MESSAGE FROM THE CHAIR

By Bridgforth Rutledge
Partner at Phelps Dunbar, LLP & 2008-2009 Chair of the Business Law Section of the Mississippi Bar

Despite the challenging economic environment, it is a good time to be a business attorney in Mississippi, and the Business Law Section is pleased to be a part of such an innovative and hard-working community of attorneys. Much of the large-scale litigation in Mississippi has disappeared, and while the economy is struggling, there are many new and exciting opportunities for business attorneys in our state.

Regardless of your political perspective, it is hard to deny that we are fortunate enough to have a number of capable, business-minded elected officials who are willing to take affirmative steps to improve the business climate in Mississippi, including Governor Barbour and Secretary of State Hosemann, both of whom have championed measures designed to remove unnecessary obstacles for existing businesses and attract new businesses from other states (and other nations).

As many of you already know, a number of study groups have been organized to propose and consider various changes to the business laws in Mississippi, including laws related to real property, trusts, intellectual property and limited liability companies. Members of the Business Law Section serve on some of these committees and provide our elected officials with valuable insight into the practical effect of various measures.

The Business Law Section was also happy to continue the tradition of granting scholarships to deserving in-state law students who have shown an interest and aptitude in business law. A student from Mississippi College School of Law and a student from the University of Mississippi Law School each received a $750 scholarship from the section this year.

It's also important to remember that the Business Law Section is not all business. It also creates a forum for attorneys to leave their practices at the office and get to know each other on a personal level. This year in May we held our annual social in conjunction with the Mississippi Corporate Counsel Association. The social was held at The Auditorium in Jackson and was well-attended.

The Business Law Section, in conjunction with the Health Care 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 Secretary of State Delbert Hosemann's presentation entitled *Business Reform Legislation from an Expert's Perspective*, Doug Noble and Chris Maddux's presentation entitled *The Sooner, The Better; Recognizing the Signs of Insolvency*, and Vivek Chandra's presentation entitled *Impacts of the Stimulus Bill to Health Law Issues*. Contact the bar for the location and time of the meeting.

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 where actively involved with the Business Law Section this year, including Bill Mendenhall, *Vice-Chair*, Bill McLeod, *Secretary/Treasurer*, Jimmy Milam, *Executive Committee Member*, Joyce Hall, *Executive Committee Member*, Cheryn Baker, *Executive Committee Member-Elect* and Ken Farmer, *Newsletter Editor*. They made my job much easier and more enjoyable.

A MERGERS & ACQUISITIONS ATTORNEY'S INTRODUCTION TO CHAPTER 11 AND THE "363 SALE"

By Douglas C. Noble, Partner at Phelps Dunbar, LLP, and Wendy R. Mullins, Counsel at Phelps Dunbar, LLP

The Chapter 11 Landscape

The Chapter 11 filing provides a "time out" to enable a company to catch its breath in order to develop and implement strategies to restructure its debt, address contractual arrangements with third parties (customers, suppliers, employees, etc.) and hopefully devise a plan to get back on its feet and move forward as a viable business. Quite frankly many larger companies have historically used Chapter 11 filings as a strategic tool to shed debt and "bad" contracts for years. Think MCI. Only recently have medium and smaller sized companies come to appreciate the potential benefits of a Chapter 11 filing. As an aside, we can all agree that there are larger problems if every company immediately jumps into a Chapter 11. After all, as business lawyers our system of order is premised on the sanctity of a contract so we are not suggesting that filing a Chapter 11 should be used without careful consideration of the pros and cons. Further as a society we have to consider the effects Chapter 11 filings have on other companies downstream when their negotiated arrangements are suddenly reworked by third parties. The point of this article is to discuss the impact of a Chapter 11 on the filing company and a buyer of assets, not the impacts - legal, economic, social or otherwise - on affected third parties.

The viability of any Chapter 11 reorganization hinges on the filing company's (the "debtor's") ability to finance its operations while in bankruptcy – whether through use of available cash collateral or through newly obtained financing ("debtor-in-possession financing" or "DIP financing"). A typical reorganization, no matter the size of the company, often takes many months or even years and is an expensive and extremely difficult undertaking for the company. Simply put, without some source of financing, a true restructuring and reorganization through Chapter 11 simply cannot work. The gridlock in the credit market has now made such reorganizations, in most instances, an unrealistic option.

As a consequence, more and more debtors are entering a Chapter 11 with the plan to sell all or part of its assets and operations under the protective cover of the Chapter 11 umbrella. Such a sale is often referred to as a "363 Sale", named for Section 363 of the Bankruptcy Code which is the Code section that governs a debtor's ability to use and/or sell its assets in bankruptcy. Likewise, savvy buyers are taking

notice of the Chapter 11 filings and going shopping for assets.

As a consequence, bankruptcy practice has emerged as one of the hottest areas in the practice of law. As an added bonus (for us Mergers & Acquisitions ("M&A") lawyers) due to the sheer volume of the filings, Chapter 11 cases have also become the new breeding ground for M&A deals. In fact, according to a report by New Generation Research Inc., a bankruptcy-data firm, the number of prearranged bankruptcy plans -- which receive significant creditor blessing before entering court -- could double in 2009, and furthermore the number of asset sales coming out of the bankruptcy court are well ahead of last year's pace. In fact, outlets both inside and outside the legal profession are recognizing this phenomenon. The *Wall Street Journal* ran an article on June 18, 2009, titled "Barbarians in Bankruptcy Court, Merger Financiers Find Action Now in Chapter 11; 'Debt Is the New Equity'" where it highlighted the interesting combination of the historic M&A deals with the protections afforded debtors (and buyers) via the bankruptcy laws.

The 363 Sale

Perhaps the most familiar and high-profile example of a 363 Sale is the recent Chrysler and GM cases. As with these cases, the 363 Sale often happens in the first few weeks or months of a Chapter 11 case. This is primarily out of necessity due to the unavailability of financing to permit operations to continue any longer than is necessary to effectuate the sale transaction. In most cases the asset sale will leave the debtor company as nothing but a shell to wind down in an orderly fashion, with the Chapter 11 process being used to liquidate in the most orderly and value-preserving fashion.

The 363 Sale will be documented with an Asset Purchase Agreement ("APA") just like a non-bankruptcy asset sale, and in form it will look very much like a traditional APA – it will define the assets and liabilities (if any) to be transferred, include representations and warranties, conditions to closing, termination and post-closing covenants, etc. However upon closer inspection you will immediately note that the 363 Sale APA is typically more basic in scope and visibly pro-seller. For example, the representations will be very narrow and straightforward, usually limited to factual statements such as that the debtor/seller has title and the ability to transfer. There is likely to be no warranty offered but instead the assets will be offered in an "as is and where is" state. And the debtor is likely not to be in a position to offer much in terms of remedy or indemnification for events arising after the closing. Occasionally, a 363 Sale APA will include an escrow to cover known liabilities that are tied to the assets being transferred, but the escrow is going to be for a very short period of time and aimed at specifically identified matters to be addressed almost immediately post-close.

The lack of contractual protections available to a buyer in a 363 Sale APA would suggest that due diligence would take on a much larger role for the buyer, when in fact that is not always the case. Due diligence certainly remains important to a buyer in a 363 Sale, but in most cases the buyer can focus its attention on the business elements of the diligence exercise versus the traditional legal issues (lien searches, real estate imperfections, environmental diligence, etc.). For the traditional M&A attorney, not digging into UCC and judgment searches, title reports, and the like sounds like madness – but this is where the benefit of the 363 Sale process comes into play. In a 363 Sale, generally and with very limited exception, the debtor/seller is able to transfer assets to a buyer free and clear of all liens, claims and encumbrances - with all liens, claims and encumbrances transferring to the proceeds – pursuant to entry of an order from the bankruptcy judge. Though rare, there have been situations where courts have held a buyer liable under a theory of successor liability, so a buyer should still proceed cautiously and negotiate as many typical contractual protections as possible. And as with most legal "rules," the circumstances of each situation must be reviewed to ensure the exception is not applicable.

Thus, a buyer in a 363 Sale is provided with a federal court order declaring that, upon closing, it will be the rightful owner of the assets in question, free of all other liens unless expressly assumed, free of successor liability or employment-related claims, and the debtor/seller and buyer both receive additional protections if, as most always must be the case, the transaction is one undertaken in good faith. For strategic and financial buyers of distressed businesses, these are protections and comforts that simply cannot be obtained – no matter how much diligence or how many protections and/or indemnifications are provided in the APA – outside of bankruptcy.

Another benefit of the 363 Sale applies to contracts. Consider the amount of time in a non-bankruptcy asset sale that is spent tediously reviewing contracts to determine if, how and when they may be assigned. In a 363 Sale, the buyer will be able to select the contracts that it wants to assume, regardless of the contractual provisions on assignment (provided all defaults are cured), and simply take them, again all with the swift entry of an order from the bankruptcy judge. Section 365 of the Bankruptcy Code governs contracts and leases, and most often 363 Sales involve Section 365 assumption and assignment of the relevant contracts and leases that accompany the assets being purchased.

The Stalking Horse & The Auction

Another interesting aspect to the 363 Sale process that a buyer and its attorney must understand is that a transaction negotiated to the APA stage with the debtor/seller will always be subject to the bankruptcy court's approval of the transaction. As with virtually all aspects of a bankruptcy filing, there is a great deal of transparency, and a transaction like this is subjected to the public proceedings that are the bankruptcy court system. Although confidential information and trade secrets are still subjected to protective orders and confidentiality agreements, a motion must be filed to approve the transaction and provided to all parties having an interest in the debtor company. These parties will have the opportunity to object to the transaction at a public hearing.

Auction sales are very common in bankruptcy because the transparent process essentially provides anyone interested in the assets with an invitation to come and attempt to purchase them. When the auction scenario is anticipated, the 363 Sale APA will typically refer to the buyer as a "stalking horse bidder" and will include provisions such as: timelines on how and when the notice and court approval is sought, a requirement that a bid be "qualified" before it can be considered, and the requirements that must be met for a bid to be a qualified bid. A buyer having negotiated an APA and being designated the stalking horse faces the potential of spending time and money to negotiate the APA in order to buy assets, only to be outbid at an auction and end up walking away with nothing. Because of this possibility, the buyer's attorney would be wise to negotiate the 363 Sale APA to include provisions aimed at offing the buyer protections – typically, a "break-up" or "topping" fee - in the event it is not the successful purchaser of the assets but its participation provided the incentive for others to bid higher for the assets. It is not unusual in instances where numerous bidders are expected to participate in a 363 Sale auction for there to be a motion filed and hearing held to actually approve the auction and bidding procedures, with a separate motion and hearing held to approve the sale to the successful bidder at the auction.

Another unique aspect to a 363 Sale transaction versus the traditional M&A transaction is that a 363 Sale is often times not simply a one-on-one, buyer-seller transaction due to the fact that unsecured creditors' committees are typically appointed and active in Chapter 11 cases of any size. Depending on the amount of debt owed and the overall value of the debtor's assets, the committee will have varying degrees of input in a 363 Sale process. The committee will certainly have an opportunity to object to an APA that has been brokered between the debtor/seller and buyer, but the committee also has the right and ability to "shop the deal" on its

own and attempt to find its own buyers or bidders. In fact, one of the committee's primary goals in the 363 Sale process will be to try and increase the return by generating competition among buyers for the assets. Accordingly, one key concern the committee will have is over the stalking horse provisions in an APA, as it will want to ensure that the provisions do not unduly hinder a third party from participating in the process. Again, the committee's constituency of unsecured creditors most often stands to benefit the most from any increase in the purchase price and therefore wants as many parties to be able to participate as possible. But, while a debtor and committee do not always see eye-to-eye on the particulars of the 363 Sale process, the ultimate goals of maximizing value is the same. Buyers must simply appreciate that, in this process, it can ultimately be a 3-party transaction with the committee trying to reshape or renegotiate the deal terms, either as an open participant in the process, through an adversarial role in the auction process, or at one or more of the hearings, which is certainly not the norm for a non-bankruptcy M&A deal.

Upon securing final court ordered approval at a 363 Sale hearing, the parties will thereafter proceed to close the transaction in what would otherwise be a very typical manner – cash changes hand, deeds are recorded, bills of sale are delivered, and files are closed.

Friendly Advice to the M&A Attorney

Since the seller in a 363 Sale is always going to be the debtor, it will already be fully staffed with counsel well versed in bankruptcy rules and procedures, who will skillfully navigate the process for the debtor's/seller's M&A lawyers. As counsel to a buyer in a 363 Sale process, obtaining qualified bankruptcy counsel to assist with the transaction in terms of navigating the court process and also drafting and documenting essential deal terms in the APA is not a luxury but rather the only prudent course of action.

Business lawyers have often referred to bankruptcy lawyers as operating in their own worlds, but there is no reason to fear the great mystery that is the world of bankruptcy. Instead, the wise M&A lawyer will partner with competent bankruptcy counsel and become a participant in all of the activity taking place in bankruptcy courts around the country. Chances are, this is where your next big transaction will arise. And while the world of bankruptcy is different, at its core the primary goal of the entire statutory scheme and related process is to make the best of a bad situation. It is in all parties' best interest to preserve the value of the enterprise not only for the creditors, suppliers and employees of the debtor business, but also the benefits felt downstream by the entire community through the continued existence of a viable business, employer and a tax payer. The possibilities are limitless for parties to be creative and to devise an otherwise unconventional method (by non-bankruptcy M&A standards) to effectuate a transaction, that results in a good, smart, fair and effective way to meet these goals. Participating in such new and interesting transactions under these circumstances is also professionally challenging and presents an M&A lawyer with a real opportunity for an "up close" look at how the outcome of your transaction affects the true stakeholders, near and far.

OVERVIEW OF THE STUDY GROUPS, PROPOSED/NEW CHANGES TO MISSISSIPPI'S BUSINESS LAWS, AND HOW THEY WILL HELP BUSINESS

By Cheryn N. Baker, Assistant Secretary of State, Division of Policy and Research

Last Spring the Secretary of State's Office formed six different volunteer groups to study all aspects of Mississippi's business laws with the goal of making them more business-friendly. People from all across the state were invited to participate, including many members of the Business Law Section of the Mississippi Bar and

people who work for businesses of all sizes in Mississippi. These groups met over the summer and have made recommendations for legislation to the Mississippi Legislature. The following is a summary of their proposals and their current status.

Business Courts

In November 2008 the Business Courts Study Group recommended the establishment of a pilot program by Supreme Court Rule or order. Under the proposal, a specialized docket would be created within the Circuit and Chancery Courts in three areas of the state (Northern, Central and Southern) for handling business cases (such as shareholder disputes, partnership dissolutions, etc. and business disputes). The Group recommended that three sitting or former judges be selected to hear the cases assigned to the business dockets. Over 20 states have some form of a business court and additional states are studying it or are in the process of implementing it. A business court will reduce the litigation costs for Mississippi's businesses because business cases will be resolved more quickly, and it will create a stable, predictable body of corporate law businesses can come to rely upon. The Group's recommendation is currently under consideration at the Mississippi Supreme Court.

Trademarks

The Trademarks Study Group recommended changes to the State's laws on trademark infringement to include the most current protections under federal law and make it easier to prove infringement claims. The new act allows businesses that have famous trademarks to enforce their trademarks rights against those businesses that would damage the mark's reputation. In addition, the updates provide greater protections to businesses that use competitor's trademarks in comparative advertising and to the media that use marks in news reporting. The Trademark Bill (SB 2641) was signed by the Governor and became effective July 1, 2009.

Charities and Nonprofits

The Charities and Nonprofits Study Group recommended a number of changes to the State's charitable solicitation laws to help ease regulatory burdens on charities and strengthen the Secretary of State's ability to enforce the law against dishonest charities. These changes include increasing the annual revenue threshold for charities registration with the Secretary of State from $4,000 a year to $25,000 a year; and expanding the Secretary of State's enforcement authority by allowing the Office to subpoena witnesses and documents during investigations, and to bring actions in Chancery Court to stop illegal activities and collect fines. The Nonprofit Corporation Bill (HB 680) was signed by the Governor and became effective July 1, 2009.

The Group also recommended a number of measures to increase transparency in our charities to help provide the public with the information it needs to make better informed decisions about donations. One recommendation is to post the IRS Form 990s of registered charities on the Agency's website. The Agency is in the process of implementing this recommendation and in the near future it will be able to post Form 990s on the agency's website as the forms are filed with the IRS. This program is currently in the testing phase with the IRS.

Limited Liability Companies and Corporations

These Groups recommended several changes to these laws to make them more business-friendly. They recommended that expedited filing services be established for a reasonable additional fee. The Groups also recommended that the Secretary be able to reduce fees when appropriate, such as allowing discounted fees for online filings. In addition, the Group recommended changing the corporation reinstatement laws to make it easier for corporations that have been administratively dissolved to get reinstated with the Secretary of State's Office. Finally, the Groups recommended that limited liability companies be required file annual reports with the Secretary of

State's Office, similar to the annual reports that corporations are required to file. Senate Bill 3060 places a cap on expedited filing fees at $25. Both Senate Bill 3060 and House Bill 515, which amend the business corporation and nonprofit corporation laws, were signed by the Governor and became effective July 1, 2009.

Securities

The Securities Law Group recommended the adoption of a new Securities act to replace our current act, which is very outdated. The new act will bring Mississippi in line with the most current state securities laws in other states and with federal law. Like the charities law changes, this act will enhance the enforcement powers for the Secretary to go after and punish dishonest companies and salespeople. It will also ease regulatory burdens of multi-state companies that sell securities in our state. The Securities Bill (HB 781) was signed by the Governor and will become effective on January 1, 2010, allowing time to adopt new rules and regulations to implement the act.

Conclusion

The Secretary of State's Office has begun educating and informing businesses about the business reform legislation that was adopted. We will give businesses plenty of lead time so they can comply with these new laws. In the meantime, we invite the public to read the materials and minutes of the groups which are on the Agency's website, under the Policy and Research Icon.

NOTE FROM THE EDITOR

If you are interested in contributing an article, have news of interest to Business Law Section members, or would like more information on an article published in this or a prior newsletter, please contact the editor, Kenneth D. Farmer, of YoungWilliams P.A., via email at: kfarmer@youngwilliams.com

For more information on the Business Law Section, please visit us online at: https://www.msbar.org/section.php