

The Mississippi Bar Business Law Section News

Summer 2004/Vol. 15. No. 1

MESSAGE FROM THE CHAIR

By Wes Daughdrill, YoungWilliams P.A.



It has been an exciting year for the Business Law Section. The Executive Committee has continued many of the traditional services that we provide to Section members, and we have also tried some new things to enhance the value of Section membership.

One of our projects for the year was to identify and add a number of useful links to our Section web page. We've added links for certain federal and state laws, government agencies, legislative sites, and business news, which I believe will be helpful to all of us as business attorneys. Please take a moment to go to our web page and check it out at http://www.msbar.org/7_business_law.php.

On the social front, we thought it would be a good idea to have a spring social so that Section members could get to know each other better and to put faces with names. We held our first spring social at Old Venice on April 27th, and although we did not have an overflow crowd, those who attended had a good time. Hopefully, the Executive Committee will continue this effort, and the crowd will grow every year.

On June 29th we held our annual Ethics Seminar with the Mississippi Corporate Counsel Association at the Capital Club in Jackson. The seminar was a huge success. We even had a waiting list. Our speaker was Wendy Keith, who spoke on recent changes to the Model Rules of Professional Conduct. Wendy did an excellent job, and I would like to thank her again for her efforts.

Our Business Law Section Annual Meeting was held on July 8th at the Bar Convention in Sandestin. Jim Marshall of Siver Insurance Consultants spoke on "Drafting and Interpreting Indemnity Provisions and Insurance Requirements in Contracts". We had a larger crowd than we have had in the last several years, and I think everyone enjoyed Jim's very informative presentation.

Once again this year the Section provided \$500 Business Law scholarships for the Ole Miss and Mississippi College Law Schools. This year's recipients were Ryan Mikkelson of Mississippi College and Elizabeth Ferguson of Ole Miss, who were both very deserving of the awards.

I would like to thank the members of the Executive Committee for their service this year. Our officers for this year were: Wes Daughdrill, Chair; Ben Roberson, Past Chair; Dodds Dehmer, Vice Chair; Chuck Ferguson, Secretary/Treasurer; and Jody Martin, Richard Yoder and William

Gillis, Executive Committee Members. I would also like to thank Mike Massey for his service as Newsletter Editor. Also, special thanks to Spiller McLeod for everything she does for us.

Please feel free to contact me at (601)-360-9030 or Wes.Daughdrill@youngwilliams.com if you have any input on how Section membership can be further enhanced and made more valuable.

Thank you for a great year.

CLARK-BACKED BUSINESS BILLS SIGNED INTO LAW

Column by Secretary of State Eric Clark

I'm pleased to report that the Secretary of State's Business Law Advisory Group successfully pushed for two changes to Mississippi's business laws this past legislative session. These bills are part of our annual work with the Legislature and experts in the private sector to make improvements and technical changes to Mississippi's business laws.

The Business Law Advisory Group is composed of volunteer attorneys, accountants and other businesspeople. Tommy Shepard of the Watkins, Ludlam, Winter and Stennis law firm chairs the Business Law Advisory Group. Robert Drinkwater of the Brunini Firm chairs the partnership committee. Senator Charlie Ross (Rankin County) and Representative Randy Pierce (Forrest, George, Greene, Perry, and Wayne counties) were key sponsors of the bills. Governor Haley Barbour signed both bills into law.

Senate Bill No. 2504 conforms Mississippi law regarding business partnerships to national standards. The Revised Uniform Partnership Act has been adopted in 35 states and is pending in several others. The law makes changes to existing partnership laws in Mississippi, some of which are based on the 1914 version of the Uniform Partnership Act.

Under the new law, a partnership is established "as a separate legal entity, and not merely as an aggregate of the partners." The Act provides a basic set of default rules covering the relationships between the partners, the partnership, and third parties where those matters are not covered by a partnership agreement. The partnership agreement, where there is one, will continue to govern most aspects of the partnership, however, certain rights and duties of the partners such as the fiduciary duties of the partner to the partnership may not be impaired by the contract.

The second BLAG bill, House Bill No. 972, makes technical changes to the Mississippi Business Corporation Act. New sections added by the bill clarify existing law by defining previously undefined terms. Also included in the bill is a provision that permits corporations to save money by delivering annual financial statements to shareholders by e-mail. The changes conform Mississippi law to new national standards moving forward in most states.

In addition to working on these two bills, our office is getting ready for major changes under the new Mississippi Administrative Procedures Act. My support for this important law is based on the belief that Mississippians should easily be able to get information about how their government works. The law provides for hearing procedures that protect the rights of private citizens in dealing with state agencies and gives businesses confidence in what they may expect from state regulators. It also creates an administrative code of regulations so that all state agency regulations will be readily accessible to the public. The new code will be a comprehensive

collection of all regulations with a uniform format, numbering system and index. The new law takes effect in 2005.

Our business law measures are not the most glamorous bills in the Capitol. But, work on this type of legislation is important to creating a strong business climate in our state. I welcome your input concerning other improvements we can make to our business laws. Since I took office, the Business Law Advisory Group has successfully promoted more than a dozen bills that have been signed into law. If you are interested in the work of the Secretary of State's Business Law Advisory Group, call Assistant Secretary of State Bill Thompson at 601-359-1626.

THE MISSISSIPPI DEVELOPMENT AUTHORITY (MDA) OFFERS VALUABLE ASSISTANCE TO BUSINESS ATTORNEYS AND THEIR CLIENTS

Editors Note: We asked the MDA to summarize the programs available to Mississippi Business Lawyers to better assist their clients.

The Mississippi Development Authority (MDA) is the business ambassador for the state of Mississippi. More than a government agency, MDA strives to meet the needs of individuals, communities, businesses and other constituents in a wide range of economic and community related areas.

MDA is committed to ensuring quality infrastructure, providing workforce development, promoting tourism, assisting both existing businesses and new companies, funding local projects and offering other essential services. Our work impacts nearly every segment of the community and every region of the state.

As the state's premier economic development organization, we also understand the importance of building partnerships and alliances across industry sectors and among professional groups. MDA is creating strong relationships with businesses and communities through targeted information sharing and networking opportunities.

MDA promotes growth in the state's business sector by providing services ranging from management and marketing consultation, analysis of business plans and strategies, and other services that can improve company profitability, increase jobs and payroll, and foster investment in Mississippi businesses and industry. We also offer many incentive programs to encourage business development as well as community improvement. Following are some of those programs:

- **Advantage Jobs Incentive Program:** The Advantage Jobs Incentive Program is designed to provide incentives to qualified companies that promise a significant development of the economy through the creation of quality jobs.
- **Mississippi Business Investment:** Through the issuance of general obligation bonds, a low-interest loan is provided to a county or incorporated city or town to finance improvements, which complement investments by a private company.

- Port and Airport Loan Program: Under the Port and Airport Loan Program, MDA makes loans to port and airport authorities in the State for construction and/or improvement to their facilities.
- Agribusiness Enterprise Loan Program: The Agribusiness Enterprise Loan Program (ABE) program is designed to encourage private institutions to participate in the development of the agribusiness industry in the state.
- Economic Development Highway Program: The Economic Development Highway Program (EDH) assists political subdivisions with the construction or improvement of highway projects, which encourage high economic benefit projects to locate in a specific area.
- Minority Business Enterprise Loan Program: The Minority Business Enterprise Loan Program (MBE) is designed to provide funding to assist in financing minority economic development. The minority business enterprise must be socially and economically disadvantaged and owned and operated by one or more women or eligible minorities.
- Mississippi Tourism Incentive Program: This is an incentive program that allows approved "family-oriented entertainment enterprise" projects to recover up to 35% of the original indebtedness or project capital costs or both within a 10-year period. Campgrounds, theme parks, auditoriums, dining facilities, gift shops and lodging facilities are identified as examples of eligible projects.
- Film Incentive Grants: The Mississippi Film Office supports filmmaking and the film industry in Mississippi through two grant programs: one for event sponsorship and one for production support.

MDA maintains several databases, including certified minority businesses, available sites and buildings, new and expanding facilities and manufacturers. The agency provides up-to-date information regarding tax rates, tort reform, contract procurement and other valuable data via our industry resource library. MDA also has an extensive workforce development program that includes training and employee-employer matching services through our partnerships with local community colleges, employment agencies and the Governor's Job Fair Network.

In an effort to foster exporting opportunities for Mississippi companies, MDA's international trade staff provides consultation services and trade/catalog show representation at venues across the globe. In the last year, staff members traveled to Spain, Canada, China, Thailand, Singapore, Cuba, Argentina and other sites to promote Mississippi products and services.

Our team of professionals is ready and willing to assist you and your clients with your business needs. In addition to our staff in the main office in Jackson, the agency has seven regional offices strategically located across the state: Greenwood, Tupelo, Jackson, Meridian, Summit, Hattiesburg and Biloxi. For more information about MDA's programs and services, visit our website at www.mississippi.org or call 601.359.3449.

Examples of the programs and services available through the Mississippi Development Authority that might be of interest to attorneys and their clients include:

Workforce Development, including:

- Training (partners with community colleges and local employment agencies)
- WIN Job Centers (employee - employer matching services)

Databases, including:

- Certified Minority Businesses
- Available Sites and Buildings
- Industry Resource Library (wealth of resources, databases, etc. about Mississippi business and industry)

Leadership Development Training, including:

- Board Development
- Seven Habits of Highly Effective People®
- Strategic Planning Sessions
- Conflict Resolution
- Diversity Training

Networking Opportunities, including:

- Building New Partnerships Conference (sponsored by Minority Business Enterprise Division)
- Governor's Winter Symposium (sponsored by the Community Services Division)
- WIN-ing Conference (sponsored by Employment Training Division)

Entrepreneurship, including:

- Start-Up Kits
- Technical Assistance/Support
- Funding Assistance

International Trade, including:

- Trade/Catalog Show representation (throughout Canada, Mexico, Latin America, the Caribbean, Europe and Asia)
- Consultation services provided by Trade Specialists and/or World Trade Center reps

Jennifer Spann

Communications Division, Mississippi Development Authority

PO Box 849, Jackson, MS 39205

Telephone: (601) 359-6680, Facsimile: (601) 359-3596

www.mississippi.org

BUSINESS RELATED OPINIONS OF THE MISSISSIPPI SUPREME COURT

By Kevin W. Brady, Massey, Higginbotham & Vise, P.A.

Among the case law handed down over the past year by the Mississippi Supreme Court, the following cases appear to be of particular interest to business law practitioners.

McKenzie Check Advance of Mississippi, LLC v. Hardy, 866 So. 2d 446 (Miss. 2004)
(Arbitration)

In the recent case of *McKenzie Check Advance of Mississippi, LLC v. Hardy*, 866 So. 2d 446 (Miss. 2004), the Mississippi Supreme Court analyzed provisions of the Federal Arbitration Act which makes enforceable a written arbitration agreement in a contract which evidences a transaction involving interstate commerce.

In *McKenzie*, borrowers under payday loan contracts with certain lenders and licensed check cashers filed a lawsuit against the lenders and check cashers challenging the manner in which the defendants generated certain fees. The defendants sought to enforce an arbitration provision in

the contract, but the circuit court denied their motion to compel arbitration. An interlocutory review by the Mississippi Supreme Court was granted.

The arbitration agreement in the contract was conspicuously presented and written in plain English. The rights that both parties agreed to waive by signing the arbitration agreement were printed in all capital letters and in bold typeface to highlight them from the rest of the text. Both of the parties signed the agreement directly underneath a highlighted acknowledgment that the agreement contained and included a “Waiver of Jury Trial and Arbitration Agreement”.

Generally, the Federal Arbitration Act favors the enforcement of arbitration agreements. *McKenzie* recognized the existence of a liberal federal policy favoring arbitration agreements. Since arbitration is a matter of contract between the relevant parties, no party can be required to arbitrate their disputes, absent an agreement to do so.

McKenzie also recognized that mutuality of obligation is not required under Mississippi law for a contract to be enforceable, as long as the underlying contract was supported by consideration. Therefore, arbitration is not unenforceable solely because it is one-sided, especially in light of the strong federal policy favoring arbitration.

McKenzie also reinforced the idea set forth in a previous case that the Magnuson-Moss Warranty Act superceded the Federal Arbitration Act.

McKenzie concluded by addressing the well settled Mississippi law that a contracting party is under a legal obligation to read a contract before signing it. The Constitution does not confer the right to a trial, but only the right to have a jury hear a case once it is determined that the litigation should proceed before a court. If the claims are properly before arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes.

Evan Johnson & Sons Construction, Inc. v. State, 2004 WL396313 (Miss. 2004) (Contracts)

In this case, the Mississippi Supreme Court analyzed the issue of commercial impossibility/impracticability in construction contracts. In *Evan Johnson & Sons Construction, Inc. v. State*, 2004 WL396313 (Miss. 2004), a construction contractor filed suit against the State of Mississippi and the architects who designed a roof for an armory facility for the Mississippi National Guard. The State counterclaimed against the contractor. The circuit court dismissed the contractor’s claims and granted summary judgment in favor of the State on its counterclaim. On appeal, the contractor argued the commercial impossibility of constructing the roof according to the specification provided by the State. The supreme court found that for a construction contractor to prove the commercial impossibility [impracticability] of constructing a building according to the plans and specifications provided by the owner, the contractor must prove that the industry as a whole found the specifications impossible. The court also found that the contractor in this case did not prove commercial impossibility and thus affirmed the ruling.

Addressing basic substantive law regarding contracts, *Evan Johnson* noted that several factors have been considered in evaluating claims of commercial impossibility. Two of those factors, which were the centerpoint of the case, are whether any other contractor was able to comply with the specifications and the extent of the contractor’s efforts in meeting the specifications.

Courts use an objective standard to prevent an incompetent or negligent contractor from recovering by simply alleging that subjectively it was unable to perform the work. The objective standard is not intended to be a “sword” but rather a “shield” to be used by defendants to deflect such charges by a contractor whose own inability was because of nonperformance.

Heartsouth, PLLC v. Boyd, 865 So. 2d 1095 (Miss. 2003) (Employment Contracts)

This decision analyzed an alleged breach of a non-solicitation clause in an employment contract. The court examined basic contract and employment issues. Heartsouth filed suit in chancery court against a doctor for damages, injunctive relief and declaratory judgment alleging that the doctor violated the terms of a physician employment agreement, specifically a covenant not to compete and not to solicit. The chancery court dismissed the action and the employer appealed.

The intention of the parties must be drawn from the words of the whole contract and if the language used is clear and explicit, one must give effect to the contract unless it contravenes public policy. One should look to the four corners of a contract whenever possible to determine how to interpret it. Therefore, when interpreting a contract, concern is not nearly so much with what the parties may have contended but with what they said. The words employed are by far the best resource for ascertaining the intent and assigning meaning and establishing fairness and accuracy.

One of the fundamental principles of contract law is that parol evidence will not be received to vary or alter the terms of the written agreement that is intended to express the entire agreement of the parties on the subject matter at hand. Parol evidence as to surrounding circumstances and intent may be brought in only where the contract is ambiguous. Where the contract is found to be unambiguous, parol evidenced has no place.

Heartsouth also addressed the employment at will doctrine. Mississippi has followed the employment at will doctrine since 1858. The employment at will doctrine provides that an employee at will may be terminated with or without justification. Absent an employment contract expressly providing to the contrary, an employee may be discharged at the employer's will for good reason, bad reason, or no reason at all excepting only reasons independently declared legally impermissible. Only two exceptions to the doctrine of employment at will has been expressively recognized in Mississippi 1) an employee who has refused to participate in an illegal act shall not be barred by the common law rule of employment at will doctrine from bringing an action in tort for damages against his employer and 2) an employee who is discharged for reporting illegal acts of his employer to the employer or anyone else, is not barred by the employment at will doctrine from bringing action in tort for damages against his employer.

Editors Note: If you would like to submit an article that you believe would be of interest to the Business Law Section members, please contact Mike Massey at (601)-420-2200 or mmassey@mhvlaw.com.