IN THE SUPREME COURT OF MISSISSIPPI

IN RE: THE MISSISSIPPI RULES
OF CIVIL PROCEDURE

RULES 89 R 99001

MOTION TO AMEND RULE 4(c)(5)
OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE

The Advisory Committee on Rules ("Committee") recommends that the Court adopt an amendment to Rule 4(c)(5) of the Mississippi Rules of Civil Procedure. In support thereof the Committee would show unto the Court the following:

1. Rule 4(c)(5) of the Mississippi Rules of Civil Procedure provides for service of process by certified mail on persons outside the State of Mississippi in the following manner:

> In addition to service by any other method provided by this rule, a summons may be served on a person outside the state by sending a copy of the summons and of the complaint to the person to be served by certified mail, return receipt requested. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery." Service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope mark "Refused."

The problem arises when service of process is attempted upon a foreign corporation, partnership or unincorporated association and a person other than the one the "restricted delivery" receipt is limited to signs on behalf of the restricted recipient. In the recent case of *Flagstar Bank v. Danos,* 2008 WL 5064953 (Miss. App. Dec.2, 2008) the Court of Appeals found service upon the registered agent of a foreign corporation by certified mail ineffective because the mail clerk signed the certified mail even though it was addressed to the registered agent. The Court of Appeals, "refuse[d] to adopt a corporate 'mailbox-type-rule' where service upon a foreign corporation is complete upon delivery as evidenced by the return receipt regardless of who signs for the corporation."

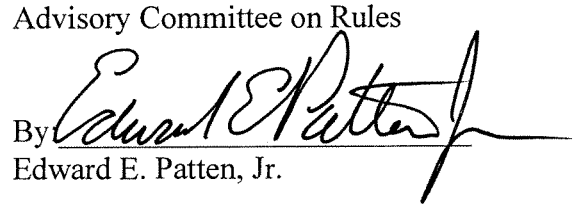
2. The Committee unanimously approved a change to Rule 4(c)(5) that would make service of process in circumstances similar to those in *Flagstar Bank* effective, with the additional requirement/safeguard of "back-up" service by first-class mail postage prepaid to the addressee at the same address used for the for certified mail. This is not without precedent in other states, *See e.g.* 12 Okl. St. Ann.§ 2004 C.2.(c). Also, Rule 4(d)(1)(B) of the Mississippi Rules of Civil Procedure contemplates effective secondary service upon individuals within the State by serving a spouse or other family members over sixteen years of age with follow-up mailing to the individual by first class mail, postage prepaid.

3. Attached as an Exhibit to this motion is a copy of the proposed change and proposed explanatory comment.

Wherefore premises considered, the Committee respectfully requests that the Court consider the Proposed Amendment to Rule 4(c)(5) of the Mississippi Rules of Civil Procedure.

Respectfully Submitted,

Mississippi Supreme Court
Advisory Committee on Rules

By 
Edward E. Patten, Jr.

Date: October 30, 2009

September 2009 Draft

Rule 4. Summons

(a) Summons: Issuance.
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(b) Same: Form.
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(c) Service.

(1) *By Process Server.*
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(2) *By Sheriff.*
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(3) *By Mail.*
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(4) *By Publication.*
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(5) *Service by Certified Mail on Person Outside State.* In addition to service by any other method provided by this rule, a summons may be served on a person outside this state by sending a copy of the summons and of the complaint to the person to be served by certified mail, return receipt requested. Where the defendant is a natural person, the envelope containing the summons and complaint shall be marked "restricted delivery." Service by this method shall be deemed complete as of the date of delivery as evidenced by the return receipt or by the returned envelope marked "Refused." On the same date that a copy of the summons and complaint are sent by certified mail to the person to be served, an additional copy of the summons and complaint shall be mailed by first-class mail, postage prepaid, to the person to be served, using the same address as was used for the certified mail. In the case of an entity described in subparagraph d(4) of this Rule, acceptance or refusal of the certified mail by any officer or by any employee of the registered office or principal place of business who is authorized to receive or who regularly receives certified mail shall constitute acceptance or refusal by the party addressed. A signed return receipt shall be presumed to have been signed by an employee authorized to receive certified mail.

(d) Summons and Complaint: Person to Be Served.
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(e) Waiver.
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(f) Return.
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(g) Amendment.
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(h) Summons: Time Limit for Service.
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[Amended effective May 1, 1982; March 1, 1985; February 1, 1990; July 1, 1998; January 3, 2002.]

COMMENT

The original version of Rule 4, effective as of January 1, 1982, was amended by the Mississippi Supreme Court on March 5, 1982. The amending order deleted the entire text of Rule 4 and substituted the prior statutory procedure for service of the summons. On December 28, 1984, the Supreme Court adopted a new Rule 4, effective March 1, 1985. Forms applicable to the new Rule 4 were adopted on May 2, 1985. This comment pertains to new Rule 4 and its forms.

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Rule 4(c)(5) provides for "Service by Certified Mail on Person Outside State" by sending a copy of the summons and complaint to the person to be served by certified mail, return receipt requested and by thereafter mailing by first class, postage prepaid, a copy of the summons and complaint to the person to be served at the same address. The Proof of Service must indicate the date on which a copy of the summons and complaint were mailed by first class mail and must also include as an attachment the signed return receipt or the return envelope marked "refused." The certified mail procedure is not available to serve a person within the state. It is an alternative form of service because a person outside of the state may also be served under Rule 4(c)(1), 4(c)(3) or 4(c)(4). The rule was amended in [ ] in response to Flagstar Bank FSB v. Danos, 2008 WL 5064953 (Miss. App. Dec. 2, 2008). There, in a case examining service upon a foreign corporation by certified mail, the Court of Appeals found that service was ineffective where the person who signed the return receipt was a mailroom clerk rather than the addressee. The amended rule clarifies that service upon a foreign corporation, partnership or unincorporated association is effective even if the certified mail is delivered to and signed for or refused by a person other than the addressee, if the person accepting delivery and signing for or refusing delivery is an employee of the defendant who is authorized to receive or who regularly receives certified mail. Due process requires that the service of process be reasonably calculated to provide the defendant with actual notice of the suit and an opportunity to defend. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Mailing a copy of the summons and complaint by certified and regular mail to a corporate agent authorized to receive service or to an officer or managing or general agent of the corporation is likely to lead to actual notice to the corporation. "[E]ven where the process is not delivered to the agent in hand, if it is accepted as special, certified mail by an employee at the agent's place of business, it is highly likely that the agent will get notice and will take the appropriate steps to initiate the corporation's response." Beck v. Atlantic Contracting Co., Inc., 157 F.R.D. 61 (D. Kansas 1994). The Rule 4(c)(5) procedure supplants the circuitous procedures previously available to obtain in personam jurisdiction against nonresidents. E.g. Miss.Code Ann. 13-3-63 (1972). However, the criteria for subjecting nonresidents to the jurisdiction of Mississippi courts are those established by the legislature.