansas Supreme Court.<sup>218</sup>

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 224.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *See id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* Later in the decision, the Court said: “But we have never addressed whether due process entails further responsibility when the government becomes aware prior to the taking that its attempt at notice has failed. That is a new wrinkle, and we have explained that the ‘notice required will vary with circumstances and conditions.’” *Id.* at 227 (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956)). “The question presented is whether such knowledge on the government’s part is a ‘circumstance and condition’ that varies the ‘notice required.’” *Id.*

<sup>218</sup> *Id.* at 225. Later in the majority opinion, the Court explained:

The State's duty is nicely summarized by the Court as follows:

As for *Mullane*, it directs that “when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” Mindful of the dissent's concerns, we conclude, at the end of the day, that someone who actually wanted to alert Jones that he was in danger of losing his house would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done.<sup>219</sup>

As to what steps the State should take, the Court said:

As noted, “[i]t is not our responsibility to prescribe the form of service that the [government] should adopt.” In prior cases finding notice inadequate, we have not attempted to redraft the State's notice statute. The State can determine how to proceed in response to our conclusion that notice was inadequate here, and the States have taken a variety of approaches to the present question. It suffices for present purposes that we are confident that additional reasonable steps were available for Arkansas to employ before taking Jones' property.<sup>220</sup>

Near the end of its opinion, the majority stated:

There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner—taking and selling a house he owns. It is not too much to insist that the

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

*Id.* at 229–230 (citations omitted) (citing *Malone v. Robinson*, 614 A.2d 33, 37 (D.C. 1992)).

<sup>219</sup> *Id.* at 238 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)).

<sup>220</sup> *Id.* (citations omitted) (quoting *Greene v. Lindsey*, 456 U.S. 444, 455 n.9 (1982)).

State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed.<sup>221</sup>

Thus, the Court held that “[t]he Commissioner’s effort to provide notice to Jones of an impending tax sale of his house was insufficient to satisfy due process given the circumstances of this case.”<sup>222</sup> The Court reversed the judgment of the Arkansas Supreme Court and remanded the case for further proceedings.<sup>223</sup> As the Court in *Jones* noted, “[b]ecause additional reasonable steps were available to the State, given the circumstances here, the Commission’s effort to provide notice to Jones was insufficient to satisfy due process. What is reasonable in response to new information depends on what that information reveals.”<sup>224</sup>

This statement clearly recognizes a case specific test, and given the fact the West Virginia statute “assigns” this duty to the tax lien purchaser, the importance of the Court’s oversight on a case by case basis is apparent.

#### VIII. THE NEED OF TAX REVENUES

As noted above, the State has a legitimate concern with respect to the collection of taxes on real estate. The rewrite of the “tax laws” in 1994 begins with a “Declaration of legislative purpose and policy.”<sup>225</sup> Among the stated purpose of the article are: “(1) To provide for the speedy and expeditious enforcement of the tax claims of the state and its subdivisions; (2) to provide for the transfer of delinquent and nonentered lands to those more responsible to, or better able to bear, the duties of citizenship than were the former owners.”<sup>226</sup>

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<sup>221</sup> *Id.* at 239.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 221–22.

<sup>225</sup> W. VA. CODE ANN. § 11A-3-1 (LexisNexis 1994).

<sup>226</sup> Section 11A-3-1 of the West Virginia Code provides:

In view of the paramount necessity of providing regular tax income for the state, county and municipal governments, particularly for school purposes; and in view of the further fact that delinquent land not only constitutes a public liability, but also represents a failure on the part of delinquent private owners to bear a fair share of the costs of government; and in view of the rights of owners of real property to adequate notice and an opportunity for redemption before they are divested of their interests in real property for failure to pay taxes or have their property entered on the landbooks; and in view of the fact that the circuit court suits heretofore provided prior to deputy commissioners’ sales are unnecessary and a burden on the judiciary of the state; and in view of the necessity to continue the mechanism for the disposition of escheated and waste and unappropriated lands; now therefore, the Legislature declares that its purposes in the enactment of this article are as follows: (1) To provide for the speedy and expeditious enforcement of the tax claims of the state and its subdivisions; (2) to provide for the transfer of

In fact, Judge Niemeyer in his dissent in *Plemons* quoted the above portion of the West Virginia statute.<sup>227</sup> A more sharply worded statement is found in Justice Thomas's dissent in *Jones v. Flowers* where he wrote:

The meaning of the Constitution should not turn on the antics of tax evaders and scofflaws. Nor is the self-created conundrum in which petitioner finds himself a legitimate ground for imposing additional obligations on the State. The State's attempts to notify petitioner by certified mail at the address that he provided and, additionally, by publishing notice in a local newspaper satisfy due process.<sup>228</sup>

It is important to keep in mind that not every tax sale involves "tax evaders and scofflaws." For example, in the *Wells Fargo Bank* case, the taxes were delinquent for the 1998 taxes and sold at the sheriff's sale on November 9, 1999.<sup>229</sup> Wells Fargo was the successor in interest to Fleet National Bank, and "paid the real estate taxes due on the property beginning in the second half of 2001 and continuing through the second half of 2006."<sup>230</sup> It was in the late fall or early winter of 2006 that the bank learned of the 1999 tax sale, and it filed suit in January 2007 to set aside the tax deed.<sup>231</sup> In the *Subcarrier Communication* case, Subcarrier notified the Preston County Clerk of its change of address and phone number after its purchase of the property from Skyline Communications.<sup>232</sup> Six months later, when Subcarrier was forwarded the notice of delinquency which had been mailed to its former address, it advised the sheriff in writing of its new address.<sup>233</sup> In addition, the check tendered in payment of the taxes bore the correct mailing address.<sup>234</sup> In spite of

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delinquent and nonentered lands to those more responsible to, or better able to bear, the duties of citizenship than were the former owners; (3) to secure adequate notice to owners of delinquent and nonentered property of the pending issuance of a tax deed; (4) to permit deputy commissioner of delinquent and nonentered lands to sell such lands without the necessity of proceedings in the circuit courts; (5) to reduce the expense and burden on the state and its subdivisions of tax sales so that such sales may be conducted in an efficient manner while respecting the due process rights of owners of real property; and (6) to provide for the disposition of escheated and waste and unappropriated lands.

*Id.*

<sup>227</sup> See *Plemons v. Gale*, 396 F.3d 569, 578 (4th Cir. 2004).

<sup>228</sup> *Jones*, 547 U.S. at 248–249 (Thomas, J., dissenting).

<sup>229</sup> See *Wells Fargo Bank, N.A. v. UP Ventures II, LLC*, 675 S.E.2d 883 (W. Va. 2009).

<sup>230</sup> *Id.*

<sup>231</sup> See *id.* at 885.

<sup>232</sup> *Subcarrier Commc'ns, Inc. v. Nield*, 624 S.E.2d 729, 731 (W. Va. 2005).

<sup>233</sup> *Id.* at 732.

<sup>234</sup> *Id.*

these efforts on the part of the taxpayer, the next year's taxes were again mailed to the old address, and since the mail forwarding order had expired, it was returned to the sheriff stamped "undeliverable, forwarding order expired."<sup>235</sup>

The recent decision in *Rebuild America, Inc. v. Davis*<sup>236</sup> reversed a lower court's decision to set aside a tax deed for failure to comply with the notice of hearing requirement as set forth in the West Virginia Rules of Civil Procedure.<sup>237</sup>

Even though the case was reversed on grounds of failure to properly "notice" the hearing, the decision does provide important insight into tax sales.<sup>238</sup> As to tax sales for the nonpayment of taxes, the Court explained that there were two notices to be given to the delinquent taxpayer.<sup>239</sup> The first notice is given by a sheriff before selling a tax lien at public auction, as provided for by West Virginia statutory provisions.<sup>240</sup> As to the "pre-sale" notices, the Court explained that the sheriff must:

- (1) [P]ublish a list of delinquent real estate as a Class I-0 advertisement,
- (2) make a second publication of delinquent real estate as a Class III-0 legal advertisement, with this notice stating that the tax lien for the delinquent taxes would be sold at public auction at a time, date and place specified in the notice, . . . and
- (3) mail a certified letter to the landowner, and others specified by statute, of the tax delinquency and that the tax lien for that delinquency will be sold at public auction at a certain date, time, and place, unless the delinquency is redeemed[.]<sup>241</sup>

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<sup>235</sup> *Id.*

<sup>236</sup> 726 S.E.2d 396 (W. Va. 2012).

<sup>237</sup> The West Virginia Rules of Civil Procedure provides:

(b) Motions and other papers—

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11.

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<sup>238</sup> See *Rebuild Am., Inc.*, 726 S.E.2d 396.

<sup>239</sup> *Id.* at 402.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* (citing W. VA. CODE ANN. § 11A-2-13 (LexisNexis 2012); W. VA. CODE ANN. § 11A-3-2 (LexisNexis 2012); W. VA. CODE ANN. § 11A-3-2(b) (LexisNexis 2007)).

The Court went on to say that “the second category of notices are those required to be made *after* sale of tax lien. In the second category (post-sale notices), three additional notices are required . . . .”<sup>242</sup> In relation to this “post-sale” category, the Court noted that “these additional notices are required where the delinquent property is classified as Class II property<sup>243</sup> at the time of the assessment.”<sup>244</sup>

The Court explained:

(1) that the sheriff, within one month of the sale of a tax lien at public auction, make a Class II-0 publication of the tax lien sale, notifying the landowner, and other persons or entities entitled to notice, that they could still pay the taxes and redeem the property,

(2) that the Clerk prepare and serve a notice to redeem. The notice to redeem informs the landowner, and others entitled by statute to notice, that a tax deed had been requested by the tax lien purchaser, but that the landowner and others still had the right to redeem the property by paying the amounts due by the time specified in the notice. The notice to redeem also informs the landowner, and others, that if the delinquent taxes are not redeemed by the time set forth in the notice, a tax deed would be delivered to the purchaser of the tax lien., and

(3)that the Clerk, when the tax delinquency is for real property that was classified as residential at the time of assessment, forward a copy of the notice to redeem by first class mail to the physical address of the property and addressed to “Occupant.”<sup>245</sup>

As to the pre-sale notice required by Section 11A-3-2(b) of the West Virginia Code, the Court explained that the same Code sections also provides: “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

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<sup>242</sup> *Id.*

<sup>243</sup> Section § 11-8-5 of the West Virginia Code classified class II property as: “Class II. All property owned, used and occupied by the owner exclusively for residential purposes; All farms, including land used for horticulture and grazing, occupied and cultivated by their owners or bona fide tenants . . . .” W. VA. CODE ANN. § 11-8-5 (LexisNexis 1961).

<sup>244</sup> *Rebuild Am., Inc.*, 726 S.E.2d at 402.

<sup>245</sup> *Id.* at 402–03 (citations omitted).

conveyed pursuant to section twenty-seven [§ 11A-3-27] or fifty-nine [§ 11A-3-59] of this Article.<sup>246</sup>

As to the facts in the case before it, the Court said:

The Legislature could not have more plainly stated its intent—a tax deed will not be set aside on the ground that a landowner or lienholder did not receive the Sheriff's pre-sale tax lien notice (sent by certified mail) if the post-sale redemption notice was properly served, and the statutory process was followed when conveying the tax deed. As opposed to the arguments made by Huntington Bank and the Davises, the real issue that the trial court needed to determine was whether the post-sale statutory process was followed and the tax deed for the Davises' property conveyed pursuant to W. Va. Code § 11A-3-27.<sup>247</sup>

Section 11A-3-27 of the West Virginia Code provides that a tax deed will not be delivered unless the post-sale notice to redeem was properly served and, despite such service, the property was not redeemed. In fact, the form deed contained in Section 27 states:

Whereas, The [Clerk] has caused the notice to redeem to be served on all persons required by law to be served therewith; and

Whereas, the tax lien(s) on the real estate so purchased has not been redeemed in the manner provided by law and the time for redemption set in such notice has expired[.]<sup>248</sup>

Section 11A-3-22 of the West Virginia Code specifies the method that must be used in serving the notice to redeem.<sup>249</sup> Subsection (b), which is applicable to the facts of this case, states:

The notice shall be served upon all persons residing or found in the state in the manner provided for serving process commencing a civil action or by certified mail, return receipt requested. The notice shall be served on or before the thirtieth day following the request for the notice.<sup>250</sup>

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<sup>246</sup> W. VA. CODE ANN. § 11A-3-2 (LexisNexis 2007). Section 11A-3-27 of the West Virginia Code refers to the sheriff's sale tax deed and Section 11A-3-59 refers to the deputy's commissioner's sale. *Id.* § 11A-3-27, -59.

<sup>247</sup> *Rebuild Am., Inc.*, 726 S.E.2d at 403 (citations omitted).

<sup>248</sup> W. VA. CODE ANN. § 11A-3-27 (LexisNexis 2010).

<sup>249</sup> *Id.* § 11A-3-22.

<sup>250</sup> *Id.*

The Court found that, “[c]ontrary to Huntington Bank’s and the Davises’ argument, it is the post-sale notice to redeem that is the relevant inquiry in a lawsuit filed under West Virginia Code section 11A-4-4, and not one of the pre-sale notices.”<sup>251</sup>

The Court’s comment in footnote 13 is also significant. At the end of the Court’s discussion concerning “notices,” as discussed above, the footnote reads: “The fact that the statutory tax sale may have been followed does not mean that constitutional due process has been satisfied. However, the Davises and Huntington Bank have not raised a ‘due process’ violation.”<sup>252</sup> Taking the Court’s discussion of “notices” and the comment of the footnote together, what the Court was stating is that the total procedure involved in the taking of an individual’s property for the nonpayment of or nonentry for taxes must comply with the due process requirement. Due process requires both a statutory procedure that satisfies the due process requirement as well as the application of that procedure to the particular set of facts involved in a manner that affords or reasonably attempts to afford the property owner of notice prior to the taking of his property.<sup>253</sup>

Finally, the Court in *Rebuild America, Inc.* addressed the burden of proof and noted:

Our law is clear that in a suit for cancellation of a tax deed, the tax deed grantee has the burden of proving compliance with the statutory steps required, including the validity of statutory notice of application for tax deed. . . . Our law is also clear that

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<sup>251</sup> *Rebuild Am., Inc.*, 726 S.E.2d at 404. As to the importance of the Court discussion regarding setting aside the tax deed, later in the opinion the Court stated:

While we reverse the trial court’s order for the reasons discussed above, we also note that we would have been compelled to reverse on the basis of a procedural error involving the manner in which the tax deed was set aside. W. Va. Code § 11A-4-4, identifies a specific procedure that trial courts must follow when a tax deed is to be set aside, which includes making a preliminary finding *before* setting aside a tax deed. The trial court did not make a preliminary finding.

Reviewing the statutorily proscribed procedure, we hold that before a trial court may enter a final order setting aside a tax deed pursuant to W. Va. Code § 11A-4-4 [1994], the trial court must make a preliminary finding that the tax deed will be set aside if, within thirty days of the entry of the preliminary finding, there is paid or tendered to the tax deed purchaser, or his heirs or assigns: (1) the amount of money that would have been required to redeem the property, (2) the amount of real estate taxes paid on the property since delivery of the deed, and (3) interest at the rate of twelve percent per annum. If these amounts are not paid or tendered to the tax deed purchaser within thirty days of entry of the preliminary findings, the trial court, upon the request of the tax deed purchaser, must enter an order dismissing the case seeking to set aside the tax deed.

*Id.* at 406 (footnotes omitted).

<sup>252</sup> *Id.* at 403 n.13.

<sup>253</sup> *See generally id.*

“[t]he owner cannot be deprived of his land by sale thereof for taxes unless the procedure prescribed by the statute, strictly construed, is substantially complied with.”

On remand, Rebuild/REO—whichever of the two is the actual grantee of the tax deed—must prove that it followed the specific requirements set forth in W. Va. Code § 11A-3-19 . . . , and that the notices to redeem were properly served as required by W. Va. Code § 11A-3-22(b) [2007].<sup>254</sup>

#### IX. JUDGE GOODWIN AND JUSTICE KETCHUM GOT IT RIGHT

On the facts of the case, the Court, in my opinion, reached the correct result in the *Wells Fargo Bank* case. In that case, the property owners received and signed for the notices to redeem and took no action to redeem.<sup>255</sup> After receiving the notice to redeem, they made the arrangements to borrow \$84,500 from Fleet National Bank, closed the loan, and the deed of trust was recorded.<sup>256</sup> While upholding the tax lien purchaser’s title, the Court noted that the Legislature had established the terms of the statute of limitation. “If the Legislature required tax sale purchasers to take actual possession before the

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<sup>254</sup> *Id.* at 404–05 (citations omitted) (quoting Syl. pt. 1, *Koontz v. Ball*, 122 S.E. 461, 461 (W. Va. 1924)). Although not explicitly referring to it, the court’s statement of the burden of proof appears to be inconsistent with Section 11A-4-4(b) of the West Virginia Code which reads:

no title acquired pursuant to this article shall be set aside in the absence of a showing by clear and convincing evidence that the person who originally acquired such title failed to exercise reasonably diligent efforts to provide notice of his intention to acquire such title to the complaining party or his predecessors in title.

W. VA. CODE ANN. § 11A-4-4(b) (Lexis Nexis 1994). However, the court’s statement as to the burden of proof is consistent with Judge Goodwin’s statement in the first *Plemons v. Gale* opinion regarding Section 11A-4-4(b) of the West Virginia Code. Judge Goodwin wrote:

Therefore, the court **FINDS** that § 11-A-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. In 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.” As is discussed in detail below, Ms. Plemons has proven by clear and convincing evidence that the defendants’ attempt to provide her with notice fails to satisfy the requirements of due process.

*Plemons v. Gale*, 298 F. Supp. 2d 380, 385–86 (citations omitted) (quoting *Burton v. United States*, 196 U.S. 283, 295 (1905)).

<sup>255</sup> *Wells Fargo Bank, N.A. v. UP Ventures II, LLC*, 675 S.E.2d 883 (W. Va. 2009).

<sup>256</sup> *Id.* at 885 (citations omitted). Assuming that Fleet Bank required a title report in order to obtain the loan, the title examiner should have ascertained that the real estate taxes had not been paid and were not current.

statute of limitation began to run, lawsuits like the one presently before us would not be barred by W. Va. Code § 11A-4-4(a) [1994].<sup>257</sup>

Such a statutory provision would provide a “solution” in a significant majority of the cases where there was an inadvertent failure to pay the property taxes. However, such a provision would not be as well suited to mineral interests or vacant lands (such as mountain acreage) where the tax liens were sold and purchased.<sup>258</sup> Therefore, such an amendment to the statute of limitation would not totally replace the need for the Court’s oversight to prevent a tax sale purchaser from “gaming the procedure.” Judge Goodwin’s admonition in *Plemons* is well-founded. Following the remand from the Fourth Circuit, Judge Goodwin repeated his earlier concern by stating the following:

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.<sup>259</sup>

The list set forth in *Mullane*, and followed in *Jones v. Flowers* is stated as:

But when notice is a person’s due process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected or, where conditions do not reasonably permit such notice, that the form chosen is not substantially

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<sup>257</sup> *Id.* at 890.

<sup>258</sup> A provision that the statute of limitation would not start to run until the tax sale purchasers enters into actual possession would be effective if the property were occupied by the “owner” or one claiming under an owner, for example, a house or business establishment. However, if the land was unimproved mountain land or mineral interest, the assertion of ownership or taking of actual possession would not necessarily produce the same type of overt assertion of competing rights. Seeking to evict an occupant is a clear overt assertion of a right as distinguished from hunting or other similar activities on isolated, unimproved mountain land. Similarly, horizontal drilling, beyond the well pad, provides no surface evidence of the underground activities.

<sup>259</sup> *Plemons v. Gale*, 382 F. Supp. 2d 826, 830 (S.D. W. Va. 2005) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)).

less likely to bring home notice than other of the feasible and customary substitutes.<sup>260</sup>

The very nature of this statement requires a fact specific examination as reflected in Judge Goodwin's opinion, and Justice Ketchum's suggestion that a tax lien purchaser should not be able to "lay low" to allow the passage of time to provide a possible defense.

The use of tax sales to help "clear" titles to the "wretched and embarrassed condition" of ownership of lands in "Western Virginia" has long since passed. The advent of the secondary market, securitization of loans, internet lending, and the increased frequency of bank mergers and acquisitions have created a new set of problems, and the tax sales of this era have created a new type of "land speculators." While the circumstances may have changed, "due process" continues to provide the method of balancing the government's need for tax revenues and the protection of an owner's property rights.

#### X. CONCLUSION

While there may be occasions where a "bright line test" furthers the ends of justice, as it relates to the "due process" requirement in the context of a tax sale case, a case by case approach would seem best. As Chief Justice Roberts said in *Jones v. Flowers*:

For the reasons stated, we conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so. . . . We think there were several reasonable steps the State could have taken. What steps are reasonable in response to new information depends upon what the new information reveals.<sup>261</sup>

As Judge Goodwin said in *Plemons* following the remand:

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

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<sup>260</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (citations omitted).

<sup>261</sup> 547 U.S. 220, 234 (2006).

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.<sup>262</sup>

In the *per curiam* decision in *Reynolds v. Hoke*,<sup>263</sup> our Court looked at the facts of the case to determine what constituted “reasonable diligence” and concluded that the tax sale purchaser did not reasonably follow up on information known to him.<sup>264</sup>

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<sup>262</sup> *Plemons*, 382 F. Supp. 2d at 831 (quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162–163 (1961) (Frankfurt, J., concurring) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))).

<sup>263</sup> 702 S.E.2d 629 (2010).

<sup>264</sup>

As set forth above, upon purchasing the tax lien on the subject property, the appellee received a certificate of sale from the sheriff which listed the names of both Bill Reynolds and Beverly Haynes as taxpayers of the property that was delinquent for the taxes. The appellee mailed a notice of the right to redeem the subject property to Bill Reynolds and he searched the public records in the county clerk’s office for any deed transfers indexed under the name of Bill Reynolds. The appellee also mailed a notice of the right to redeem to Beverly Haynes. Significantly, the appellee failed to search the public records in the county clerk’s office for deed transfers indexed under the name of Beverly Haynes who was listed as a taxpayer on the property in the certificate of sale given to the appellee. If the appellee had done so, he would have discovered the February 8, 2006 quitclaim deed conveying the subject property by Beverly Haynes to the appellants and filed in the county clerk’s office on June 7, 2006. Because Beverly Haynes’ name appeared as a taxpayer on the certificate of sale received by the appellee upon purchasing the tax lien for the subject property, this Court finds as a matter of law that reasonable diligence required that a search of the public records in the county clerk’s office be made to determine whether there were any deed transfers indexed under the name of Beverly Haynes.

Further, the appellants’ deed was of record in the county clerk’s office during the applicable time period as having received the subject property by quitclaim deed from Beverly Haynes. Consequently, the appellee was charged with exercising reasonable diligence to provide notice to the appellants of their right to redeem the property. Moreover, there is evidence in the record that the sheriff’s office assessed the appellants for taxes on the subject property for the year 2007. Specifically, the record contains a statement of taxes due for the year 2007 sent by the Sheriff of Monroe County to the appellants. Pursuant to W. Va. Code § 11A-3-23(a) (1998), “the owner of, or any other person who was entitled to pay the taxes on, any real estate for which a tax lien thereon was purchased by an individual may redeem at any time before a tax deed is issued for the real estate.” (Emphasis added). Therefore, also as persons entitled to pay taxes on the property, the appellants can redeem the property.

*Id.* at 632–33 (footnotes omitted).

While those who profit from the tax sale procedure by buying property at a fraction of the true value will assert that requiring them to take reasonable steps to actually notify the “true” owner of their right to redeem will take away their incentive to bid at tax sales, such an assertion actually serves to validate Judge Goodwin’s concerns. As to some of the tax sales purchasers, Mr. Shuman in his “updated” article noted:

The trade of purchasing tax liens at sheriff’s sales has many within its ranks that can be termed “professionals.” . . . 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.<sup>265</sup>

Also, as to the “risk” that the delinquent taxpayer may redeem, it is important to note that the West Virginia statute, as recently amended, requires the redeemer to reimburse the tax lien purchaser within one month with interest at 12% per annum.<sup>266</sup>

Given the fact that the United States Supreme Court has said: “Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner ‘notice and opportunity for hearing appropriate to the nature of the case,’”<sup>267</sup> our courts will continue to be challenged by applying that safeguard. It is submitted that what constitutes an appropriate effort to give adequate notice to an owner of one’s intent to “take” or usurp his or her property that is valuable, has improvements and is occupied, will be different from a case involving an abandoned mineral interest or wild and vacant mountain property. Therefore, a case by case approach will be necessary to determine what constitutes due process. The adoption of the amendment to the statute of limitation provision suggested by Justice Ketchem in *Wells Fargo Bank, N.A. v. UP Ventures II, LLC*<sup>268</sup> would serve to reduce efforts to “game” the system to avoid the issue of whether due process requirements have been met. Also, it is noted that the 2010

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<sup>265</sup> See Shuman, *Update*, supra note 123, at 752–53.

<sup>266</sup> Section 11A-3-23 of the West Virginia Code provides what the redeemer must pay when redeemed after the sheriff’s tax sale. W. VA. CODE ANN. § 11A-3-23 (LexisNexis 2010). Section 11A-3-56 of the West Virginia Code provides what the redeemer must pay after the deputy commissioner sale. W. VA. CODE ANN. § 11A-3-56 (LexisNexis 1995). Section 11A-4-4 of the West Virginia Code provides the procedure, including the reimbursement in the above code sections, that must be paid to set aside a “tax deed.” W. VA. CODE ANN. § 11A-4-4 (LexisNexis 1994).

<sup>267</sup> *Jones v. Flowers*, 547 U.S. 220, 223 (2006) (citation omitted).

<sup>268</sup> 675 S.E.2d 883 (W. Va. 2009).

amendment to West Virginia Code Section 11A-3-22(d) requiring notice to be mailed to the “occupant” if the property is classified as Class II property at the time of the assessment<sup>269</sup> is a step in the right direction toward assuring that due process requirements are satisfied.

While such a requirement should help, a letter addressed to the occupant is still not as likely to be as effective as a view combined with the appropriate inquiry in getting the critical notice in the hands of the one most likely to act upon the information contained in the notices.

However, as the United States Supreme Court noted in *Mullane*, “[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is 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 objection.”<sup>270</sup> It is submitted that “under all the circumstances,” the party who is to provide notice may be required as part of following through where the mailed notice is returned as undelivered is to view or visit the property.<sup>271</sup> The duty to take a view is already a part of the duty of a purchaser under our recording laws.<sup>272</sup> A visit to the site is precisely what Sheriff Neil did on the day the clerk gave him the tax deed in the *Subcarrier* case, and that visit provided him the information necessary to contact Subcarrier advise it, immediately after he had recorded the tax deed, that he now “owned” its property.<sup>273</sup> As Judge Goodwin noted in *Plemons*, under a case by case approach the court would be able to determine on the facts of each case whether a view or visit to the property should have been a part of the reasonable effort to get notice to the delinquent taxpayer.<sup>274</sup>

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<sup>269</sup> W. VA. CODE § 11A-3-22(d) (LexisNexis 2010).

In addition to the other notice requirements set forth in this section, if the real property subject to the tax lien was classified as Class II property at the time of the assessment, at the same time the State Auditor issues the required notices by certified mail, the State Auditor shall forward a copy of the notice sent to the delinquent taxpayer by first class mail, addressed to “Occupant”, to the physical mailing address for the subject property. The physical mailing address for the subject property shall be supplied by the purchaser of the tax lien pursuant to the provisions of section nineteen [§ 11A-3-19] of this article.

*Id.*

<sup>270</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

<sup>271</sup> This argument was advanced in *Subcarrier*, but was not addressed by the court on appeal. The case was decided on the basis of the prohibition of the sheriff’s purchase at the tax sale under Section 11A-3-6(a) of the West Virginia Code. *Subcarrier Commc’ns, Inc. v. Nield*, 624 S.E.2d 729, 738 (W. Va. 2005). Mr. Shuman in his article argues the Court should adopt such a requirement. See Shuman, *Update, supra* note 123, at 728–29.

<sup>272</sup> See John W. Fisher, *The Scope of Title Examination in West Virginia: Can Reasonable Minds Differ?*, 98 W. VA. L. REV. 449, 496–500 (1996).

<sup>273</sup> *Subcarrier Commc’ns, Inc.*, 624 S.E.2d 729 at 732.

<sup>274</sup> *Plemons v. Gale*, 298 F. Supp. 2d 380, 390 (S.D. W. Va. 2004).

## APPENDIX

## III. PROPOSED ARTICLE 11A-5: AN OVERVIEW

*A. Goal of the Legislation*

The goal of this legislation is to enable the state to dispose of forfeited and delinquent property without every acquiring fee simple title to the property. The state can't acquire title to the property without notifying the owner and other interested parties, and the expense of this notice is excessive in light of the benefits of fee simple ownership—since no one had bid on the property at the sheriff's sale, or redeemed the property prior to the sale or during the lengthy redemption period after the sale, it probably isn't worth owning, and the state could expect to realize little or no revenue from its expense in notifying owners that it was taking the property.

Thus, under the proposed system, the property never becomes irredeemable while in the hands of the state. It only becomes irredeemable after an individual purchaser has bid on the property, examined the title to discover all parties entitled to notice that a deed will be issued, and paid the responsible government official an amount necessary to pay for the service of the notice. After the notice is served and a reasonable redemption period has expired, a deed is issued for the property. This enables the state to shift the cost of due process to a tax purchaser. Not only are the costs shifted, but the risks are shifted as well. The state is only selling a right to obtain a deed upon the completion of certain tasks. Each individual purchaser must perform these tasks, and his failure to do so in no way jeopardizes the state's right to dispose of other property.

The proposed legislation still provides for sales by both sheriffs and deputy commissioners. The role of the sheriff remains the same. Indeed, the statutes providing for sheriffs' sales have undergone little substantive change, with the notable exception that lienholders will be required to file addresses with the sheriff should they wish to receive notice of a pending tax sale.

The role of the deputy commissioner has changed a great deal, however. Under the current system, the deputy commissioners institute suits in the circuit courts to sell forfeited, delinquent and irredeemable, escheated, and waste and unappropriated property. Title to this property, by definition, is deemed vested in the state. Following *Menonite*, it is clear that the system is constitutionally flawed, as it divests owners of their rights in real property without any notice other than notice of the pending tax sale, which is issued nearly two years before the property becomes irredeemable. No notice is provided to owners of forfeited property, and, in practice, lienholders also do not receive notice.

The proposed legislation provides that such property is always redeemable until sold. The deputy commissioner now acts as a state land agent

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in each county, who is in charge of disposing of the “orphan” property. He conducts one public auction per year, and may sell property which is not bought at the auction to anyone who expresses interest in the property. It is expected that some property will remain with the deputy commissioner indefinitely. Although this is not a “neat” way of disposing of this property, and will do little to clear up land titles, it is much cheaper than performing title searches on what is likely to be worthless property. Ultimately, the market will determine whether such property is redeemed and put to use. Truly valuable property is not likely to languish in the deputy commissioner’s office for an extended period. The proposed legislation requires a prospective tax purchaser to take the same steps to obtain a deed, whether the property is purchased from the sheriff or the deputy commissioner. Basically, he must perform a title search, generate a list of names and addresses of persons entitled to notice that a deed will be issued, and pay for the preparation and service of the notice. Upon the expiration of the redemption period, the purchaser receives a deed to the property.