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## Section Chair's Corner

By **Kenneth D. Farmer**

Welcome to the Summer 2013 issue of the Mississippi Business Law Reporter. As we close the 2012-2013 year, I thought I would share with you some of the things that the Business Law Section has accomplished over the past year and inform you of some of our upcoming events.

For the second year in a row, the Business Law Section made a monetary donation to the Mississippi Volunteer Lawyers Project ("MVLP"). This donation was well received and was intended to serve as a reminder of the importance of the wonderful work that MVLP does each year. While many transactional business lawyers rarely, if ever, step foot in a courtroom, there are other ways for transactional lawyers to contribute to organizations (such as MVLP) that help facilitate equal access to the justice system in Mississippi. I encourage those of you who are unable to take on a case to consider other ways to assist MVLP with its mission, either through monetary donations, sponsoring a CLE or other event to support MVLP, or otherwise. To find out how you can help support MVLP, please contact MVLP's Executive Director/General Counsel, Tiffany M. Graves, or me.

Last year the Executive Committee of the Business Law Section began discussing ways that the Section could facilitate more interaction between the Business Law Groups at both The University of Mississippi School of Law and the Mississippi College School of Law. Both student groups were invited to attend the Section's 2012 annual social and a number of students from both groups attended the event. This year, the Executive Committee of the Business Law Section agreed that the Section would extend a standing invitation to both groups' members to (1) attend the Section's annual social, (2) attend each of the Section's CLE events, and (3) contribute a student-article to the Section's Fall and Spring newsletter. The Executive

Committee of the Business Law Section has also agreed to help find business lawyers to present on business law related topics, to attend events at each of the schools and serve as mentors to the groups. If you, or someone you know, may be interested in presenting or otherwise becoming involved, please feel free to contact Rene Garner at The Mississippi Bar or me.

This year, the Business Law Section and The Mississippi Corporate Counsel Association will co-sponsor a Business Law Ethics CLE Seminar for one (1) hour of Ethics credit at the River Hills Club in Jackson on Tuesday, June 11, 2013. Professor Donald E. Campbell, Assistant Professor of Law, Mississippi College School of Law; David M. Allen, Esq., Page, Mannino, Peresich & McDermott, PLLC, and Adam Kilgore, General Counsel of The Mississippi Bar, will participate in a roundtable discussion on business law related ethics issues. Please join us for what is sure to be an interesting discussion.

Additionally, the Business Law Section, in conjunction with the Real Property Section, will be holding a meeting and CLE seminar at this year's bar convention in Sandestin, Florida. I think that the attendees will really enjoy The Impact of the Consumer Finance Protection Bureau's 2013 Regulations presented by Ms. Loretta Salzano, of Franzen and Salzano, P.C., Norcross, Georgia. I encourage each of you to attend our joint meeting scheduled for Thursday, July 11, 2013, from 10 a.m. through 12 noon.

I was honored to serve as this year's Chair of the Business Law Section. I was consistently impressed by the caliber of business attorneys that we have in this state, and I would encourage all of them to find a way to get involved with the Business Law Section. Not only will it be a personally

rewarding experience, but it will help to shape and improve the practice that we enjoy. If you are interested in getting involved in the Business Law Section, whether as an officer, a committee member or in another capacity, please feel free to contact the Mississippi Bar or me.

Finally, I would like to express my sincere gratitude to the capable attorneys who were actively involved with the Business Law Section this year,

including Stan Smith, *Vice-Chair*, Jimmy Milam, *Secretary/Treasurer*; Joyce Hall, *Past Chair*; Jason Bailey, *Executive Committee Member*; Tammra Cascio, *Executive Committee Member*; Ryan Pratt, *Executive Committee*; and Drew Snyder, *Newsletter Editor*. They made my job much easier and more enjoyable.

# Thirty Five Questions (And Answers) About the New Amendments to Article 9 of the Uniform Commercial Code

By W. Rodney Clement, Jr.

Article 9 of the Uniform Commercial Code (“UCC”) governs security interests in personal property. So when a borrower (a “debtor” under Article 9) grants a security interest to a lender (a “secured party” under Article 9) to secure a loan, Article 9 provides the governing law. In 2010 the National Conference of Commissioners of Uniform State Laws and the American Law Institute, with participation by the American Bar Association, adopted amendments (“2010 Amendments”) to Article 9. The Mississippi Legislature, in its regular 2013 session, adopted the 2010 Amendments in Senate Bill No. 2609 (“S.B. 2609”). S.B. 2609 was signed by Governor Bryant and becomes effective on July 1, 2013.<sup>1</sup>

The 2010 Amendments make many changes to Article 9. Some of these changes are technical clarifications and corrections, and others address court decisions, new technology and gaps in the last major revision of Article 9. A comprehensive description of all of these changes is beyond the scope of this article. This article will focus on the changes that the author thinks are the most significant. In this article, Article 9 prior to July 1, 2013 is referred to as current Article 9.

## GENERAL

Question 1. Why is Article 9 being amended?

The last major revision to Article 9 occurred when Revised Article 9 was adopted, which was January 1, 2002 in Mississippi and July 1, 2001 in most of the rest of the country. Since that time gaps in Revised Article 9 have become evident, some decisions of some courts have been issued that are generally deemed to be misinterpretations, and of course technology has changed.

Question 2. Do the 2010 Amendments completely restate Article 9, like Revised Article 9 did?

No, the drafters of the 2010 Amendments tried to make as many changes as possible through amendments to the Official Comments to Article 9 and amendments to existing sections, rather than adding new sections that would change the numbering. While reading the Official Comments has always been important in interpreting the meaning of Article 9, the fact that many of the changes made by the 2010 Amendments are in the Official Comments makes reading the Official Comments even more important than before. In Mississippi, the Official Comments are not adopted as part of the amendments.

Question 3. Why is Mississippi just now adopting amendments that were promulgated in 2010?

Historically it has taken approximately three years for final amendments to the UCC to be adopted by all of the states. The national target date for adoption of the 2010 Amendments is July 1, 2013, the date that S.B. 2609 becomes effective, so Mississippi is on track with the other states.

Question 4. How many states have adopted the 2010 Amendments?

As of May 31, 2013, forty states have adopted the 2010 Amendments, according to the website of the National Conference of Commissioners of Uniform State Laws.<sup>2</sup>

Question 5. How can I get a copy of the 2010 Amendments?

One can download a copy of S.B. 2609 from the website of the Mississippi Legislature.<sup>3</sup> The official uniform version of the 2010 Amendments as promulgated, including the Official Comments, can be downloaded from the website of the National

Conference of Commissioners of Uniform State Laws.<sup>4</sup>

## INDIVIDUAL NAMES

Question 6. What is the most important change in the 2010 Amendments?

The clarification of rules regarding names of individual debtors on financing statements generally is considered the most important change.

Question 7. What does the current version of Article 9 require for individual names?

The current version of Article 9 does not give any guidance about individual names. Current Section 75-9-502(a)(1) provides that a financing statement is sufficient only if it “provides the name of the debtor.”<sup>5</sup> An Official Comment to the current version of Section 9-503 states that “the actual individual or organizational name of the debtor on a financing statement is both necessary and sufficient.”<sup>6</sup> The problem is that there are many sources for a person’s name. For example, a person’s name can be shown differently on official records such as the person’s birth certificate, Social Security card, passport and driver’s license. The person may be known by a different name in the community than is shown on official records. Which name is correct? Courts have come to different conclusions. For example, one court held that the name “Terry J. Kindernecht” for a debtor on a financing statement was not sufficient because the debtor’s legal name was “Terrance Joseph Kindernecht.”<sup>7</sup> On the other hand, a court applying Mississippi law held that the name “Louie Dickerson” was sufficient even though the debtor’s legal name, according to the court, was “Brooks L. Dickerson.”<sup>8</sup> Another court held that a debtor’s legal name could only be the name on his birth certificate.<sup>9</sup>

Question 8. How did the 2010 Amendments try to bring clarity to individual names?

The drafters of the 2010 Amendments gave the states two options for names of individuals. Alternative A, known as the “only if” approach, requires that the name of an individual debtor on a financing

statement be the same as the debtor’s driver’s license. Under Alternative B, known as the “safe harbor” approach, the use of the name on the driver’s license is always valid, but variations on that name also are valid.

Question 9. Which alternative did Mississippi adopt?

The Mississippi legislature, like most states, adopted Alternative A. S.B. 2609 amends Section 75-9-503 to provide a new Section 75-9-503(a)(4) that provides a financing statement sufficiently provides the name of the debtor, “...if the debtor is an individual to whom this state has issued a driver’s license or nondriver’s identification card that has not expired, only if the financing statement provides the name of the individual which is indicated on the driver’s license or nondriver’s identification card.”

Question 10. Does Mississippi issue nondriver’s identification cards?

Yes, the Mississippi Department of Public Safety issues nondriver’s identification cards.<sup>10</sup>

Question 11. What if the name on the driver’s license contains an error?

The secured party has to use the name on the driver’s license even if it is incorrect. New Official Comment 2.d to Section 9-503 states in relevant part: “A financing statement does not “provide the name of the individual which is indicated” on the debtor’s driver’s license unless the name it provides is the same as the name indicated on the license. This is the case even if the name indicated on the driver’s license contains an error.”

Question 12. What if a debtor does not have a driver’s license or an identification card?

If the debtor does not have either a driver’s license or identification card, then Section 75-9-503(a)(4) governs and the name on the financing statement is sufficient “only if the financing statement provides the individual name of the debtor or a surname and first personal name of the debtor;”.

New Official Comment 2.d to Section 9-503 in the 2010 Amendments states in relevant part:

Article 9 does not determine the “individual name” of a debtor. Nor does it determine which element or elements in a debtor’s name constitute the surname. In some cases, determining the “individual name” of a debtor may be difficult, as may also be determining the debtor’s surname. This is because in the case of individuals, unlike registered organizations, there is no public organic document to which reference can be made and from which the name and its components can be definitively determined. Comment 2.d does provide some general guidance about individual names, such as stating that the name on the debtor’s birth certificate is not necessarily the debtor’s current name. The alternative of using the debtor’s “surname and first personal name” in Section 9-503(a)(5) also gives secured creditors some certainty that the middle name or middle initial is not necessary. Beyond these guidelines, the 2010 Amendments leave open the question of determining the individual’s name when the individual does not have an unexpired driver’s license or nondriver’s identification card. If a secured party has doubt about which name to use, the secured party can file more than one financing statement with a different name on each financing statement. It is possible that future legislation or court decisions could provide additional guidance to secured parties about the name to use if the debtor does not have an unexpired Mississippi driver’s license or identification card.

**Question 13.** What if a debtor has only an expired license and no identification card at the time that he signs the financing statement?

If the debtor only has an expired license and no identity card at the time that he signs the financing statement, then he does not have a “driver’s license or nondriver’s identification card that has not expired” as required by Section 75-9-503(a)(4), and Section 75-9-503(a)(5) controls.

**Question 14.** What if the debtor has an unexpired driver’s license at the time that the secured party makes the loan, the secured party perfects its

security interest by filing a financing statement using the debtor’s name on the driver’s license, the debtor changes her name but does not change the name on her driver’s license?

Under Section 75-9-503(a)(4), as long as the name on the financing statement remains the same as the name on the debtor’s unexpired driver’s license, the secured party remains perfected, even if the debtor changes her name. However, the secured party could become unperfected if the driver’s license expires or the state issues a new driver’s license in the new name. See Questions 15 and 17.

**Question 15.** What if the debtor has an unexpired driver’s license at the time that the secured party makes the loan, the secured party uses the name on the driver’s license on the financing statement and perfects its security interest by filing, the debtor’s name changes, and then the debtor’s driver’s license expires?

If the debtor’s driver’s license expires, Section 75-9-503(a)(5) governs the sufficiency of the name on the financing statement. As long as the name on the financing statement also meets the requirements of Section 75-9-503(a)(5), the secured party will remain perfected. The secured party could become unperfected, however, if the secured party’s name under Section 75-9-503(a)(5) is different than the name on the expired driver’s license. In that case, the debtor’s name on the financing statement may become “seriously misleading” under Section 75-9-507(c). If the name on the financing statement becomes seriously misleading, under Section 75-9-507(c) the financing statement becomes ineffective as to any collateral acquired by the debtor four months after the driver’s license expires unless the financing statement is amended before the end of the four-month period.<sup>11</sup> For example, suppose the debtor’s name on his driver’s license is Ronald William Artest, Jr.; a secured party makes a loan to the debtor and perfects its security interest by filing a financing statement identifying Ronald William Artest, Jr. as the debtor; Ronald William Artest, Jr., changes his name to Metta World Peace; and then debtor’s driver’s license expires and he does not get a new driver’s license. In either case, the name on



the financing statement would become seriously misleading, and the secured party would become unperfected unless it filed an amendment to the financing statement changing the debtor's name to Metta World Peace before the end of the four-month period. This type of complete name change is probably going to prove to be uncommon in practice. A much more common circumstance, and a closer case, is when the debtor changes part of her name to reflect a change in marital status. The same rules regarding a complete change in the debtor's name will apply to changes in the debtor's name due to a change marital status. For example, suppose a secured party makes a loan to Betty Catherine Jones and files a financing statement identifying Betty Catherine Jones as the debtor; Betty Catherine Jones marries Bill Smith and changes her name to Betty Jones Smith without changing the name on her driver's license, and then her driver's license expires. The secured party who filed a financing statement relying on the name Betty Catherine Jones on her driver's license could become unperfected if the name change is deemed to make the name on the financing statement seriously misleading.

**Question 16.** When does a change in the debtor's name make the name in the financing statement "seriously misleading"?

Section 75-9-506(c), which is not being amended as part of the 2010 Amendments, provides that "If a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with Section 75-9-503(a), the name provided does not make the financing statement seriously misleading." In other words, if a search of the Secretary of State's records under the new name would disclose a financing statement filed under the original name, the name change would not be seriously misleading. To put this another way, if a second secured party runs a search of the changed name and the search does not show the financing statement with the original name, the second secured party is protected if it files a financing statement using the changed name.

**Question 17.** What if the debtor has an unexpired license at the time that the secured party makes the loan, the secured party uses the name on the driver's license, the secured party perfects its security interest by filing a financing statement, the debtor changes her name, and the state issues a driver's license in her new name?

The same rules would apply as when the debtor's driver's license expires. If the name on the new driver's license makes the name on the financing statement seriously misleading under Section 75-9-507(c), the secured party will become unperfected as to any collateral acquired by the debtor four months after the new license is issued, unless the secured party amends its financing statement before the end of the four-month period to identify the debtor by the new name.

**Question 18.** Is there a public database in Mississippi that would allow secured parties to check to see if their debtors' driver' licenses have expired, or if their debtors have changed their names?

Not to the author's knowledge.

**Question 19.** What if a debtor who moves to Mississippi from another state does not have a driver's license issued by Mississippi, but still has an unexpired driver's license or nondriver's identification card from the other state? Does it matter whether the driver's license is expired or not expired?

Section 75-9-503(a)(4) requires the use of the name on the driver's license only if the driver's license is issued by "this state." In most cases, the law of the state in which the debtor is located governs perfection of a security interest in the debtor's collateral.<sup>12</sup> An individual is located at the individual's principal place of residence.<sup>13</sup> So if the debtor is located in Mississippi, and a financing statement perfecting the secured party's security interest must be filed in Mississippi under Mississippi's version of Article 9, then the secured party can only rely on a driver's license or nondriver's identification card issued by the State of Mississippi. A driver's license or nondriver's identification card from another state cannot be relied upon.



Section 75-9-503(a)(5) applies rather than Section 75-9-503(a)(4), and as a result the secured party must identify the individual's name or the surname and first personal name of the debtor. A passport should be treated the same as a driver's license from another state.

## REAL ESTATE INTERESTS

Question 20. Does the requirement for using the debtor's name on the driver's license apply to fixture filings and financing statements covering timber to be cut and as-extracted collateral?

Fixtures, timber to be cut and as-extracted collateral are in twilight zone between real and personal property. A secured party has to perfect its security interest in these types of collateral under the UCC. A special problem with these types of collateral is that the debtor's interest in the real estate may be owned in a different name than the name shown on the debtor's driver's license (or public organic record, if the debtor is a registered organization), according to the real estate records. The 2010 Amendments address this issue in a limited way by amending Section 75-9-502(c)(3) to provide that when a mortgage also is serving as a fixture filing, the mortgage does not have to use the name on the debtor's driver's license, but can provide "the individual name of the debtor or the surname and first personal name of the debtor, even if the debtor is an individual to whom Section 75-9-503(a)(4) applies." In other words, the same hazy requirements regarding the debtor's name apply as if the debtor did not have a driver's license or nondriver's identification card. This amendment does not address financing statements covering as-extracted collateral or timber to be cut. This may be a circumstance when it is prudent for the secured party to file two financing statements, with one financing statement identifying the individual debtor by the name on his driver's license, and the other financing statement identifying the debtor by the name under which he owns title to the real estate.

## SEARCHING THE DEBTOR'S NAME

Question 21. Since S.B. 2609 requires the use of the name on an individual debtor's driver's license on financing statements, is that the only name that a secured party needs to search when searching for existing security interests encumbering the debtor's interest?

No, there are at least two reasons for continuing to search variations of the debtor's name. First, existing financing statements that were perfected before July 1, 2013 using names other than the name on the debtor's driver's license can be effective through 2018. Second, and more importantly, Article 9's rules requiring the use of the name on the debtor's driver's license do not apply to tax liens filed by the Internal Revenue Service.<sup>14</sup> Federal tax liens are usually filed in the name on the debtor/taxpayer's tax return, which in turn usually is the name on the debtor's Social Security card or the name to which the Internal Revenue Service issued an employer identification number in the case of a corporation. So if the secured party only searches for the name on the debtor's driver's license, and a federal tax lien or judgment is filed in a different name, the search might not pick up the federal tax lien. The same rules apply for registered organizations.

Question 22. Couldn't the potential differences between the name on an individual debtor's driver's license and the potentially infinite variety of alternative names on a Social Security card be reduced if the Mississippi Department of Public Safety adopted a policy of using the name on Social Security cards as the name on driver's licenses?

Yes.

## CHANGE IN LOCATION OF DEBTOR AND COLLATERAL

Question 23. What if a debtor whose residence is in Mississippi grants a security interest, the secured party files a financing statement in Mississippi to perfect its security interest, and then the debtor moves to another state?

If a debtor changes his residence from Mississippi to another state, then the law governing perfection of the secured party's security interest will change to the law of the second state, which will require that a financing statement be filed in the second state. Under the current version of Section 75-9-316(a), the secured party's security interest in existing collateral will remain perfected for four months. If the secured creditor does not file a new financing statement in the second state within this four-month period, its security interest becomes unperfected and is deemed never to have been perfected against a purchaser of the collateral.<sup>15</sup> The 2010 Amendments add a new section, Section 75-9-316(h), which provides that if the secured party files the new financing statement in the second state before the end of the four-month period, the secured party will not only maintain its perfected security interest in collateral that the debtor owned at the time that it changed its location, but the secured party also will have a perfected security interest in any new collateral that the debtor acquired during the four-month period.

**Question 24.** What happens if a debtor whose residence is another state grants a security interest, the secured party files a financing statement in that state, and then the debtor moves to Mississippi?

The same rule applies as in the previous question when the secured party perfects by filing in Mississippi and then the debtor changes location to another state. The secured party who filed in the other state has to file a new financing statement in Mississippi within four months, or become unperfected.

**Question 25.** Do the same rules regarding change in location of an individual debtor apply to the change in the location of a corporation?

Yes, but it is much less common for a corporation to change its location for Article 9 purposes than for individuals. A corporation, limited liability company or limited partnership would be a "registered organization" under Article 9, and a registered organization is deemed to be located in the state in which it is organized.<sup>16</sup> So in order to change its

location to another state, a corporation would have to re-incorporate in the other state, or be merged into another corporation located in the other state.

## NAMES OF REGISTERED ORGANIZATIONS

**Question 26.** Do the 2010 Amendments make any changes regarding names of debtors who are corporations as well as debtors who are individuals?

Yes. The current definition of a registered organization in Section 75-9-102(a)(70) of Mississippi's Article 9 is "an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized." The problem with this definition is that neither Article 9, nor Article 1, which is the default source of definitions for the UCC, defines public records. Because of this, it is possible for more than one document that may be a public record to exist for a registered organization, and the possibility of different names on different public records. For example, a license issued by the Mississippi Department of Insurance to a corporation could be a "public record," and the name on the license could be different than the name on the articles of incorporation filed in the Mississippi Secretary of State's office. A certificate of good standing issued by the Secretary of State's office could be a public record. The 2010 Amendments address this issue by changing the definition of a "registered organizations" to one formed by the filing of a "public organic document".<sup>17</sup> The 2010 Amendments add a new definition of "public organic document" as Section 75-9-102(a)(68) that limits public organic documents to "a record consisting of the record initially filed with or issued by a state or the United States to form or organize an organization" and any amendments. A new Official Comment 11 to Section 9-102 states that a certificate of good standing issued with respect to a corporation cannot be a "public organic document" because the issuance of the certificate of good standing does not form or organize the corporation.

## TRUSTS AND ESTATES

**Question 27.** Do the 2010 Amendments make it easier to perfect a security interests in property owned by trusts and estates?

Yes, the 2010 Amendments make a number of changes that clarify how to perfect a security interest in property owned by trusts. The current version of Article 9 generally treats all trusts the same. The 2010 Amendments distinguish between common-law trusts and statutory trusts. The 2010 Amendments further distinguish between trust that are business trusts, which can be registered organizations, and other trusts. The 2010 Amendments make substantial changes to Section 75-9-503(a)(3) regarding the sufficiency of names of trusts on financing statements. The 2010 Amendment also add new provisions regarding the name of debtor when the property is owned by an estate of a decedent.<sup>18</sup> The new Official Comments to Section 9-102 and Section 9-503 are invaluable in understanding the new rules regarding trusts and estates.

## TRANSITION RULES

**Question 28.** If an individual debtor grants a security interest to a secured party, and the secured party perfects the security interest by filing in Mississippi before July 1, 2013, and the name on the debtor's driver's license is the same as the name on the debtor's Mississippi driver's license or nondriver's identification, does the secured party have to take any action before or after July 1, 2013 to maintain perfection?

No. New Section 75-9-805(a) provides that a financing statement that is filed before July 1, 2013 is effective to perfect a security interest if that filing would satisfy the requirements of the Article 9 as amended by S.B. 2609.

**Question 29.** If an individual debtor grants a security interest to a secured party, the secured party perfects its security interest by filing in Mississippi before July 1, 2013, and the name on the financing statement is not the same as the name on the debtor's Mississippi driver's license, does the

secured party have to take any action before or after July 1, 2013.

No. New Section 75-9-805(b) provides that "This act does not render ineffective an effective financing statement that, before this act takes effect, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in Article 9 as it existed before amendment." The example in the New Official Comments to Section 9-801 of the 2011 Amendments expressly addresses the situation in which an individual debtor's name on a financing statement filed before July 1, 2013 is not the same as the name on his driver's license.

**Question 30.** Section 75-9-803(b) requires that any financing statement that does not meet the requirements of Article 9 as amended by S.B. 2609 must be amended within one year after July 1, 2013. Doesn't that section require a secured party to file an amendment if an individual debtor's name on an existing financing statement is not the same as the name on the debtor's driver's license?

No, Section 75-9-803(b) is expressly subject to Section 75-9-805.

**Question 31.** Suppose a debtor grants a security interest to a secured party, the secured party perfects its security interest by filing in Mississippi before July 1, 2013, the debtor changes its name, and then the secured party wants to file a continuation statement. Does the secured party use the name in the original financing statement in the continuation statement, or the new name?

The secured party has to take two steps. First, it has to amend its original financing statement to reflect the changed name. Second, the secured party has to file a continuation statement.

**Question 32.** Can the secured party do this in a single UCC Amendment form, by checking both the box for continuation and the box for party information change?

No, the secured party has to file two separate UCC-3 Amendments, one to change the debtor's name and another to continue the security interest.

**Question 33.** Will the forms of financing statements and amendment statements change as a result of the 2010 Amendments?

Yes. Changes are made to the current standard forms to reflect other changes in the 2010 Amendments, such as the names of trusts and estate. Among other changes, the new form of financing statement has checkboxes to indicate when the collateral is held in a trust or being administered by a decedent's personal representative, and whether the transaction involves a transmitting utility, public finance transaction, or manufactured housing, rather than this information being on an addendum. The requirement for an organizational identification number has been eliminated. The new form has spaces for an individual's surname, first personal name and additional name/initial(s) rather than for an individual's last name, first name and middle name. Samples of the new forms are included in Section 9-521 of the uniform version of the 2010 Amendments that was promulgated by the American Law Institute and the National Conference of Commissioners of Uniform State Laws. Mississippi, and many other states, historically has not included copies of sample forms in their versions of the UCC. S.B. 2609 instead amends Section 75-9-521 to provide that a filing office may not refuse to accept an initial financing statement or written record set forth in the 2010 Amendments to Article 9.

#### **OTHER NEW UCC LEGISLATION**

**Question 34.** Did S.B. 2609 make any other material changes to the UCC in addition to adopting the 2010 Amendments to Article 9?

Yes, S.B. 2609 makes two other changes to Mississippi's UCC. First, in Section 2 of S.B. 2609, Section 75-2-719(4) was amended to allow buyers and sellers to agree to a limitation of remedies, other than in the sale to consumers. This amendment is consistent with Section 75-2-315.1, which permits a seller of goods other than consumer goods to disclaim implied warranties, and the amendment to Section 11-7-18 in 2010, which prohibits limitations of remedies or disclaimers of implied warran-

ties in sales to consumers. Second, Section 3 of S.B. 2609 amended Section 75-4A-108. Section 75-4A-108 currently states that Section 4A does not apply to any funds transfer which is governed the federal Electronic Fund Transfer Act ("EFTA"). The amendment makes an exception for "remittance transfers" as defined in EFTA. This amendment was recommended by the Permanent Editorial Board for the Uniform Commercial Code to address an amendment to EFTA in the Dodd-Frank Wall Street Reform and Consumer Protection Act, and is being made by most of the states.<sup>19</sup>

**Question 35.** Did the 2013 Mississippi Legislature pass any other bills that affect the UCC in addition to S.B. 2609?

The Legislature passed two other bills relating to unauthorized filings that were signed by the Governor. One bill, S.B. 2385, makes offering a false instrument that imposes a lien on the real or personal property of a law enforcement officer, public official or public employee a misdemeanor punishable by a fine or imprisonment. The second bill, H.B. 1008, creates a new section of Article 9, Section 75-9-501.1. This new section gives the Secretary of State the authority to refuse to file or to terminate a financing statement if the Secretary of State has a reasonable basis for concluding that the financing statement was intended to harass, was not authorized or was not being filed in connection with a valid financing transaction. The problem of bogus filings being made against public officials is common, and many states have adopted statutes to try to prevent bogus filings from being made.<sup>20</sup> Prior to this bill, the Secretary of State did not have the authority to refuse to file or to terminate financing statements that obviously were not authorized. While the current version of Section 75-9-518 permits a debtor to file a correction statement to the effect that the filing was unauthorized after the unauthorized filing had been made, the Secretary of State could not refuse to file the financing statement in the first place. The 2011 Amendments amend Section 75-9-518 to change the name of the "correction statement" to an "information statement," and

permit secured parties to file information statements as well as debtors. (2011)).

<sup>1</sup> Miss. Code Ann. § 75-9-801 (effective July 1, 2013).

<sup>2</sup> [http://uniformlaws.org/NewsDetail.aspx?title=40 States Have Enacted the 2010 Amendments to UCC9](http://uniformlaws.org/NewsDetail.aspx?title=40%20States%20Have%20Enacted%20the%202010%20Amendments%20to%20UCC9)

<sup>3</sup> <http://billstatus.ls.state.ms.us/2013/pdf/history/SB/SB2609.xml>.

<sup>4</sup> <http://www.uniformlaws.org/Shared/Docs/UCC9/UCC9KitBundle.pdf>

<sup>5</sup> Miss. Code Ann. § 75-9-502(a)(1).

<sup>6</sup> Official Comment 2 to Section 9-503.

<sup>7</sup> *Clark v. Deere & Co. (In re Kindermecht)*, 308 B.R. 71 (BAP 10<sup>th</sup> Cir. 2004)(applying Kansas law).

<sup>8</sup> *Peoples Bank v. Bryan Brothers Cattle Co.*, 504 F.3d 549 (5<sup>th</sup> Cir. 2007).

<sup>9</sup> *In re Miller*, 2012 WL 32664 (Bankr. C.D. Ill., January 6, 2012). This decision by a bankruptcy court later was reversed by the district court. *In re Miller*: 2012 WL 3589426 (C.D.Ill., August 17, 2012).

<sup>10</sup> The website of the Mississippi Department of Public Safety provides in relevant part, “Any blind or physically disabled person, or any other persons six (6) years of age or older may apply to the Department of Public Safety for an identification card. Identification cards are issued for a four (4) year period, except those issued to legally blind persons, which are for a ten (10) year period.” <http://www.dps.state.ms.us/driver-services/new-drivers-license/identification-cards/>.

<sup>11</sup> The secured party remains perfected as to collateral acquired by the debtor prior to the time that the debtor’s driver’s license expired. If the loan was a purchase money obligation and the secured party does not have any obligation to make additional advances, the secured party may not be harmed if its financing statement becomes unperfected as to future collateral only.

<sup>12</sup> Miss. Code Ann. § 75-9-301(1).

<sup>13</sup> *Id.* § 75-9-307(b)(1).

<sup>14</sup> *See United States v. Crestmark Bank (In re Spearing Tool and Manufacturing Co.)*, 412 F.3d 653 (6<sup>th</sup> Cir. 2005).

<sup>15</sup> *Id.* § 75-9-316(b). Note that when a debtor changes its name, and the secured party does not perfect within the four-month period, as discussed above, the secured party’s security interest is only ineffective as to future collateral. When the debtor moves to another

state, and the secured party does not file a new financing statement within four months, the secured party becomes unperfected as to all collateral, not just future collateral. *See* note 11. So the consequences of the secured party failing to file a new financing statement after the debtor changes location are much worse than if the secured party fails to file a financing statement after the debtor changes its name.

<sup>16</sup> Miss. Code Ann. § 75-9-307(e). The 2010 Amendments do not change this result.

<sup>17</sup> This revised definition of “registered organization” will be renumbered as Section 75-9-102(a)(71) under the 2010 Amendments.

<sup>18</sup> *See* §§ 75-9-503(a)(2), 75-9-503(f), 75-9-503(h).

<sup>19</sup> *See*

[http://www.uniformlaws.org/Act.aspx?title=UCC%20Article%204A%20Amendments%20\(2012\)](http://www.uniformlaws.org/Act.aspx?title=UCC%20Article%204A%20Amendments%20(2012)).

<sup>20</sup> *See State Strategies to Subvert Fraudulent Uniform Commercial Code (UCC) Filings*, National Association of Secretaries of State (August 8, 2012), available from the website of the National Association of Secretaries of State at [http://nass.org/index.php?option=com\\_content&view=article&id=226&Itemid=469](http://nass.org/index.php?option=com_content&view=article&id=226&Itemid=469).



# New Mississippi Law Aims to Curb Fraudulent UCC Filings

By Preston D. Goff

Public officials and private citizens alike have been subject to the growing problem of false financing statements being filed under the Uniform Commercial Code. In addition to harassing individuals, these false filings frustrate the filing office's efficiency. Under previous law the filer simply provided a properly drafted form and the financing statement was recorded. There was little to nothing the filing office could do, even in situations where the filings were obviously improper – such as when a document lists the same individual as both the secured party and debtor.

Some documents, such as those filed against public officials, can be easily spotted as questionable, but fraudulent filings made against private citizens are more difficult to detect. This results in individuals only learning of these filings when they seek financing for a home, car or other purchase. The problem is increased by the fact that removal of a false filing required a court order. Because of this, and because there are no uniform provisions to address fraudulent filings, the Secretary of State's Office researched and proposed a remedy. The new law gives the Secretary of State the ability to reject and terminate records found to be false. Governor Bryant signed House Bill 1008 into law on March 20, 2013.

## Preventing false documents

The first step in remedying false financial statements is to prevent the document from being recorded. In this respect, House Bill 1008 creates a new section 75-9-501.1 which provides that no person shall file a false record that the person knows or reasonably should know is:

- filed to harass or defraud;

- not authorized or permitted under the UCC; or
- not related to a valid or potential transaction, lien, or judgment.

The Secretary of State may investigate any record if he “has reason to believe, from information contained in the record or obtained from the person that communicated the record to the filing office,” that the document violates the above requirement. If an investigation is conducted, the Secretary must notify the secured party and request additional information confirming the validity of the filing. The law also instructs that the Secretary may give heightened scrutiny when:

- the “record asserts a claim against a current or former employee or officer of a federal, state, county, or other local governmental unit that relates to the performance of the officer's or employee's public duties, and for which the filer does not hold a properly executed security agreement or judgment from a court of competent jurisdiction;”
- the debtor and secured party are substantially the same;
- the debtor claims to be a transmitting utility; or
- the transaction is a “public-finance transaction.”

If the Secretary determines the filing violates section 75-9-501.1, the financing statement may be refused.

## Removing a false document

In the event a false document is recorded, under House Bill 1008 the victim can seek an administrative review through the Secretary of State's office. The victim initiates a review by filing an information statement under Section 75-9-518. Once

started, the procedure for the review is identical to that identified above, and if found to be fraudulent the record is terminated.

If a record is rejected, or terminated, the secured party may seek judicial review in the Chancery Court of Hinds County, First Judicial District. Should the court order the financing statement to be accepted, or reinstated, it is treated as effective from the date of the initial filing, except “as against a purchaser of the collateral which gives value in reasonable reliance on the absence of the record from the files.”

**“Regulated financial institutions”**

As a safety precaution, the bill contains an exemption for “regulated financial institutions.” Under this exception, the Secretary cannot review

filings made by these institutions, other than to request verification that the financing statement is actually filed by, or on behalf of, a regulated financial institution. The statute defines “regulated financial institution” as “a financial institution subject to regulatory oversight or examination by a state or federal agency, including, but not limited to, any bank, commercial finance lender or insurer, consumer loan broker, credit union, debt management service provider, finance company, industrial loan company, insurance premium finance company, investment company, investment fund, mortgage service provider, savings association, small loan company, and trust company.” This exception prevents routine and legitimate filers from harassment by individuals attempting to cancel genuine financing statements.



# Extra Credits: Additional Economic Incentives on the Way for Mississippi Businesses

By Drew L. Snyder

In 2013, Mississippi lawmakers continued to press for more tax credits, tax exemptions, rate reductions, loan programs, and cash rebates to businesses in hopes of attracting new businesses and strengthening existing ones. Approximately twenty bills creating or enhancing economic incentives were signed into law during the 2013 Regular Session of the Mississippi Legislature. Here is a look at some of them.

## Workforce Training Option to Jobs Tax Credit (HB 117)

This bill allows a business qualifying for Mississippi's Jobs Tax Credit to claim an income tax credit or receive job training grants equal to 75% of the training or retraining costs incurred by the business.

## Increased Rebate Amount and Video Games Included under Mississippi Motion Picture Investment Act (SB 2462)

Under the 2004 Mississippi Motion Picture Investment Act, a motion picture company could receive a rebate of up to 25% of its base investment in a project up to \$8 million and a rebate of up to 25% of its Mississippi payroll up to \$1 million.

SB 2462 expands the base investment cap from \$8 million to \$10 million and the payroll cap from \$1 million to \$5 million.

The Senate amended the bill to include computer and video games in the definition of motion picture.

## Strengthening Mississippi Academic Research Through Business Act – The SMART Business Act (HB 826)

This cleverly-titled bill allows a business investing in research at a Mississippi research university to receive a 25% rebate for the research costs incurred by the business.

The business desiring to apply for a rebate must receive certification from the Board of Trustees of State Institutions of Higher Learning before claiming the credit from the Department of Revenue.

## Historic Property Income Tax Credits Become Transferable (HB 1003)

Currently, an income tax credit is available for the rehabilitation of historic buildings that are determined by the United States Secretary of the Interior to be "certified historic structures." These credits can be carried forward, but not sold.

Under the amended law, a taxpayer can sell the unused portion of a historic property tax credit subject to guidelines established by the Department of Revenue. The bill also expands the list of eligible certified historic structures to include structures that have been deemed eligible for the National Register of Historic Places. Currently, the structure must already be listed.

## Health Care Industry Zones Expanded (HB 722)

Under the Health Care Industry Zone Act signed into law in 2012 (HB 1537), certain businesses can qualify for incentives if they locate within five miles of a hospital and are in a tri-county area that has 375 or more acute care hospital beds. Over 70 of Mississippi's 82 counties have areas that can be zoned as a health care industry zone.

Under the amended law, businesses will also be eligible for these incentives if they locate within five miles of a SACS-accredited college or university that provides training in health care or pharmaceutical training and are within a master planned community along or near Mississippi Highway 67.

The amendments were geared toward the developments near William Carey University's Tradition campus.

### **Easier to Qualify for Headquarters Credit (HB 591)**

This bill reduces the number of jobs that must be created at the new headquarters of a company establishing or transferring its national or regional headquarters from within or outside this state in order for the company to be eligible for certain sales tax exemptions. The prior law required a 35-job minimum. The bill lowers the minimum to 20.

The bill also creates a sales tax exemption for certain sales of component materials for any company expanding or making additions to its national or regional headquarters within the state after January 1, 2013. At least 20 new jobs must be created at the headquarters as a result of the expansion or addition to qualify.

The bill authorizes the Department of Revenue rather than the Mississippi Development Authority, to establish criteria and prescribe procedures to determine if a company qualifies as a national or regional headquarters.

### **Sales Tax Exemptions (SB 2244)**

This bill exempts from sales taxation:

- Certain sales by producers of honey bees or other products of an apiary.
- The gross proceeds of sales of tangible personal property made for the sole purpose of raising funds for a K-12 public or private school or an organization affiliated with those schools.
- Sales of durable medical equipment and home medical supplies when ordered or prescribed by a licensed physician for medical purposes of a patient, and when payment for the equipment or supplies is made, in part or in whole, on behalf of or for the benefit of an insured as a covered benefit under an insurance policy, contract, or plan.

### **Extension of Incentive Program for Redevelopment Areas (SB 2147)**

Originally passed in 2005, the Economic Redevelopment Act established an incentive program administered by MDA for the purpose of encouraging economic development in certain areas where environmentally contaminated sites are located. The act allowed a county or municipality to

apply to MDA for the incentive during the period from 2005 to the end of 2009. Certain state taxes collected from business enterprises located in the redevelopment area are required to be deposited into a fund and a certain amount is paid to the business enterprise.

Under current law a “contaminated site” is defined as real property that is subject to a bankruptcy court order in which the property has been abandoned from the bankruptcy estate and the expansion, redevelopment or reuse of which is complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant. This bill modified the definition of contaminated site to include brownfield property that is subject to a brownfield agreement under Section 49-35-11.

This bill also removes the December 31, 2009, cut-off date for applications under the act, and increases the eligible payment period.

### **Alternative Fuel Revolving Loan Fund (HB 1685)**

This bill creates the Mississippi Alternative Fuel School Bus and Municipal Motor Vehicle Revolving Loan Fund. Through the fund, the MDA will provide loans to public school districts and municipalities to assist in paying costs incurred for the purchase of alternative fuel school buses and alternative fuel motor vehicles, the conversion of school buses and motor vehicles to utilize alternative fuels and for alternative fuel systems and alternative fuel system equipment and facilities. The bill authorizes the issuance of \$2,750,000 of state general obligation bonds to provide funds for the revolving loan program. “Alternative fuel” is compressed natural gas and liquefied natural gas, as defined in Section 27-59-3, and propane fuel when used as a fuel in a motor vehicle or motor vehicles on the highways of the state.

### **Reduced Severance Taxes on Horizontally Drilled Wells (HB 1698)**

This bill reduces the severance tax on oil and natural gas produced from horizontally drilled wells or horizontally drilled recompletion wells from

which production commences from and after July 1, 2013. For the purposes of the bill:

The bill reduces the rate of the severance tax to 1.3% of the value of the oil or gas at the point of production for a period of 30 months beginning on the date of first sale of production or until payout of the well cost is achieved, whichever first occurs.

#### **Expanded Definitions in Qualified Equity Investment Tax Credit Laws (HB 934)**

This bill revises the law governing qualified equity investment tax credits. Under the bill, the term “credit allowance date” is expanded to include not only the date upon which the investment is initially made but also to provide that in the case of an investment made prior to the allocation of credits based on such investment, the date on which the MDA issues a certificate allocating credits based on such investment.

The bill authorizes MDA to allocate credits based on the amount of qualified equity investments made or to be made by a qualified community development entity. The prior law authorized the allocation of credits only for the anticipated amount of qualified equity investments to be made.

#### **Reduced Tax Rate for Energy Used in Enhanced Oil Recovery (HB 841)**

This bill provides a 1.5% tax rate for the sale of electricity, current, power, steam, coal, natural gas, liquefied petroleum gas or other fuel to a producer of oil and gas for use directly in enhanced oil recovery using carbon dioxide or the permanent sequestration of carbon dioxide in a geological formation.

#### **Energy Sales Tax Exemptions (HB 844)**

This bill provides a sales tax exemption for sales of electricity, current, power, steam, coal, natural gas, liquefied petroleum gas or other fuel to:

- A manufacturer, custom processor, technology intensive enterprise or public service company for industrial purposes, which shall include that used to generate electricity, to operate an electrical distribution or transmission system, to operate

pipeline compressor or pumping stations, or to operate railroad locomotives;

- A producer or processor for use directly in the production of poultry or poultry products, the production of livestock and livestock products, the production of domesticated fish and domesticated fish products, the production of marine aquaculture products, the production of plants or food by commercial horticulturists, the processing of milk and milk products, the processing of poultry and livestock feed, and the irrigation of farm crops; and

- A commercial fisherman, shrimper or oysterman.

#### **New Commercial Airline Fuel Exemption (SB 2847)**

This bill provides a 12-month excise tax exemption for special fuel sold to be consumed as fuel by planes used by a commercial airline for new interstate air service offered by a new carrier in the market. The 12-month exemption also applies for interstate service to a new city by an existing airline; or additional interstate service to a city already served by a commercial airline.

#### **The Cultural Retail Attraction Joins the Tourism Project Sales Tax Incentive Program (SB 2806)**

The tourism project sales tax incentive program is provides a rebate to certain tourism projects of the amount of sales tax collected at a project until the earlier of the date that 30% of the approved project costs incurred by a participant has been paid to the participant; or 10 years after the date the tourism project opens for commercial operation.

This bill adds cultural retail attractions within the definition of the term “tourism project” under the tourism project sales tax incentive program.

Under the bill a “cultural retail attraction” is defined as a project which combines destination shopping with cultural or historical interpretive elements specific to Mississippi with a minimum private investment of \$50 million in land, buildings, architecture, engineering, fixtures, equipment, furnishings, amenities and other related costs approved by MDA. It also must be located in a

“qualified resort area” as defined under the Local Option Alcoholic Beverage Contract Law.

A cultural retail attraction must also be a part of a master-planned development with a total investment of not less than \$100 million in land, buildings, architecture, engineering, fixtures, equipment, furnishings, amenities and other related costs approved by MDA. Moreover, the cultural retail attraction must have a minimum of 50 retail tenants with a minimum of 300,000 square feet of heated and cooled space; and have a minimum investment of \$1 million in one or more of the following: (1) art created by Mississippi artists or portraying themes specific to Mississippi; (2) memorabilia,

signage or historical markers which serve to promote Mississippi; (3) audio/visual equipment used to showcase Mississippi artists; (4) a minimum of 1,250 square feet of heated and cooled space available to the MDA or its assignee for at least 10 years.

#### **Broadband Technology Exemptions Extended (SB2829)**

This bill extends the sales and ad valorem exemptions for equipment used in the deployment of broadband technology until July 1, 2020.

## Contributors to this Issue

### **Kenneth D. Farmer**

Ken Farmer is an attorney with Young Wells Williams Simmons PA. He is a member of the firm's Business Opportunities Group, and concentrates his law practice in the areas of real estate, commercial transactions and general business/corporate law. Ken graduated from the University of Southern Mississippi with a Bachelor of Business Administration in Management Information Systems. He received his J.D. from the Frederic G. Levin College of Law at the University of Florida, and his Master of Science in Real Estate from the University of Florida's Warrington College of Business. Ken currently serves as Chair of the Business Law Section of the Mississippi Bar Association and Secretary of the Real Property Section.



### **W. Rodney Clement, Jr.**

Rod Clement is a partner with Bradley Arant Boult Cummings LLP. His practice focuses on commercial real estate and secured transactions. Rod graduated from Millsaps College. He received his J.D. from Washington & Lee Law School. Rod is a member of the Board of Governors and Executive Committee of the American College of Real Estate Lawyers and a former member of the Board of Regents of the American College of Mortgage Attorneys. He has also served as ABA representative to the Joint Editorial Board for Uniform Real Property Acts and Vice-Chair of the Real Estate Financing Group of the ABA's Section of Real Property, Trusts and Estates.

### **Preston D. Goff**

Preston Goff is an attorney with the Secretary of State's Office, Division of Policy and Research. Before joining the Secretary of State's Office in June 2012, Preston was an associate at Rushing & Guice, P.L.L.C. in Ocean Springs. Preston received a B.A. in Political Science from the University of Southern Mississippi. He graduated *magna cum laude* from Mississippi College School of Law.



## About the Editor

### Drew L. Snyder

Drew Snyder is Mississippi's Assistant Secretary of State of Policy and Research. Before joining the Secretary of State's Office in January 2012, Snyder was an associate at Hollingsworth LLP in Washington D.C. A Eupora native, Snyder graduated *summa cum laude* from the University of Mississippi with a Bachelor of Business Administration, with an emphasis in Management and Managerial Finance. He received his J.D. from the University of Virginia School of Law. Drew currently serves as a commissioner on the Uniform Laws Commission.



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## How to Contribute

Persons interested in submitting news, a proposal or an article for publication in The Mississippi Business Law Reporter should submit it by e-mail to the editor Drew Snyder at [drew.snyder@sos.ms.gov](mailto:drew.snyder@sos.ms.gov). All news, proposals and articles are subject to review and approval by the Editor and Section Leadership.

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Articles should be arranged in the following order: (i) article title, (ii) author's name, (iii) acknowledgement of assistance, if applicable or desired, and (iv) text of the article. All contributions should be submitted in MS Word format.

A short biographical statement should also be provided at the time the article is submitted. The statement should include, at a minimum, the author's (i) current position, (ii) practice areas, (iii) professional affiliations. A head and shoulder photograph of the author(s) in color is requested but not required.



## Section News & Announcements

### ***Ethics Hour CLE Program June 11 at River Hills***

The Business Section's Ethics Hour CLE will be held June 11, 2013 at River Hills Club located at 3600 Ridgewood Road, Jackson, MS. Mississippi Bar General Counsel Adam Kilgore and Page Mannino's David Allen will be panelists. MC law professor Donald Campbell will moderate. Registration begins at 11:00 a.m. followed by lunch at 11:30 a.m. The Business Law Ethics CLE seminar will begin at noon. The cost is \$50. One hour of CLE credit has been approved.

### ***2013 Annual Meeting and Summer School July 8-13***

The 2013 Summer School for Lawyers will be held at the Linkside Conference Center in Sandestin Resort July 8-10. The 2013 Annual Meeting will be held at the Sandestin Hilton July 10-13.

### ***Joint CLE Seminar at Bar Convention July 11, 10 a.m.***

The Business Law Section, in conjunction with the Real Property Section, will be holding a meeting and CLE seminar at this year's bar convention in Sandestin, Florida. Loretta Salzono will be discussing the Impact of the Consumer Finance Protection Bureau's 2013 Regulations. The joint meeting is scheduled for Thursday, July 11, 2013, from 10 a.m. through 12 noon.

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## Section Leadership

### Chair

#### **Kenneth D. Farmer**

Young Wells Williams Simmons P.A.  
P. O. Box 23059  
Jackson, MS 39225-3059  
Phone: (601) 948-6100  
Fax: (601) 355-6136  
Email: kfarmer@youngwells.com

### Vice-Chair

#### **Stanley Q. Smith**

Jones, Walker, Waechter, Poitevent, Carrère &  
Denégre, L.L.P.  
P. O. Box 427  
Jackson, MS 39205-0427  
Phone: (601) 949-4863  
Fax: (601) 949-4804  
Email: ssmith@joneswalker.com

### Secretary/Treasurer

#### **James T. Milam**

Milam Law P.A.  
P. O. Box 1128  
Tupelo, MS 38802-1128  
Phone: (662) 205-4851  
Fax: (888) 510-6331  
Email: jtm@milamlawpa.com

### Past Chair

#### **C. Joyce Hall**

Watkins & Eager PLLC  
P. O. Box 650  
Jackson, MS 39205-0650  
Phone: (601) 965-1900  
Fax: (601) 965-1901  
Email: jhall@watkinseager.com

### Members-At-Large

#### **Jason W. Bailey** (8/2011–7/2013)

Jones, Walker, Waechter, Poitevent, Carrère &  
Denégre, L.L.P.  
P. O. Box 1456  
Olive Branch, MS 38654-1456  
Phone: (662) 895-2996  
Fax: (662) 895-5480  
Email: jbailey@joneswalker.com

#### **Tammra Cascio** (8/2012–7/2014)

Gulf Guaranty Life  
P. O. Box 12409  
Jackson, MS 39236  
Phone: 601-981-4920  
Fax: (601) 981-3402  
Email: tammra@gulfguaranty.com

#### **Ryan L. Pratt** (8/2012–7/2015)

Pratt Law Firm PLLC  
574 Highland Colony Pkwy, Suite 320P  
Ridgeland, MS 39157  
Phone: (601) 707-9480  
Fax: (601) 856-0901  
Email: ryanpratt@prattlawfirm.net

### Newsletter Editor

#### **Drew L. Snyder**

Mississippi Secretary of State's Office  
401 Mississippi Street  
Jackson, MS 39205  
Phone: (601) 359-3101  
Fax: (601) 359-1499  
Email: drew.snyder@sos.ms.gov

### A Special Thank You

#### **Rene' Garner**

Section and Division Coordinator  
Phone: (601) 355-9226  
Fax: (601) 355-8635  
Email: rgarner@msbar.org

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