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Section Chair's Corner

By Stanley Q. Smith, Esq.

Welcome to the Fall 2013 issue of The Mississippi Business Law Reporter, a publication of the Business Law Section of The Mississippi Bar. I am honored to serve as Chair of the Business Law Section for the current fiscal year (2013-2014). It is my pleasure to serve in conjunction with the following Business Law Section Officers and Executive Committee members: Jimmy Milam of Milam Law P.A., Tupelo, Vice-Chair; Jason Bailey of Jones Walker LLP, Olive Branch, Secretary; Kenneth Farmer of Young Wells Williams Simmons P.A., Jackson, Past Chair; Tammra Cascio of Gulf Guaranty Life Insurance Company, Jackson, Executive Committee; Ryan Pratt of Pratt Law Firm PLLC, Madison, Executive Committee; Drew Snyder of the Mississippi Secretary of State's office, Jackson, Executive Committee; and Neal Wise of Jones Walker LLP, Jackson, Newsletter Editor.

I am appreciative of our immediate Past Chair, Ken Farmer, and all of the other Section Officers and Executive Committee members for their time and commitment in making the past year a success for our Section. Based upon everyone's participation thus far, we are off to a great start in building on the foundation laid in prior years.

The Business Law Section Officers and Executive Committee have set the following goals and events for our Section during the coming year:

1. We plan to publish three (3) newsletters: Fall 2013 (this issue), Spring 2014, and Summer 2014. Please contact Neal Wise if you wish to contribute an article or have a topic of interest which may be informative and helpful to our members.
2. The Business Law Section and the Mississippi Corporate Counsel Association will jointly hold a Winter Social. Our two

groups will gather at Nick's Restaurant in the Fondren area of Jackson on Tuesday, December 3, 2013, from 4:00-6:00 p.m. Our guest of honor will be Secretary of State Delbert Hosemann and his Chief of Staff, Doug Davis. In addition to our membership, we are also inviting business law students and professors from the University of Mississippi School of Law and Mississippi College School of Law to join us. Last year's Fall Social honoring Brent Christensen, Executive Director of the Mississippi Development Authority, was a great success, and this year's event should be just as good. Put this date on your calendar, and come out to visit with your colleagues and Secretary Hosemann.

3. We plan to co-sponsor a one-hour CLE teleseminar with the Appellate Practice Section of the Bar, probably in January 2014.
4. We plan to offer a Legislative Update CLE program at the Bar Center on April 29, 2014, to provide an update to members on new and revised business laws passed in the 2014 Mississippi Legislative Session.
5. We plan to co-sponsor an ethics lunch hour CLE program with the Mississippi Corporate Counsel Association at River Hills Club in Jackson on June 10, 2014.
6. Our Section has contributed \$1,000 to the University of Mississippi School of Law's Negotiation Board and \$1,000 to Mississippi College School of Law's Moot Court Board to assist with each group's participation in national and regional transactional law competitions.

7. Our Section shall award separate \$1,000 scholarships to deserving business law students at the University of Mississippi School of Law and Mississippi College School of Law during the Spring of 2014.
8. Our Section will be responsible for all the feature articles in the Summer 2014 issue of The Mississippi Lawyer magazine. This will be designated as the Business Law Section's issue.
9. Our Section will continue to provide Monday through Friday the electronic Lexology to all members.

The Business Law Section will hold its annual meeting on June 26, 2014, during the Annual Meeting of The Mississippi Bar at Sandestin, Florida. We anticipate offering once again a CLE seminar in conjunction with our annual meeting.

As you can see your Section Officers and Committee Members are planning a number of activities and benefits for members of our Section. I hope you will be able to attend some, if not all, of these. If you have any suggestions for activities or CLE topics, please contact me or any of your Section Officers or Committee Members with your ideas or comments.

The Point of No “Return”: New Developments in Chapter 7 Bankruptcy for Mississippians

By Marie Wicks*

A Note from The Editor: *I am pleased to announce a new feature to The Mississippi Business Law Reporter. Beginning with this issue, we are presenting two articles written by students at each of Mississippi’s two law schools: the University of Mississippi School of Law and the Mississippi College School of Law. Each article was chosen by faculty at the respective law schools from those submitted during a competition among the law student members of each school’s Business Law Section.*

A U.S. Court of Appeals ruling in a Mississippi case has effectively precluded the discharge of a debtor’s tax liabilities in Chapter 7 bankruptcy if the return is filed late. The Fifth Circuit decision rejected established precedent and thereby sparked a conflict with other federal courts and the I.R.S. that is likely to be ultimately resolved by the Supreme Court.

The factual narrative of *In re McCoy* is not unusual.¹ McCoy sued the Mississippi State Tax Commission (MSTC) in bankruptcy court after the court denied her request under Chapter 7 bankruptcy to discharge two years of debts for state income tax. She had filed both her 1998 and 1999 tax returns belatedly in 2002. The bankruptcy court sided with the MSTC, finding that McCoy’s late filings precluded her from counting them as “returns” that are eligible for discharge. The district court and Fifth Circuit upheld the bankruptcy court’s decision.

The Fifth Circuit applied Section 523(a) of the U.S. Bankruptcy Code to preclude the discharge of McCoy’s tax liabilities. Under Section 727 of the Code, a debtor may discharge all debts “[e]xcept as provided in Section 523.”² The exceptions in Section 523 include those “with respect to which a return, or equivalent report or notice, if required

was not filed or given.”³ In 2005, Congress amended the section to include subparagraph Section 523(a)(*)—no subparagraph number was provided, hence the “*” —to clarify that:

For purposes of this subsection, the term “return” means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.⁴

The Fifth Circuit found that McCoy’s returns did not satisfy “applicable filing requirements,” which in Mississippi include filing before the mid-April deadline.⁵ Therefore, her filings were not “returns” for discharge purposes. Further, Section 523(a)(*) permits discharge of returns prepared pursuant to I.R.C. Section 6020(a), which applies to debtors who have disclosed the necessary information to aid the Secretary in preparing a substitute and have provided a signatory authorization of the return. McCoy’s filings also did not qualify for this safe harbor.

In interpreting 523(a) broadly, the Fifth Circuit rejected established precedent in determining whether taxes were dischargeable when the return was filed late. Since 1986, courts have applied the *Beard* test to examine whether a filing constituted a return to be discharged in Chapter 7 bankruptcy.⁶ According to *Beard*, a document shall qualify as a return if it (1) purports to be a return, (2) is executed under a penalty of perjury, (3) contains sufficient data to allow calculation of tax, and (4) represents an honest and reasonable attempt to satisfy the requirements of the tax law.⁷ Many federal courts have given the most weight to the “honest and reasonable attempt” prong of the *Beard* test to determine the validity of late filings as dischargeable returns.⁸ Courts that have used the *Beard* test have concluded that returns filed before the debtor is prompted to do so by tax authorities are evidence of “honest and reasonable” compliance and therefore are eligible for discharge, even if the returns were filed late.⁹ McCoy argued that if this test had been applied in her case, all of her tax debt would have been discharged, because she filed her income tax returns prior to the MSTC assessment of her tax liabilities.¹⁰ Instead, the Fifth Circuit discarded the test and effectively prevented tax returns from qualifying as “returns” for the discharging of debts even if they are filed only one day after the deadline.

The Fifth Circuit’s position has been specifically rejected by the Tenth Circuit,¹¹ bankruptcy and district courts across four other circuits,¹² and the I.R.S.¹³ One reason is the Fifth Circuit’s interpretation of the hanging paragraph renders redundant the additional proviso that I.R.C. Section 6020(b) returns are not “returns” for discharge purposes. As stated by one commentator, “If the parenthetical ‘(including applicable filing requirements)’ in

[523(a)(*)] created the rule that no late-filed return could qualify as a return, the provision ... that returns made pursuant to section 6020(b) are not returns for discharge purposes would be entirely superfluous.”¹⁴ In addition, the creation of a return under 6020(b) necessarily occurs after the filing deadline has passed. If 523(a)(*) was meant to broadly exclude all late-filed tax returns from discharge, as the Fifth Circuit held, why would the text further stipulate that late filings under 6020(b) are also excluded? Even the I.R.S. does not draw such a hard line as the Fifth Circuit, maintaining instead that a filing submitted after the deadline still constitutes a return as long as it was filed before an assessment was completed.¹⁵ The text of 523(a)(*) suggests a more flexible application that does not assume all late filings to be nondischargeable.

The *McCoy* decision will likely have a large impact on debtors in the tens of thousands of Chapter 7 bankruptcy cases that arise in the Fifth Circuit each year.¹⁶ This number pales in comparison to the hundreds of thousands of cases in the rest of the U.S. that will not be affected since no court has agreed with the Fifth Circuit’s approach.¹⁷ Due to the sheer volume of Chapter 7 bankruptcy cases and the circuit split that has resulted from the *McCoy* decision, it is not a question of *whether* this case will reach the Supreme Court, but a question of *when*. At the center of the conflict are the individual debtors, whose attempts to discharge their tax liabilities may be thwarted by a hanging paragraph in the Bankruptcy Code as they reach the point of no “return.”

*This opportunity would not have been possible without the time and effort of the Business Law Institute at The University of Mississippi School of Law. I would like to thank Prof. Mercer Bullard, Associate Professor of Law and Director of the Institute, for his assistance and expertise. I would also like to thank business law expert Prof. John Czarnetzky for his insight. In addition, I would like to thank Dean Richard Gershon for his enthusiasm and support of the Business Law Institute.

¹ *In re McCoy*, 666 F.3d 924 (5th Cir. 2012), *cert. denied*, 133 S.Ct. 192 (2012).

² 11 U.S.C.A. § 727 (1986) (amended 2005).

³ 11 U.S.C. § 523(a)(1)(B)(i) (1978).

⁴ 11 U.S.C. § 523(a)(*) (2005).

⁵ *In re McCoy*, 666 F.3d at 932.

⁶ *Beard v. Comm'r*, 793 F.2d 139 (6th Cir. 1986).

⁷ *Id.*

⁸ *See, e.g., In re Wogoman*, 475 B.R. 239 (B.A.P. 10th Cir. 2012).

⁹ *See, e.g., In re Rhodes*, No. 11-4074, 2013 WL 5291400, at *5 (Bankr. N.D. Ga. May 6, 2013); *In re Brown*, 489 B.R. 1, 6 (Bankr. D. Mass. 2013); *In re Martin*, 482 B.R. 635, 640 (Bankr. D. Colo. 2012).

¹⁰ *McCoy v. Miss. State Tax Comm'n (In re McCoy)*, No. 08-00175, 2009 WL 2835258 (Bankr. S.D. Miss. Aug. 31, 2009), *aff'd*, 2011 WL 8609554 (S.D. Miss. 2011), *aff'd*, 666 F.3d 924 (5th Cir. 2012), *cert. denied*, 133 S.Ct. 192 (2012).

¹¹ *In re Wogoman*, 475 B.R. at 239.

¹² *In re Mallo*, No. 13-CV-00098-AP-LTB, 2013 WL 4873057, at *4 (D. Colo. Sept. 11, 2013); *In re Rhodes*, 2013 WL 5291400, at *7; *In re Pitts*, 497 B.R. 73, 73 (Bankr. C.D. Cal. 2013); and *In re Brown*, 489 B.R. 1 at 4.

¹³ *See, e.g., I.R.S. Chief Council Notice CC-2010-016, Litigating Position Regarding the Dischargeability in Bankruptcy of Tax Liabilities on Late Filed Returns and Returns Filed After Assessment*, 2010 WL 3617597 (Sept. 2, 2010); *See also, e.g., In re Smythe*, No. 11-04077, 2012 WL 843435, at *4 (Bankr. W.D. Wash. March 12, 2012).

¹⁴ Morgan D. King, *Tolstoy, Discharging Taxes, and the Fifth Circuit*, 4 Norton Bankr. L. Adviser 3 (April 2012).

¹⁵ I.R.S. Chief Council Notice CC-2010-016, 2010 WL 3617597 (2010).

¹⁶ *2013 Bankruptcy Filings*, UNITED STATES COURTS (March 31, 2013), *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/0313_f2.pdf.

¹⁷ *Id.*

Amazing Potential for Redevelopment of Abandoned Contaminated Sites

By Betty Ruth Fox

Would you believe that abandoned contaminated sites have amazing potential for redevelopment? Amendments to the Mississippi Economic Redevelopment Act that became effective on July 1, 2013, allow a developer to recover up to 2 ½ times the costs of remediation of a “contaminated site” which includes a site that has been abandoned by a bankruptcy estate. The amendments also include contaminated sites that are covered by a Brownfield Agreement with the Mississippi Department of Environmental Quality (MDEQ).¹

The key ingredients are a contaminated site and a developer prepared to redevelop the site. Once a developer has identified a contaminated site, the city and/or county must approve the “redevelopment project area” and file an application with the Mississippi Development Authority (MDA) for a certificate of public convenience and necessity.² The application includes MDEQ’s approval of the existence of a contaminated site and of the assessment and remediation of the site; the city’s and/or county’s approval of the boundaries and establishment of the redevelopment project area; and the agreement with the developer of the site.³

Certain future state taxes and fees collected from business enterprises in the redevelopment project area will be deposited into a special fund

known as the “Redevelopment Project Incentive Fund” administered by MDA.⁴ MDA will make payments to a developer in January and July of each year for up to fifteen years from the date that is two years after the date the project is approved by MDA or until the total aggregate amount of incentive payments equals 2 ½ times the amount of allowable remediation costs, whichever occurs first.⁵ There is no monetary cap on the amount of allowable remediation costs.

One project is currently on target to participate in the Mississippi Economic Redevelopment Act remediation incentive program. The District Land Development Company, LLC is remediating and redeveloping the former Mississippi School for the Blind located just east of I-55 and north of Eastover Drive in Jackson. Buildings on that site contain asbestos requiring abatement. The proposed use of the site after remediation is a mixed-use development. The potential recovery to the developer is up to \$1,250,000 (2 ½ times \$500,000 – the estimated costs for remediation). A second proposed project located in Starkville, Mississippi, involves the remediation of the Cooley Building which sits on the edge of the campus of Mississippi State University. Buildings on that site also contain asbestos and lead paint requiring remediation. The use of the site after remediation is mixed use development and conference center, hotel, parking garage, and retail. The potential recovery to the developer is up to

¹ Miss. Code Ann. §§ 57-91-1 through 11 (2013).

² Miss. Code Ann. § 57-91-7 (2013).

³ *Id.*

⁴ Miss. Code Ann. Section 57-91-9 (2013).

⁵ *Id.*

\$3,750,000 (2 ½ times \$1,500,000 – the estimated cost for remediation). Several other proposed projects located in the City of Jackson are being considered.

The redevelopment of brownfields has many benefits in addition to the incentive payments available through the Economic Redevelopment Act. The economic and environmental benefits of brownfield developments are well documented by New Partners for Community Revitalization, Inc., a not-for-profit redevelopment organization, as follows:

- **Investment in Brownfields Leverages Private Investment and Creates Jobs:** \$1 of public investment in brownfields leverages \$8 in total investment; \$10,000 to \$13,000 in public investments creates/retains one job.⁶

- **Brownfield Redevelopment Revitalizes Neighborhoods As Measured by Adjacent Property Value Increases.** Cleanup and redevelopment of brownfield properties lead to property value increases on the order of 5% to 15% for properties that are up to ¾ mile from the site.⁷

- **Public Investment in Brownfields Results in Direct Generation of Local Tax Revenue.** Public investments in brownfields are generally recouped from local taxes generated by the project within about three years.⁸ A national survey found that redeveloping brownfields in just 105 surveyed

cities could lead to \$2.2 billion in local tax revenue, annually.

- **Brownfields Redevelopment Has Lower Infrastructure Costs.** The cost of providing infrastructure (roads, water, sewer, electricity, etc) to a greenfield site averages \$50,000 to \$60,000 per unit, compared to \$5,000 to \$10,000 per unit for a brownfield or greyfield site.⁹

- **Urban Brownfields Redevelopment Accommodates Growth Without Sprawl.** One acre of redeveloped brownfields saves 4.5 acres of farms and countryside from sprawl development due to higher density of development on brownfield sites and the elimination or reduction of the additional lands for associated infrastructure for greenfield development.¹⁰

- **Brownfield Redevelopment Has a Lower Carbon Footprint and Produces Air Quality and Greenhouse Gas Improvements.** A recent report released by Urban Land Institute (ULI) documents that compact urban development, as an alternative to sprawl, could reduce vehicle miles traveled (VMT) by 20 percent to 40 percent.¹¹ Studies of brownfields projects indicate similar VMT savings.¹² These reduced VMT's translate directly to emission reductions and greenhouse gas savings of

⁹ Environmental and Energy Studies Institute and the Funders Network, "Energy and Smart Growth and Energy, it's about What and Where We Build."

¹⁰ George Washington University, see <http://www.gwu.edu/~cem/Brownfields/>

¹¹ Urban Land Institute, Smart Growth America, the Center for Clean Air Policy, and the National Center for Smart Growth, "Growing Cooler, Evidence on Urban Development and Climate Change," <http://www.smartgrowthamerica.org/gcindex.html>

¹² US Conference of Mayors, "Clean Air/Brownfields Report," December, 2001.

⁶ NorthEast-MidWest Institute Digest Report, *Brownfields Policy Research*, Volume 1, Number 3, August 15, 2008

⁷ De Sousa, C. and C. Wu. "Assessing the Impact of Publicly Supported Brownfields Redevelopment on Surrounding Property Values." (In Progress)

⁸ De Sousa, C. 2006. "Unearthing the benefits of brownfield to green space projects: An examination of project use and quality of life impacts." *Local Environment* 11(5): 577-600.

a similar or greater magnitude. This is in part due to proximity to mass transit.

- **Brownfield Redevelopment Has Water Quality Benefits/Less Run-off.** Brownfields development, because it tends to be higher density than alternative greenfields development, lowers run-off and improves water quality.¹³

The amendments to the Mississippi Economic Redevelopment Act should promote the safe redevelopment of contaminated sites, even those abandoned in bankruptcy, to the benefit of the health and environment of all citizens of Mississippi. With hundreds of abandoned contaminated sites in Mississippi, this Act is a “win-win” for everyone.

¹³ *Lynn Richards*, “Water and the Density Debate,” *Planning Magazine*, June 2006, APA
http://www.epa.gov/smartgrowth/water_density.htm

Community Banks Take Advantage of New Opportunities

By Neal C. Wise

While many companies claim to be community-development oriented, an increasing number in Mississippi are becoming certifiably so. Across the state, a number of community banks are taking advantage of a program that recognizes the work Mississippi's financial institutions have been doing since opening their doors. The Community Development Financial Institution Fund ("CDFI Fund") is a division of the U.S. Treasury that oversees several programs, one of which is the Community Development Financial Institution ("CDFI") certification program. The CDFI program is not particularly new – tracing its origins to the Riegle Community Development and Regulatory Improvement Act of 1994 – but Mississippi's financial institutions, specifically its community banks, are finding innovative ways to take advantage of the program.

According to its website, the CDFI Fund's stated purpose is to promote "economic revitalization and community development through investment in and assistance to community development financial institutions (CDFIs)." A bank must meet seven criteria to become a CDFI. Several criteria, such as being a legal entity, adopting a primary mission of community development, functioning as a financing entity, and not being controlled by a governmental entity, are a given for any community bank. Additionally a bank must serve a Target Market, maintain accountability to that Target Market, and provide development services in conjunction with its financing activities.

The Target Market served by a CDFI bank may be defined several ways, but in Mississippi, the vast

majority of these financial institutions are serving Target Market's that are considered Investment Areas. An Investment Area is a geographic unit – either a census tract or an entire county – that meets certain metrics according to the most recent census data: a poverty rate of 20% or greater, an unemployment rate 1.5 times the national average, or a median family income 80% or less of the national average, among others. Investment Areas are not hard to come by in Mississippi. In fact, more than 70 of Mississippi's 82 counties are considered Investment Areas.

Maintaining accountability to one of these Target Markets is typically quite easy for a bank as well. At most community banks in Mississippi, the boards of directors consist of local community members, business and civic leaders, and members of families from the communities that have lived in these towns since they were founded. A governing board composed of residents and business owners from the community is the most effective way a bank can maintain accountability to its Target Market.

Finally, a bank must show that it is providing development services along with its financing activities. This requirement may be the easiest of all for many community banks. Development services encompass the essence of what has made Mississippi's community banks so vital to their communities for decades. For example, the bank may consider one-on-one loan applicant guidance to be a "development service." The same goes for customer credit counseling. Often as a bank officer

is trying to assemble the CDFI application information, the most difficult task is quantifying how they provide these services – this is every day business for most community banks rather than something beyond normal.

In 2009 as the financial crisis ripped through the banking industry, many banks in Mississippi were in need of capital to restore depleted balance sheets. In response, Treasury commenced the Troubled Asset Relief Program (or “TARP”) which, through the Capital Purchase Program, or CPP, provided much needed capital to banks in need. While CPP calmed the storm for many banks, it presented its own set of problems – reputational concerns, dividend restrictions, and most critically, a higher interest rate. In 2010, Treasury announced a new program, the Community Development Capital Initiative (“CDCI”) which provided the needed capital to participating banks at only 2% -- less than half of the rate offered in the CPP. In addition to new applicants, financial institutions that had participated in the CPP were allowed to refinance into the CDCI program provided they met one criteria – obtaining CDFI certification. The CDFI certification allowed these banks to access affordable capital that was traditionally only found at higher rates in the private market.

Now qualified as CDFIs, many banks across Mississippi began exploring the CDFI program and its other benefits. One of the first things to catch their eye was a relatively unknown program called the Bank Enterprise Award (“BEA”). The BEA provides grants to insured depository institutions for increasing qualified financial activities in low-to-moderate income communities on a year-over-year basis. By definition, a CDFI bank is tailor-made for this program. Many Mississippi banks have applied for BEA grants over the last several years and nearly all of them have received an award. These

awards have ranged from less than \$50,000 to, in some years, \$600,000 or more. For many community banks in Mississippi, this can be a significant source of income.

More recently, CDFI certification presented an important strategic opportunity for many of Mississippi’s financial institutions. In the wake of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the newly-established Consumer Financial Protection Bureau (“CFPB”) has unleashed a barrage of new regulations causing much anxiety among the banking industry. In particular, one new rule prescribed by the CFPB mandates that a bank may no longer extend a residential mortgage loan to a consumer without first calculating (using a head-spinning set of factors) the borrower’s ability to repay the loan. [*Author’s Note: One wonders what the CFPB thinks these banks were doing prior to these common-sense decrees?*] Due to a perception that they are harmful to consumers, these new rules effectively prohibit many banks from making balloon loans – a product many community banks rely heavily on for income due to these products’ interest rate risk-management characteristics. While the new rules do provide some safe-harbors for smaller institutions, a bank is still forced to weigh its legal exposure under the new rules with the benefits of making such loans. However, a recent amendment to the final rules offered a nice surprise for CDFIs – an exemption. Due to the fact that most CDFIs – and for that matter, most community banks – already have in place rigorous underwriting standards and extremely low foreclosure rates, CDFIs are exempt from the new ability-to-repay rules. Therefore, the CDFI certification provides a unique regulatory opportunity for many community banks in Mississippi.

CDFI certification provides many other opportunities for banks and non-banks alike – some

outside the scope of anything seen in Mississippi. One particular advantage of CDFI certification is that a certified CDFI automatically qualifies as a Community Development Entity, or CDE, which allows that entity to compete for tax credit allocations under the New Markets Tax Credit Program – a popular commercial real estate vehicle around the Gulf South. Although few banks have taken advantage of this particular aspect of CDFI certification, as institutions become more familiar with the program they may decide to venture out of their comfort zone. Further, bank CDFIs are increasingly applying for grants under the CDFI Financial Assistance (“CDFI FA”) award which, like the BEA, awards institutions for qualified activities in

low-to-moderate income areas. Traditionally reserved for non-banking entities, recent years have seen more and more awards being made to CDFI banks under the CDFI FA award. Such programs highlight some of the unique ways in which a bank can take advantage of their CDFI certification.

Mississippi’s community banks have been developing communities since the 19th century. Over one hundred years later, they are staying true to their mission to support the economies of the towns and communities of this state. Through the CDFI program, Mississippi’s banks are able to leverage that important mission into new opportunities that can help them navigate through the uncertain and challenging times facing the banking industry.

Secretary of State Publishes Brochure for Start Up and Small Businesses

The Securities Division of the Mississippi Secretary of State's office has recently published a useful brochure which outlines the state securities laws that may apply to small businesses interested in seeking investors or raising money. This quarter-fold color brochure which is available on the Division's website includes an overview of the Mississippi Securities Act in addition to a discussion of the Act's anti-fraud standards, registration requirements and coordination with the Federal securities laws exemptions. A link to the brochure may be found [here](#). The brochure is set forth below in full. For questions about the brochure or to request printed copies contact the Securities Division at 601-359-1334.



due no later than fifteen (15) days after the first date of sale in the State. There is no limit on the dollar amount raised. **Note: The SEC has recently amended Rule 506 to permit general advertising in certain types of Rule 506 securities offerings.** See MCA §75-71-302(c) and Rule 229.

Offerings Only to "Accredited Investors." State law provides an exemption for offerings by certain non-excluded issuers to accredited investors. A general announcement is permitted, but it may only contain certain information. **Requirements:** a Notice of Transaction filed with the Securities Division, including a copy of the general announcement, and a \$300 filing fee due no later than fifteen (15) days after the first date of sale in the State. See MCA §75-71-203 and Rule 717.

Domestic Issuer Offerings to 35 or Fewer Purchasers. State law also provides an exemption for issuers organized in Mississippi for sales to both residents and non-residents. **Requirements:** MS Rule 703 form, prospectus and a \$300 filing fee to be filed with the Secretary of State's Office and written acknowledgment by the Securities Division prior to sales; sales to not more than 35 persons; and no general advertising is permitted. There is no limit on the dollar amount raised. See MCA §75-71-203 and Rule 703.

Coordination with Federal Exemptions

All securities sold in Mississippi must also be properly registered or exempted under federal law. Like the Securities Act, federal securities laws contain certain exemptions from securities registration. The following is a list of commonly used federal registration or exemption provisions which may have corresponding State provisions. **Remember, even notice filings made with the Securities Division require filing fees.**



Federal Regulation A and Rule 504. Mississippi has no corresponding exemption to these federal exemptions. Offerings made pursuant to these federal exemptions must be registered with the Securities Division by qualification.

Federal Regulation D Rule 505. Administrative Rule 701 (§75-71-203) (UOE) generally provides a corresponding Mississippi exemption for an offering up to \$5 Million pursuant to Federal Regulation D Rule 505.

Federal Regulation D Rule 506. Mississippi Administrative Rule 229 (§75-71-302(c)) generally provides a corresponding exemption for securities offerings pursuant to Federal Regulation D Rule 506.

Section 3(a)(11)/Rule 147. Section 75-71-201(14) of the Securities Act is the most commonly used exemption for small (10 or fewer purchasers) intra-state offerings exempt federally pursuant to Section 3(a)(11) of the 33 Act or Federal Rule 147. For intra-state offerings with over 10 purchasers, the Domestic Issuer Offering exemption (§75-71-203; MSA Rule 703) may be used for up to thirty-five (35) purchasers. Intra-state offerings under Section 3(a)(11) of the 33 Act or Rule 147 with more than thirty-five (35) purchasers generally must be registered with the Securities Division.

SECURITIES DIVISION

ABOUT THE SECURITIES DIVISION

The Securities Division of the Office of the Secretary of State is responsible for regulating the offer and sale of securities investments. These may include many types of stocks, bonds, limited partnerships, virtual settlement investment contracts, some oil and gas investments, and other investment contracts. Other activities include the registration of securities offerings, the licensing of broker-dealers and investment advisers, and the investigation of alleged violations of securities laws. The Securities Division may be reached by calling (601) 359-1334 or toll free at (888) 236-6167.



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There are many legal considerations in the start-up and operation of a small business, such as the legal structure of the entity (corporations, LLC, partnership, etc.), tax considerations and filing requirements with various government agencies.

Federal and State securities laws apply when a business seeks to raise money by issuing ownership interests (stocks membership or partnership interests), debt obligations (bonds or promissory notes), or when the business promises a return to investors.

This brochure provides basic general information about Mississippi securities laws, *but is not a substitute for competent legal counsel.* Additional information should be obtained by contacting the Securities Division and reviewing the Secretary of State website at www.sos.ms.gov. See the Federal Securities and Exchange Commission (<http://www.sec.gov>) website for information on Federal securities law.

An overview of the Mississippi Securities Act

The Mississippi Securities Act and administrative rules which are administered and enforced by the Securities Division of the Secretary of State's Office apply to all sales of securities in Mississippi. See MCA §75-71-101 et seq.

A security is defined in §75-71-102(28) of the Securities Act and includes a wide range of investment opportunities, business plans, and typical investments, such as stocks, bonds, options, and promissory notes. The Securities Act also includes formal legal documents constituting investment contracts. An investment contract includes, among other contracts: an investment in a limited partnership, an interest in an LLC, or an

investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor.

A "sale" is broadly defined in the Securities Act to include every contract of sale, contract to sell, or disposition of a security or interest in a security for value.

An "offer to sell" includes every attempt or offer to dispose of, or solicitation of, an offer to purchase a security for value.



If the Securities Act applies: (1) the person selling the securities must be registered with the Securities Division or properly exempted from registration; (2) the securities being sold must be registered with the Division or exempt from registration; and/or (3) anti-fraud standards apply and prohibit fraudulent tactics, including false representations and omissions. In the sale of securities, similar aspects of the Federal securities law also apply.

The Act's anti-fraud standards

The Securities Act's anti-fraud standards prohibit fraudulent activities, statements, behavior and omissions in connection with the offer or sale of a security. The standards

also provide for penalties for filing inaccurate or misleading information. Violation of these standards may result in both civil liability and criminal prosecution, and may also result in administrative actions. Those actions include the denial or revocation of a registration and sale of securities in Mississippi.

The Act's registration requirements

The Securities Act requires:

- All securities issuers or agents of an issuer must be registered with the Securities Division, or properly exempted from registration.
- All securities broker-dealers and broker-dealer agents must be registered with the Securities Division, or properly exempted from registration.
- All investment advisers and adviser representatives must be registered with the Securities Division, or properly exempted from registration.

Securities Act: Registration and exemption

The following information is a summary of these requirements. Comprehensive requirements and additional details on how to comply are set forth in the Mississippi Securities Act and administrative rules.

Perhaps the most important consideration for a small business seeking to raise money by issuing securities is registration. All securities sold in Mississippi must be registered with the Secretary of State's Office or properly exempted from registration.

- **Securities Registration.** There are two ways to register securities with our office under the Securities Act: An issuer registering securities with the Securities and Exchange Commission under the Securities Act of 1933 may file a registration by

coordination with the Securities Division. Issuers not eligible for registration by coordination may pursue registration by qualification.

- **Exemptions from Securities Registration.** Because securities registration can be complicated and time-consuming, issuers of securities often seek to fit within an exemption. The most commonly available exemptions to the Mississippi securities laws for start-up and small businesses are:

Ten or Fewer Purchasers. The Securities Act provides an exemption for the sale of securities by the issuer to not more than ten (10) purchasers in Mississippi. There is no limit on the dollar amount raised. **Requirements:** the issuer must believe the investors are purchasing for investment; sales commissions may only be paid to broker-dealers and agents who are registered in Mississippi; and no general advertising is permitted. No filing with the Securities Division is required for this exemption. See MCA §75-71-202(14).

Private Offerings up to \$5 Million. The administrative rules provide a uniform limited offering exemption (UOE) for private offerings up to \$5 Million. **Requirements:** compliance with Federal Rule 505 and a notice filing with the Securities Division of a Form D, prospectus and \$300 filing fee, written acknowledgment by the Securities Division prior to sales; sales commissions may only be paid to registered broker-dealers and agents; sales to not more than thirty-five (35) persons; and no general advertising is permitted. See Rule 701.

Offerings Pursuant to Regulation D Rule 506. State rules and regulations provide an exemption for transactions within the "safe harbor" of Federal Rule 506. **Requirements:** compliance with Federal Rule 506 and a notice filing with the Securities Division of a Form D and \$300 filing fee

Contributors to this Issue

Marie Wicks



Marie Wicks, of Ocean Springs, MS, is a J.D. candidate in her first year at The University of Mississippi School of Law. At the law school, she is a member of the Business Law Institute and is on the staff of the Business Law Reporter. She also represents the 1L class as a senator in the Law School Student Body Senate. Prior to entering law school, Marie served as Miss Mississippi 2012. In this role, she traveled throughout the state to promote the Miss America Organization—the world’s largest scholarship provider for young women—and its national platform, Children’s Miracle Network Hospitals. Marie is a charter member and past president of the University Lions Club. She graduated *magna cum laude* from The University of Mississippi with B.A. degrees in International Studies and French, and a minor in Chemistry. A member of Phi Beta Kappa and Phi Kappa Phi, Marie was inducted into the 2011-2012 Ole Miss Hall of Fame.

Betty Ruth Fox

Betty Ruth Fox is Counsel with Watkins & Eager focusing in the areas of environmental law and bankruptcy. From 1993 to 2002, Betty Ruth was a Senior Attorney with the Mississippi Department of Environmental Quality and worked in regulation and enforcement in every MDEQ Program Area, coordinating with appropriate federal, state and local agencies and/or governing authorities. After the Brownfields Law was passed in 1998, Betty Ruth worked with the Staff drafting regulations and developing forms and procedures to place that law into action. While with MDEQ, Betty Ruth received a Certificate of Commendation from the U. S. Department of Justice for assistance in support of the activities of the Environment and Natural Resources Division. Beginning in 2002, Betty Ruth worked as a Trial Attorney with the Department of Justice/U. S. Trustee Program in civil bankruptcy enforcement. Since 2007, Betty Ruth has focused her private practice on Environmental, Bankruptcy and General Litigation matters. Betty Ruth is a member of the Mississippi Bar and the American Bar Association. She received her B.B.A. degree from Millsaps College and her J.D. degree, with distinction, from Mississippi College.



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Neal Wise is an associate in the Jackson office of Jones Walker LLP, where he practices in the firm’s Banking & Financial Services Practice Group. His practice focuses on representation of banks and other financial institutions. He handles both transactional and regulatory matters for financial institution clients including corporate issues, mergers & acquisitions, capital planning, and bank regulatory and securities issues. Mr. Wise is a 2011 graduate of The University of Mississippi School of Law, where he received his juris doctor degree, *magna cum laude*. He served on the *Mississippi Law Journal* as Mississippi Cases Editor and the Moot Court Board. Mr. Wise is a 2008 graduate of Mississippi State University, where he received his Bachelor of Business Administration in Economics and a Bachelor of Business Administration in General Business, *cum laude*.

About the Chair

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Stan Smith is a partner in the Jackson office of Jones Walker LLP. A graduate of the University of Mississippi (1976 B.B.A. in Accountancy; 1979 J.D.), Stan was employed by the Houston, Texas, office of Arthur Andersen & Co. prior to attending law school. Stan concentrates his law practice in the areas of communications and public utilities law. Stan is admitted to all state and federal courts in Mississippi, the United States Fifth Circuit Court of Appeals, and the United States Tax Court. He is a current member of the American Bar Association's National Advisory Panel, and he has twice served as President of the Associate Members of the Alabama-Mississippi Telecommunications Association. Stan has been a speaker at national communications conferences on the topic of the Low Income Program of the federal Universal Service Fund. He handles matters involving wireline and wireless communications, including certificates, transfers of authority, corporate restructures, and rates and tariffs; broadband and internet; utility pole attachments for power and communications carriers; cable systems; water and sewer services; and gas and electric issues. Stan is a member of the Board of Deacons of First Baptist Church of Jackson.



About the Editor

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⌘ DISCLAIMER ⌘

The Mississippi Business Law Reporter is a publication of The Business Law Section of The Mississippi Bar. The Reporter is intended to provide general information of interest to lawyers involved in Mississippi's business law community, and nothing contained herein should be construed as legal advice.

The views and opinions expressed in the articles published in The Mississippi Business Law Reporter are the authors' only and are not to be attributed to the Editor, the Business Law Section, or The Mississippi Bar unless expressly stated. Authors are responsible for the accuracy of all citations and quotations.

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 Neal Wise at nwise@joneswalker.com. All news, proposals and articles are subject to review and approval by the Editor and Section Leadership.

When submitting an article, the article should be the original work of the author and must not have been previously published (unless proof of consent to reproduction can be provided). Articles shall not, to the best of the author's knowledge, contain anything which is libelous, illegal, or otherwise infringes upon anyone's copyright or other rights. Authors are responsible for the accuracy of all citations and quotations.

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

Business Law Section Awards Scholarships

The Business Law Section of The Mississippi Bar made a \$1,000 donation to the University of Mississippi School of Law's Negotiation Board to help with participation in two competitions: (1) the national Entertainment Law Competition in Los Angeles, California, and (2) the regional meet of the Fourth Annual Transactional LawMeet in Kansas City, Missouri.

Pictured on Top are (from left to right): Stan Smith, Chair of the Business Law Section of The Mississippi Bar and Dean Richard Gershon of the University of Mississippi School of Law.



Recently, the Business Law Section of the Mississippi Bar also made a monetary gift to the Mississippi College School of Law. The award was earmarked to help the Moot Court Board send a team to the Transactional Meet competition. This competition requires law students to draft and negotiate an amendment to a business agreement. This year the competition will center on indemnification provisions in an acquisition agreement.

Pictured on Bottom are (from left to right): Mississippi College School of Law Dean Jim Rosenblatt; MC Law Student Philip Anthony (Head of the Business Law Student Section); Stan Smith; and MC Law Professor Cecile Edwards.



Business Law Section Co-Hosts Fall Social

The Business Law Section of the Mississippi Bar and the Mississippi Corporate Counsel Association will jointly host their 2013 Winter Social on December 3, 2013 from 4:00 p.m. to 6:00 p.m. at Nick's Restaurant in Fondren – on the Patio in Jackson, Mississippi. Our guests of Honor will be Secretary of State of Mississippi, Delbert Hosemann, and his Chief of Staff, Doug Davis. We hope you will make plans to attend.

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**The Business Law Section
of the Mississippi Bar has a
listserv.**



**As a member of the
Business Law Section you
are automatically a member
of the listserv.**

**To send a message to the
following listserv email address:**

BusinessLaw@listbox.com

LISTSERV RULES AND ETIQUETTE

TO MB LISTSERVE PARTICIPANTS:

Please review the listserve rules, etiquette and legal disclaimer below. This email is forwarded to participants on all MB listserves on a periodic basis to remind everyone of the rules and etiquette of MB listserves.

Listserve Rules and Etiquette

By joining and using The Mississippi Bar's listserves, you agree that you have read and will follow the rules and guidelines set for this listserve. You also agree to reserve list discussions for topics intended for discussion on this listserve.

As with any community, there are guidelines governing behavior on the listserves. Please take a moment to acquaint yourself with these important guidelines. MB reserves the right to suspend or terminate membership on all lists for members who violate these rules.

- **When sending messages use a meaningful subject line.** State concisely and clearly the specific topic of the comments in the subject line. This is a time-saver for all participants. Listserve participants will know if something can wait. Also, if they are not interested in the subject matter they can delete the message.
- **Do not post commercial messages.** The cyberspace term for this is "spamming". Contact people directly with products, programs and services that you believe would be of interest to them.
- **Stick to the topics intended for discussion on the listserve.**
- **Be polite, professional and civil.** Do not challenge or attack others. The discussions on MB listserves are meant to stimulate conversation, not to create contention. If you have a conflict with an individual, please settle it by private email.
- **Include a signature tag on all messages.** Include your name, affiliation, location, and e-mail address. Include only the relevant portions of the original message in your reply, delete any header information, and put your response before the original posting.
- **Warn other list subscribers of lengthy messages.** Either in the subject line or at the beginning of the message body with a line that says "Long Message."
- **Do not post anything you do not want to be seen in public.** Remember that e-mail is very easily forwarded and reproduced and can show up anywhere. Do not post anything in a listserve message that you would not want the world to see or that you would not want anyone to know came from you.
- **All defamatory, abusive, profane, threatening, offensive, or illegal materials are strictly prohibited.**
- **Don't send meaningless messages with no content.** Messages such as "thanks for the information" or "me, too" to individuals--not to the entire list. Do this by using your e-mail application's forwarding option and typing in or cutting and pasting in the e-mail address of the individual to whom you want to respond.
- **Do not send administrative messages through the listserve.** Messages such as "remove me from the list", should be directed to Rene' Garner at rgarner@msbar.org
- **Use caution when discussing products.** Information posted on the listserve is available for all to see, and comments are subject to libel, slander, and antitrust laws.
- **Use virus detection/protection software.** Make sure you have and use virus detection/protection software on your PC. If you receive a email that has a virus please post a message to the listserve immediately with "WARNING VIRUS" in the subject line followed by an explanation.

- **Do not send attachments through MB Listserves.** Many virus are spread by way of attachments. If you wish to send an attachment to someone please email directly and DO NOT POST to listserve .

Disclaimer and Legal Rules

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Messages should not be posted if they encourage or facilitate members to arrive at any agreement that either expressly or impliedly leads to price fixing, a boycott of another's business, or other conduct intended to illegally restrict free trade. Messages that encourage or facilitate an agreement about the following subjects are inappropriate: prices, discounts, or terms or conditions of sale; salaries; profits, profit margins, or cost data; market shares, sales territories, or markets; allocation of customers or territories; or selection, rejection, or termination of customers or suppliers.

MB does not actively monitor the site for inappropriate postings and does not on its own undertake editorial control of postings. However, in the event that any inappropriate posting is brought to MB's attention, MB will take all appropriate action.

MB reserves the right to terminate access to any user who does not abide by these guidelines.