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IN THE SUPREME COURT OF MISSISSIPPI

OCT 12 2011

IN RE: THE MISSISSIPPI RULES  
OF CIVIL PROCEDURE

RULES 89-R-99001

OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS

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

On November 2, 2009, the Advisory Committee on Rules (“Committee”) filed a motion recommending the Court adopt an amendment to Rule 4(c)(5) of the Mississippi Rules of Civil Procedure and to its Comment following the Mississippi Court of Appeals decision in Flagstar Bank FSB v. Danos, 46 So. 3d 348 (Ms. App. 2008). Subsequently, in 2010, the Supreme Court overruled the Court of Appeals in Flagstar Bank, FSB v. Danos, 46 So. 3d 298 (Miss. 2010). The Committee discussed the proposed amendment, upon review of the Supreme Court’s decision and determined to continue to recommend the Rule be amended so as to require the back-up mailing by first class mail.

In light of the Court’s decision in 2010, the Committee has recommended, however, that the proposed amendments to the Comment be revised to omit the reference to the Court of Appeals’ decision in Flagstar and to include a reference to the Supreme Court’s decision in Flagstar as follows:

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 serviced 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

MOTION# 2009-301

available to serve a person within the state. It is an alternative form of service because a person outside 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 rules clarifies that s 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). See Flagstar Bank FSB v. Danos, 46 So. 3d 298 (Miss. 2010)(finding service by certified mail upon a foreign corporation effective where the plaintiff addressed the certified mail to the foreign corporation’s registered agent for service of~~

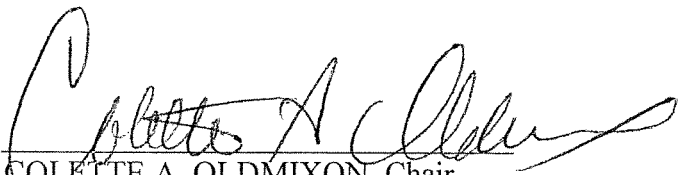
process and the certified mail was delivered to the proper address and signed for by the mail clerk rather than the registered agent). Service of process is not effective under Rule 4(c)(5) if the mailing is returned marked "unclaimed/refused", "unclaimed", or "undeliverable as addressed." See Bloodgood v. Leatherwood, 25 So. 3d 1047 (Miss. 2010). 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 non-residents to the jurisdiction of Mississippi courts are those established by the legislature.

The Committee respectfully requests that the Court consider the proposed amendments to Rule 26 of the Mississippi Rules of Civil Procedure and requests an opportunity, if it pleases the Court, to meet with the Court to discuss the proposed amendments, especially the two tiered approach to discovery as to experts and those pertaining to the discovery of electronically stored information.

The Committee respectfully supplements its original motion filed on November 2, 2009 and asks the Court to consider this supplementation when it takes up the Motion. The new proposed text for the Comment is attached as Exhibit 1 hereto.

Respectfully submitted, this, the 10<sup>th</sup> day of October, A.D., 2011.

MISSISSIPPI SUPREME COURT  
ADVISORY COMMITTEE ON RULES

BY:   
COLETTE A. OLDMIXON, Chair

## EXHIBIT 1

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 serviced 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 the state may also be served under Rule 4(c)(1), 4(c)(3), or 4(c)(4). 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. See *Flagstar Bank FSB v. Danos*, 46 So. 3d 298 (Miss. 2010)(finding service by certified mail upon a foreign corporation effective where the plaintiff addressed the certified mail to the foreign corporation’s registered agent for service of process and the certified mail was delivered to the proper address and signed for by the mail clerk rather than the registered agent). Service of process is not effective under Rule 4(c)(5) if the mailing is returned marked “unclaimed/refused”, “unclaimed”, or “undeliverable as addressed.” See *Bloodgood v. Leatherwood*, 25 So. 3d 1047 (Miss. 2010). 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 non-residents to the jurisdiction of Mississippi courts are those established by the legislature.