

Business Law

Section *NEWS*

From the Mississippi Bar

Message from the Chair

By Ben Roberson, Butler, Snow, O'Mara, Stevens & Cannada, PLLC



This year, the Business Law Section, through its Executive Committee, continues to provide quality services for its members.

The Section has been assisting in the production of LexisNexis' newly published *Mississippi Business Organizations Laws Annotated*, promoting new Mississippi business legislation, and pursuing various other projects designed to provide value to Section members.

Mississippi Business Organizations Laws Annotated was first published in November 2002 through the collaboration of LexisNexis, the Mississippi Secretary of State's office and the Business Law Section. This single volume contains most of the Mississippi statutory law frequently used by business law practitioners, including the Business Corporation Act, Limited Liability Company Act, Limited Partnership Act, Uniform Partnership Act, Professional Corporation Act, Nonprofit Corporation Act, Securities Act, Corporate Income and Franchise Tax statutes and many more. We hope this volume will provide a convenient resource for our Section members. LexisNexis plans to update the volume annually. To obtain your copy of the *Mississippi Business Organizations Laws Annotated*, please refer to the ordering information at the conclusion of this newsletter.

On the legislative front, members of our Section continue to participate in efforts to update Mississippi's business laws. Many

Section members serve on Secretary of State Eric Clark's Business Law Advisory Group. This year, the Business Law Advisory Group has promoted the adoption of a Mississippi Administrative Procedures Act, as well as certain changes to the Mississippi Business Corporation Act and an update to the Mississippi Uniform Partnership Act. We have included summaries of these efforts from the Mississippi Secretary of State's office and the Business Law Advisory Group. I would like to thank David Blount and Chuck Bearman with the office of the Secretary of State, Bill Mendenhall and Tommy Shepherd, Chairman of the Business Law Advisory Group, for their efforts in this regard.

We plan to continue our tradition of co-sponsoring with the Mississippi Corporate Counsel Association an ethics seminar specifically targeted to business attorneys. We hope to schedule this in early summer (prior to the July 31 CLE deadline). We trust that this seminar will continue to be valuable to a large number of our Section members, as well as other attorneys.

Currently, the Business Law Section has 313 members, and our Section funds appear to be adequate to support the planned activities of the Section, including continuation of the annual business law scholarships for the Ole Miss and Mississippi College Law Schools.

Please make plans to attend the Mississippi Bar Annual Meeting to be held again at Sandestin, Florida, from July 23 through July 26, 2003. In connection with our Business Law Section Annual Meeting, we plan to have a dual program with the

Intellectual Property Section of the Mississippi Bar covering areas of mutual interest. Details on this program will be forthcoming.

Our officers for this year are: Benjamin W. Roberson, Chair; J. Wesley Daughdrill, Jr., Vice Chair; Dodds M. Dehmer, Secretary/Treasurer; John M. Flynt, Past Chair; Albert G. Delgado, Jody B. Martin, and Richard L. Yoder, Executive Committee Members; and Charles W. Ferguson, Newsletter Editor. I would like to thank John Flynt for his service as Chair of the Business Law Section during 2001-2002 and for his continuing to serve on the Section Executive Committee. John was also recognized for his service to the Section at the 2002 Annual Meeting in Sandestin.

Please feel free to contact me at 601-985-4582 or at ben.roberson@butlersnow.com if you have any ideas for how the Business Law Section can better serve our members and the community.

SOS PROPOSES 2003 BUSINESS LAW CHANGES

Column by Secretary of State Eric Clark



Each year, the Secretary of State's Office works with the Mississippi Legislature to improve the business climate in our state. In recommending changes to our business laws, I work closely with our Business Law Advisory Group (BLAG) and leaders in the Legislature. BLAG is composed of attorneys and business people who volunteer their time to make it easier to do business in Mississippi.

This year we recommended three major legislative items to the Legislature. The bills concerned corporations, partnerships,

and state agency administrative procedures and rule-making.

After years of work, we were successful in passing major changes to the Mississippi Administrative Procedures Act. Support for this important proposal was based on the belief that Mississippians should easily be able to get information about their government. Our proposal provides for hearing procedures that protect the rights of private citizens in dealing with state agencies and give 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. Senator Charlie Ross introduced the bill in the Senate as SB No. 2297 and Representative Cecil Brown introduced HB No. 651. Other House sponsors were Rep. Les Barnett (Biloxi), Rep. John Reeves (Jackson), Rep. John Mayo (Clarksdale), Rep. Jim Simpson (Pass Christian), Rep. Greg Ward (Ripley), Rep. May Whittington (Schlater), and Rep. Jamie Franks (Mooreville). Governor Ronnie Musgrove signed the bill into law on February 19, 2003.



Reforming our state's Administrative Procedures law will give Mississippi citizens access to a clear, consistent record on how state agencies do business. *The Clarion-Ledger* (January 16, 2003) stated in a recent editorial:

"What this legislation does is require that government bureaucrats cannot arbitrarily set rules, change them, hide them or weasel out of standing behind the rules they made. ... The act is designed to remove secrecy from government, the routine, day-to-day decisions of government that so greatly affect the general public."

Our proposal was endorsed by the Mississippi Economic Council, Mississippi Bar Association, Mississippi Association of Supervisors, Mississippi Association of REALTORS, Mississippi Center for Freedom of Information, Common Cause, and the League of Women Voters.

As of March 7, two of our proposals had not been approved by the Legislature. The first recommended conforming the Mississippi Business Corporation Act to the Model Business Corporation Act by adoption of new Model Act amendments. We adopted significant amendments from the Model Act two years ago regarding business takeover provisions. This year, the proposed changes clarify and define some of the language in the previous amendments. It is important that the Mississippi Business Corporation Act conform to the Model Act to keep our business climate competitive with other states. The bill was introduced as SB No. 2470 by Senator Charlie Ross and as HB No. 1003 by Representative Randy Pierce.

Likewise, we recommended that Mississippi adopt the 1997 Model Partnership Act. Our partnership act has not seen any major changes since it became effective in 1977. The proposed changes to the Model Partnership Act make some major revisions in the area of liability, disassociation of partners and dissolution of the partnership. The bill has been introduced as SB No. 2462 by Senator

Charlie Ross and as HB No. 1314 by Representative Randy Pierce.

A copy of all proposed legislation can be found on the Legislative Services website at www.ls.state.ms.us under "Bill Status." I would encourage you to read and study these bills that should benefit you and your clients.

I also ask for 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.

SUMMARY OF LEGISLATIVE INITIATIVES

The following summaries were prepared from information provided by the Business Law Advisory Group as well as versions of each bill available as of the printing of this newsletter.

Summary of SB No. 2470's Changes to the Mississippi Business Corporation Act

The primary purpose of revisions to the Mississippi Business Corporation Act (the "MBCA") contained in Senate Bill 2470 and recommended by the Business Law Advisory Group is to improve Mississippi's shareholder rights provisions to more carefully regulate under what circumstances "extrinsic facts" can be referred to in documents filed with the Secretary of State's office. The MBCA currently allows references to extrinsic facts. However, the MBCA does not currently provide specific guidance as to how such extrinsic facts would be referred to and under what

circumstances. Senate Bill 2470 provides this guidance by adding a new subsection (k) to Section 79-4-1.20 which addresses the manner in which the terms of a plan or filed document may be dependent on facts objectively ascertainable outside the plan or filed document. In order for a plan or document to be dependent on facts objectively ascertainable outside the plan or filed document the following provisions apply:

(1) The manner in which the facts will operate upon the terms of the plan or filed document shall be set forth in the plan or filed document.

(2) The facts may include, but are not limited to:

(i) Any of the following that is available in a nationally recognized news or information medium either in print or electronically: statistical or market indices, market prices of any security or group of securities, interest rates, currency exchange rates, or similar economic or financial data;

(ii) A determination or action by any person or body, including the corporation or any other party to a plan or filed document; or

(iii) The terms of, or actions taken under, an agreement to which the corporation is a party, or any other agreement or document.

Senate Bill 2470 also contains certain amendments to Section 79-4-6.02 dealing with the issuance of additional classes of shares or reclassification of unissued shares by the board of directors without shareholder approval. The amendments to this section were recommended by the American Bar Association to make these provisions consistent throughout the country.

Summary of SB No. 2462's Changes to the Mississippi Uniform Partnership Law

The primary purpose of revisions to the Mississippi Uniform Partnership Law (the "MUPL") contained in SB 2462 and recommended by the Business Law

Advisory Group is to conform the MUPL to the Revised Uniform Partnership Act ("RUPA") as drafted by the National Conference of Commissioners on Uniform State Laws.

The most significant changes to the MUPL contained in SB 2462 are as follows:

More comprehensive rules govern the duties, authority and liabilities of partners and management of the partnership, in the absence of specific agreement of the partners;

A partnership need not dissolve upon a partner's withdrawal, death, expulsion, bankruptcy or other dissociation;

The duties of the partners to each other partner in the partnership as well as the partnership itself are specifically enumerated and may be modified but not eliminated by agreement of the partners;

Partnership creditors generally must exhaust the partnership's assets before levying on the individual property of a joint and severally liable partner;

Statements to evidence the authority, or limitations on authority, of partners to bind the partnership may be filed;

Disputes may be resolved through direct actions without the necessity of a dissolution and accounting; and

The conversion of partnerships into other partnership forms and mergers among partnerships and other types of entities are permitted.

Summary of HB No. 651's Changes to the Mississippi Administrative Procedures Law.

On February 19, 2003, the Governor signed House Bill number 651, which created the Mississippi Administrative Procedures Law ("Act"). As set forth in the Act, the revised law intends to provide

minimum administrative procedures for state agencies taking actions affecting rights and duties of the public. The Act specifically limits which agencies are covered and provides that the new rules shall not preempt more stringent requirements required of certain agencies by other statutory provisions.

The Act defines "Agency" as a board, commission, department, officer or other administrative unit of the state. However, the legislature, the Governor, the judiciary and their component units are specifically excluded from coverage. It is important to note that numerous important government functions are performed by such units, including the Division of Medicaid and the Legislature Budget Office. The Act further defines declaratory opinions, orders, and rules and provides an exception from the definition of a rule for regulations establishing criteria or guidelines for audits, investigations or inspections.

The Act further provides methods for filing by electronic means with the agency, sets forth the requirements for serving notices, pleadings, motions and other documents, and allows for the computation of periods of time.

The Act continues to require the Secretary of State to prescribe a uniform numbering system, form, style and transmitting format for all proposed and adopted rules. In addition, the Secretary is required to publish, on a regular interval, an administrative bulletin containing proposed and approved rules. The Secretary is also required to compile and supplement an administrative code. Finally, each agency is required to make available for public inspection all written final orders.

Procedures and deadlines for requesting and obtaining declaratory opinions are set forth. Furthermore, the Act provides that any individual acting in good faith pursuant

to such a declaratory opinion, shall not be prosecuted, civilly or criminally unless a court finds the opinion manifestly wrong or without substantial support. Declaratory opinions are required to be publicly available.

The Act concludes with technical provisions on making rules, providing the public opportunities to comment on and oppose the proposed rules, and conducting economic impact analysis of the changes. All adopted rules generally become effective thirty (30) days after filing with the Secretary of State or at a later date if specified by the rule. Finally, Section 27 of the Act requires all agencies to file, by October 1, 2003, a report of conflicts between the new Act and other laws affecting the agency.

The effective date of the Act, for all sections except Section 27, is July 1, 2005.

CASE LAW UPDATE

By: Jon D. Seawright, Baker, Donelson, Bearman & Caldwell, P.C.

In a case of first impression, the Mississippi Supreme Court analyzed whether the Magnuson-Moss Warranty Act supersedes the Federal Arbitration Act. In Parkerson v. Smith, a manufactured housing purchaser sued a manufactured housing dealer asserting claims for breach of express and implied warranties. 817 So. 2d 529, 531 (Miss. 2002). Pursuant to the sale of the mobile home, the purchaser signed a contract entitled "Retail Installment Contract, Security Agreement, Waiver of Trial by Jury and Agreement to Arbitrate or Reference by Judge Alone." That agreement provided that the parties waived all rights to a jury trial and any disputes related to the purchase of the mobile home would be subject to arbitration. Parkerson, 817 So. 2d at 531. The defendants moved to have the case dismissed and to compel arbitration.

817 So. 2d at 531. After the motion was granted by the Circuit Court of Neshoba County, the plaintiff appealed to the Mississippi Supreme Court arguing that the Magnuson-Moss Warranty Act supersedes the Federal Arbitration Act and therefore renders the arbitration provision unenforceable. Id. at 532.

Generally, the Federal Arbitration Act favors the enforcement of arbitration agreements. Id. at 533. However, the Magnuson-Moss Warranty Act provides that any "consumer who is damaged by the failure of a...warrantor...to comply with any obligation under...a written warranty, implied warranty or service contract may bring a suit for damages and other legal and equitable relief." Id. (citing 15 U.S.C. § 2310(d)(1) (2002)). In analyzing the statutes' conflicting provisions, the court noted that "nearly every Federal court which has addressed the issue has ruled that the Magnuson-Moss Warranty Act prevails over the arbitration clause." Parkerson, 817 So. 2d at 532. Further, the court stated that where two statutes are in irreconcilable conflict, the more recently enacted and more specific statute controls. Id. at 533. Since Magnuson-Moss was enacted approximately 50 years after the Federal Arbitration Act, the court held that the provisions of the Magnuson-Moss Warranty Act providing a consumer with a cause of action supersedes the Federal Arbitration Act and therefore the arbitration clause in the purchase contract was unenforceable. Id. at 535.

In another arbitration-related case, the Mississippi Supreme Court analyzed the effect on of an arbitration clause on self-help remedies. In Russell v. Performance Toyota, Inc., the plaintiff, Russell, traded in his truck to purchase a Toyota Tacoma from Performance Toyota. 826 So. 2d. 719, 721 (Miss. 2002). The purchase documents for the new truck included an agreement compelling arbitration for any controversy

or claim arising out of or relating to the vehicle subject to the sales contract. Russell, 826 So. 2d at 723. Although Russell represented that the trade-in had not been wrecked, Performance Toyota discovered that its title noted that it had been rebuilt. 826 So. 2d at 721. Upon discovery of the misrepresentation, Performance Toyota repossessed the Toyota Tacoma and took steps to cancel the sale, and notified Russell that he could reclaim the trade in vehicle. Id. After Russell filed suit, Performance Toyota moved to have the case dismissed and the claims subjected to arbitration in accordance with the arbitration agreement. Id. After the Circuit Court of Lee County granted Performance Toyota's motion and compelled arbitration of the dispute, Russell appealed to the Mississippi Supreme Court arguing, inter alia, that the arbitration agreement should not be enforced. Id.

First, Russell asserted that claims for wrongful repossession, conversion, fraud and tortious interference with a business relationship arose from the willful and wanton disregard of his property rights, and therefore were outside the scope of claims subject to the arbitration agreement. Id. at 722. In Smith Barney, Inc. v. Henry the court held that the language "arising out of or relating to an account management agreement" was broad enough to encompass a claim for breach of fiduciary duties where the claim was derived directly from the actions and transactions covered by the management agreement. 777 So. 2d 722, 726 (Miss. 2001). Relying on the Smith Barney decision, the court held that the broad language in the arbitration agreement was sufficient to cover the claims asserted by Russell since all the claims were related to the ownership of the two vehicles which were the subject of the purchase agreement. Russell, 826 So. 2d at 723.

Second, Russell argued that even if the arbitration clause was valid, Performance Toyota waived its right to arbitration by repossessing the Toyota Tacoma. Id. at 723-24. Russell based his argument on Cox v. Howard, Weil, Labouisse, Fredricks, Inc., 619 So. 2d 908, 901 (Miss. 1993), where the court held that a party waives arbitration if it substantially takes advantage of the judicial process, and Subway Equipment Leasing Corp. v. Forte, 169 F. 3d 324 (5th Cir. 1999), where the court held that a party waives arbitration if that party invokes the judicial process to the detriment of the other party. Russell, 826 So. 2d at 724. However, the court read these cases strictly to require the use of the *judicial* process. Id. Since repossession was a non-judicial remedy available to Performance Toyota under the Uniform Commercial Code as adopted in Mississippi, the court held that repossession of the truck by Performance Toyota did not waive the arbitration provision. Id.

Finally, the court addressed Russell's claim that the arbitration clause was unconscionable due to his lack of knowledge, lack of bargaining power and that the clause was not reasonably related to business risk of the parties. Id. at 725-26. First, the court stated that the claims for lack of knowledge and lack of voluntariness were procedural unconscienability claims that attached to the purchase agreement as a whole, rather than just the arbitration agreement. Id. at 725. This was important because the court adopted the reasoning of Rojas v. T. K. Communications, Inc., 87 F. 3d 745 (5th Cir. 1996), where the U.S. Court of Appeals for the Fifth Circuit held that the Federal Arbitration Act requires that attacks on the procedural unconscionability of an agreement as a whole should be submitted to the arbitrator. Russell, 826 So. 2d at 726. Further, the court addressed the substantive merits of Russell's unconscionability claims and in doing so

provided useful guidance on interpreting such claims. Id. Notwithstanding the apparent disparity in bargaining power between the parties, the court said that there were numerous car dealerships in the area where Russell purchased the truck, there was no evidence that Russell was coerced to do business with Performance Toyota or sign the purchase agreement presented to him, the arbitration provision was clearly identified in the agreement, and it was equally binding on both parties. Id. Therefore, the court stated that Russell's unconscionability claims were without merit. Id. at 727.

One-Volume Reference for Mississippi Business and Tax Lawyers

LexisNexis and The Business Section of the Mississippi Bar are pleased to announce that Section members are entitled to receive a 15% discount off the purchase price of *Mississippi Business Organizations Laws Annotated*. This handy new resource is a single-volume compilation of relevant statutes from the Mississippi Code of 1972 Annotated pertaining to the law of corporations, partnerships, and other business entities. Featuring comprehensive annotations prepared by LexisNexis, a handy listing of "Sections Affected by 2002 Legislation," and additional resource material provided by the Mississippi Secretary of State's office, this book provides fingertip access to comprehensive coverage of the Mississippi business organization laws.

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Or, just go to the LexisNexis Bookstore at

<http://bookstore.lexis.com/bookstore/catalog> go to the MS Business Organizations Laws Annotated product listing, and enter the promotion code "MS Business" where prompted.