Judge Neil P. Olack's Opinion Summaries[1]
2020 Mississippi Bankruptcy Conference Newsletter

(1) *In re* Bohannon, Case No. 19-02123-NPO (Bankr. S.D. Miss. Aug. 16, 2019)
Chapter 13: Carl Bohannon ("Carl") initiated a contempt proceeding against his ex-wife, Patricia Bohannon ("Patricia"), in chancery court to enforce payment of a property settlement obligation awarded him in their divorce. The chancery court judge found Patricia in contempt of court and set the matter for a "review" hearing on June 18, 2019 (the "June Hearing"). Before the June Hearing, Patricia filed a voluntary petition for relief under chapter 13. She identified Carl as an unsecured creditor in her bankruptcy schedules and listed both Carl and his divorce counsel in the creditor mailing matrix. Notwithstanding the pendency of the bankruptcy case, the June Hearing took place with both Patricia and Carl in attendance along with their respective divorce counsel. No one mentioned Patricia's bankruptcy case to the chancery court judge. At the request of Patricia's divorce attorney, the chancery court judge reset the June Hearing. The day before the rescheduled hearing, Patricia's bankruptcy counsel filed the Notice of Chapter 13 Bankruptcy Filing (the "Bankruptcy Notice") in the contempt proceeding. Thereafter, the chancery court judge declined to proceed any further.

In the bankruptcy case, Patricia filed a motion for contempt alleging that Carl and his divorce attorney knew about the bankruptcy case but proceeded with the June Hearing anyway in violation of the automatic stay under § 362. Carl and his divorce attorney testified that they did not receive notice of the bankruptcy case before the June Hearing. As proof that they had received notice, Patricia relied on the BNC's certificate of mailing of the Bankruptcy Notice. She also testified that she saw Carl near her divorce attorney's office and that Carl's girlfriend was "telling everyone" about the bankruptcy filing.

The Court noted that a bare denial of having received a bankruptcy notice in the mail generally is insufficient to rebut the presumption arising from the BNC's certificate of mailing. Carl and his divorce attorney, however, presented additional evidence indicating that it was customary for Carl to bring any mail he received to his divorce attorney's office for his same-day review. Both testified that Carl never brought the Bankruptcy Notice to his divorce attorney's office. Moreover, everyone agreed that the bankruptcy case was never mentioned at the June Hearing. Patricia's testimony about Carl's girlfriend was too tenuous to establish by implication that Carl or his divorce attorney knew about the bankruptcy filing before the June Hearing. For all of these reasons, the Court found that Patricia had failed to show that either Carl or his divorce attorney

[1]These opinion summaries were prepared by Rachael H. Lenoir, Olivia O'Brien, and Natalie McCarty, judicial law clerks to U.S. Bankruptcy Judge Neil P. Olack. They include those opinions that have not been summarized previously in the materials provided at the Mississippi Bankruptcy Conference and all opinions rendered this year through September 1, 2020. Opinions pending on appeal, however, are not included in these summaries but are listed at the end. These materials are designed to provide general information and should not be considered as a substitute for the actual text of the opinions. Unless noted otherwise, all references to code sections are to the U.S. Bankruptcy Code, and all references to rules are to the Federal Rules of Bankruptcy Procedure.

willfully violated the automatic stay by proceeding with the June Hearing. *Young v. Repine (In re Repine)*, 536 F.3d 512, 519 (5th Cir. 2008).

(2) *In re* Harris, Case No. 19-02083-NPO (Bankr. S.D. Miss. Sept. 9, 2019)

Chapter 13: The Debtor listed 104 Riverpark #B, Jackson, MS 39202 (the "Duplex") as his street and mailing address in his chapter 13 bankruptcy petition. In his schedules, the Debtor listed the Duplex as his homestead and claimed an exemption in the Duplex of $21,000.00 pursuant to MISS. CODE ANN. § 85-3-21. The Debtor did not list rent as a source of income. The Trustee filed an objection to the Debtor's claim of exemptions arguing that the Duplex, only one side of which was occupied by the Debtor, did not fall within the definition of an exempted "residence" as under MISS. CODE. ANN. § 85-3-21. At the hearing, the Debtor explained that one side of the Duplex was currently vacant and that he intended to remodel and rent that unit.

As a matter of first impression, the Court overruled the Trustee's objection and held that the Debtor was entitled to the homestead exemption under Mississippi law for the entirety of the Duplex. The Court was persuaded by the historical development of the homestead exemption in Mississippi. Mississippi courts liberally construe the homestead exemption in favor of the property owner and have held that the homestead exemption statute does not require the "actual literal, continuous, physical occupation" of the land adjoining the residence for the owner to claim it as part of his homestead. *Daily v. City of Gulfport*, 212 Miss. 361, 54 So. 2d 485, 488 (1951). Indeed, the homestead exemption has been extended to protect not just the place of shelter but also its use as a means of making a living. The Court reasoned that no other interpretation justified the statutory protection of over one hundred and sixty (160) acres of land since the quantity exceeded the needs of a residence and any possible curtilage. The Court held that at the time the bankruptcy petition was filed, only the Debtor occupied and owned the Duplex, and his use of the property did not present any obstacles to his claiming the entire Duplex as his exempt homestead.

(3) *In re* Heritage Real Estate Investment, Inc., Case No. 14-03603-NPO (Bankr. S.D. Miss. Sept 11, 2019)

Chapter 7: In a separate but related adversary proceeding (16-00040-NPO), the Court found that a quitclaim deed purportedly conveying the debtor's interest in approximately eighty (80) acres of land in Kemper County, Mississippi (the "Kemper Property") to Dynasty Group, Inc. ("Dynasty") was invalid and void as a matter of Mississippi law. In addition, the Court found that the Trustee was entitled to avoid the quitclaim deed as a hypothetical bona fide purchaser for value without notice of the unrecorded quitclaim deed under § 544(a)(3). On appeal, the District Court affirmed the Court's ruling. Dynasty appealed the District Court's affirmance to the Fifth Circuit.

While the appeal was pending, the Trustee filed an application seeking the Court's permission to employ an auctioneer to sell the Kemper Property in the bankruptcy case. Dynasty objected on the ground that granting the application would result in inconsistent judgments if the Fifth Circuit ruled in its favor. Dynasty also filed a motion to stay the bankruptcy case pending the appeal in the adversary proceeding. The Court denied the stay because it lacked authority to do so under Rule 8007 and entered an order approving the employment of the auctioneer. Subsequently, the Trustee filed a motion seeking authority from the Court to sell the Kemper Property to the highest and best bidder at an on-line auction sale. Again, Dynasty objected to the sale motion on the ground that granting it could result in inconsistent judgments. Again, the Court found no reason

in the absence of a stay to prevent the Trustee from moving forward with his duties to liquidate estate assets.

(4) Pool v. Winstead (*In re* Winstead), Adv. Proc. 19-00013-NPO (Bankr. S.D. Miss. Sept. 24, 2019)

Chapter 13: The Debtors, in their capacity as members of Winstead & Son Trucking, LLC, entered into a promissory note with Darin D. Grantham ("Grantham") for the purchase of a 1998 Kenworth W900 (the "Kenworth") for $110,000.00. The Debtors granted Grantham a security interest in the Kenworth and, in their individual capacities, executed two deeds of trust in favor of Grantham. Grantham assigned his interests to the Creditor. The Debtors defaulted on their payments, and the Creditor repossessed the Kenworth and paid the property taxes on the other collateral. The Creditors did not foreclose on the Kenworth but kept it in their possession. The Debtors then filed a chapter 13 voluntary petition and listed the Creditor's claims on their bankruptcy schedules. After filing the bankruptcy case, the Debtors retrieved the Kenworth from the Creditor's possession without the Creditor's knowledge or consent. The Creditor filed proofs of claim in the bankruptcy case to which the Debtors filed objections.

In the meantime, the Creditor filed an adversary complaint alleging that the debts of the Debtors and Winstead & Son Trucking, LLC were nondischargeable under § 727 and § 523. The Creditor filed an application to the clerk of the bankruptcy court for entry of a default alleging that the Debtors had failed to "plead, answer or otherwise defend" the adversary. The clerk entered a default, and the Debtors then filed a motion to set aside the default judgment. The Creditor filed an application for an entry of default judgment in the adversary. After a hearing, the Court set aside the entries of default and denied the application for a default judgment. The Court also consolidated the claim objection and response into the adversary pursuant to Rule 7042. The Debtors filed a motion to dismiss the adversary for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)") as made applicable to the adversary by Rule 7012. The Creditor filed a response with a general denial of the assertions set forth in the motion to dismiss.

First, the Court found that Winstead & Son Trucking, LLC was not a debtor in a bankruptcy case and the claims against it should be dismissed. Second, the Court held that the Creditor's claims under § 727 and § 523(a)(6) should be dismissed given that the Debtors sought relief under chapter 13. Left for the Court's decision was the dischargeability issue under § 523(a)(2). The Creditor cited § 523(a)(2)(A) as authority in favor of nondischargeability but did not identify any false representation that the Debtors knowingly made to the Creditor and did not allege actual fraud. The Creditor next relied on § 523(a)(2)(B) but did not present any factual allegations regarding any statement made in writing or otherwise that presented a claim under § 523(a)(2)(B). The Creditor's request for damages did not indicate whom the court should enter a judgment against, and the Creditor did not cite any applicable law for the Court to consider in deciding the damages issue. The Court held that the adversary complaint failed to state a claim upon which relief could be granted.

The Court then addressed the procedural issues with the adversary. Local Rule 7056-1 (3) requires the respondent in an adversary to file both a response and memorandum brief. The Creditor filed a one (1)-page document, which the Court struggled to classify as a proper response. The Creditor

stated in the one (1)-page document only that he "stands on the assertions in the *Complaint*" and did not file an accompanying memorandum brief. At the hearing, Creditor's counsel did not indicate that she wished to remedy the Creditor's failure to comply with the Local Rules. Indeed, the Creditor did not take advantage of the multiple opportunities to amend the complaint to withstand a Rule 12(b)(6) motion. The Court held that the failure to act to amend the complaint and counsel's position at the hearing were acknowledgments that the Creditor had stated its best case for nondischargeability. The Court, therefore, dismissed the nondischargeability claim with prejudice. The Court allowed the Debtors an opportunity to seek attorney's fees under § 523(d).

(5) *In re* Youngblood, Case No. 19-02780-NPO (Bankr. S.D. Miss. Oct. 15, 2019)

Chapter 13: The Debtor filed a petition for relief under chapter 7 on June 20, 2016 and received a discharge after which the bankruptcy case was closed. Almost two years later, the Debtor filed a voluntary petition for relief under chapter 13. Before the completion of the second bankruptcy case, the Debtor entered into an agreed order dismissing the second bankruptcy case on May 21, 2019. Less than three months after the second bankruptcy case was dismissed, the Debtor filed another voluntary petition for relief under chapter 13 commencing her current bankruptcy case. Trustmark National Bank ("Trustmark"), the holder of the Debtor's mortgage on her residence, filed a motion asking the Court to determine the applicability of the automatic stay as to its collateral and to impose a 180-day filing bar on the Debtor.

The Court noted that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 created a specific statutory scheme to address repetitive filings that afforded decreasing access to the protection of the automatic stay with each successive bankruptcy case pending within a year. The Court held that the progressive limitation of the automatic stay under § 362(c)(3) applied to the Debtor because she had a chapter 13 case pending within the one-year period prior to filing the current bankruptcy case. The Court, however, adopted the majority view that § 362(c)(3) terminated the stay only with respect to the debtor and the debtor's property and did not terminate the stay as to property of the bankruptcy estate. Because the residence was property of the bankruptcy estate, § 362(c)(3)(A) did not terminate the protections of the automatic stay.
(**Note**: After the Court issued this opinion, the Fifth Circuit Court of Appeals in *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 230 (5th Cir. 2019), adopted the same majority view.)

(6) Origin Bank v. Barrett (*In re* World Health Jets, LLC), Adv. Proc. 19-00026-NPO (Bankr. S.D. Miss. Oct. 21, 2019)

Chapter 7: Mitchell Chad Barrett ("Barrett") formed World Health Jets, LLC ("WHJ"). On November 27, 2013, WHJ obtained a commercial loan from Origin Bank in the original principal amount of $3,150,000.00 (the "WHJ Loan") to finance the purchase of a jet aircraft (the "Airplane"). Barrett purportedly executed in favor of Origin Bank a Commercial Guaranty (the "WHJ Guaranty") personally guaranteeing the WHJ Loan. In early 2016, the U.S. Department of Defense seized the Airplane as part of a statewide health care fraud investigation. On February 2, 2016, WHJ filed a chapter 11 petition for relief (the "WHJ Case") (No. 16-00296-NPO). On that same day, five pharmacies and a management company owned by Barrett filed chapter 11 petitions for relief. These cases, including the WHJ Case, were consolidated into the lead bankruptcy case of the management company (No. 16-00297-NPO). The WHJ Case was later de-consolidated and converted to a chapter 7 case.

In the WHJ Case, Origin Bank filed a proof of claim in the amount of $2,837,480.35 identifying Barrett as a co-debtor on the WHJ Loan. Neither WHJ nor Barrett filed an objection to the proof of claim. After entry of an order granting Origin Bank relief from the automatic stay, WHJ coordinated the release of the Airplane from the U.S. Department of Defense. On July 13, 2016, Origin Bank and Barrett entered into a settlement agreement concerning the conditions and terms under which the Airplane would be sold (the "Settlement Agreement"). A recitation in the Settlement Agreement provided that Barrett executed the WHJ Guaranty in favor of Origin Bank. Following the Airplane sale, a deficiency balance remained. Origin Bank filed suit against Barrett in the U.S. District Court for the Southern District of Mississippi (the "District Court"), No. 3:17-cv-00920-CWR-LRA, seeking a judgment against him for the deficiency balance owed under the WHJ Loan and for the amounts it incurred as a result of Barrett's alleged failure to comply with the WHJ Guaranty and the Settlement Agreement.

The District Court referred the dispute to this Court for final adjudication pursuant to 28 U.S.C. § 157(a). The District Court observed that there was a factual dispute in the record as to whether Barrett personally guaranteed the WHJ Loan but found that because Barrett signed the Settlement Agreement, Barrett was liable for the WHJ Loan deficiency. In the referral order, the District Court noted that despite his finding on liability, the Court was "free to reconsider the evidence and law *de novo* should it identify any errors or omissions."

In the adversary, the Court considered cross-motions for summary judgment and Barrett's motion to strike the affidavit of Randy Impson (the "Impson Affidavit."). With respect to the motion to strike, Barrett argued that Randy Impson ("Impson") lacked personal knowledge of the WHJ Loan transaction in question. Randy Impson ("Impson") was the senior vice president and senior credit officer of Origin Bank and also custodian of Origin Bank's books and records. The Court found that a motion to strike was unnecessary after the 2010 amendment to Rule 56 of the Federal Rules of Civil Procedure ("Rule 56"), as made applicable to adversary proceedings by Rule 7056, because under Rule 56(c)(2), a "party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Therefore, the Court treated the motion to strike as an objection to the Impson Affidavit under Rule 56(c)(2). The Court found that because the Federal Rules of Bankruptcy Procedure contemplate the need for testimony by corporate officers and because Impson, in the event of a deposition, would be Origin Bank's representative, Impson's statements as to the contents of the exhibits attached to the Impson Affidavit constituted competent summary judgment evidence and satisfied Rule 56(c)(4).

In cross-motions for summary judgment, both Barrett and Origin Bank sought judgment as a matter of law on Origin Bank's claim for damages for Barrett's alleged breach of the WHJ Guaranty. To establish its claim, Origin Bank had the burden to show that: (1) Barrett signed the WHJ Guaranty; (2) the WHJ Guaranty encompasses WHJ's obligations under the WHJ Loan documents; (3) Origin Bank is the current holder and owner of the WHJ Loan; (4) the WHJ Loan is in default; and (5) the conditions (if any) of Barrett's liability—as laid out in the WHJ Guaranty—have been met. *Edwards Family P'ship, Ltd. v. Dickson*, 821 F.3d 614, 618 (5th Cir. 2016) (applying Mississippi law). Only the first element was in dispute because Barrett denied that the signature on the WHJ Guaranty was his and denied that he authorized anyone to sign his name to the WHJ Guaranty.

With respect to Barrett's summary judgment motion, Barrett contended there was no genuine dispute that he did not sign the WHJ Guaranty. In addition to his own testimony, Barrett submitted a report composed by a forensic document and handwriting examiner, which concluded that the disputed signature was not his. The Court found that notwithstanding Barrett's testimony and the opinion of the handwriting examiner, there was a genuine dispute as to whether Barrett signed the WHJ Guaranty or authorized someone else to sign it on his behalf. Such evidence defeated summary judgment in favor of either Barrett or Origin Bank as to the genuineness of Barrett's signature. This finding was consistent with the District Court's observation that there was a factual dispute in the record as to whether Barrett personally guaranteed the WHJ Loan. The Court, therefore, denied Barrett's summary judgment motion.

In Origin Bank's summary judgment motion, Origin Bank argued that the doctrines of ratification, equitable estoppel, and judicial estoppel precluded Barrett from denying the validity of WHJ Guaranty. First, Origin Bank asserted that Barrett ratified the signature on the WHJ Guaranty. Because the relevant time frame for ratification purposes was measured from the date Barrett first learned about the forgery, the Court examined the summary judgment record to determine whether there was a genuine dispute demonstrating that Barrett had ratified the WHJ Guaranty after he became aware of the forgery. *Northlake Dev. L.L.C. v. BankPlus*, 60 So. 3d 792, 797 (Miss. 2011). The Court found that the undisputed facts established that Barrett ratified the WHJ Guaranty by not repudiating it within a reasonable period of time after he learned of the forgery. By actively engaging in settlement negotiations with Origin Bank while remaining silent, Barrett deprived Origin Bank of the opportunity to protect itself. The Court, therefore, found that Barrett's ratification of the WHJ Guaranty precluded him from denying its validity.

Second, Origin Bank asserted that Barrett was equitably estopped from denying the validity of the WHJ Guaranty because it detrimentally relied on the WHJ Guaranty in extending the WHJ Loan for the purchase of the Airplane. Origin Bank's detrimental reliance on the WHJ Guaranty at the time it extended the WHJ Loan was undisputed by Barrett. The Court found that Barrett's duty to inform Origin Bank of the alleged forgery did not arise until he discovered it. The Court, therefore, focused its inquiry on whether there was a genuine dispute that Origin Bank suffered prejudice as a result of Barrett's silence after July 2016. Because Barrett's conduct misled Origin Bank into believing that the WHJ Guaranty was valid after July 2016, the Court found that Origin Bank did reasonably rely on Barrett's silence to its detriment. Accordingly, the doctrine of equitable estoppel applied to prevent Barrett from denying the validity of the WHJ Guaranty.

Third, Origin Bank contended that Barrett was judicially estopped from asserting the position that he did not sign the WHJ Guaranty because he previously asserted the contrary position in the WHJ Case, where WHJ consistently described Barrett in the WHJ Case as the guarantor on the WHJ Loan. Because all three elements of judicial estoppel were met, the Court found that Barrett was judicially estopped from denying the validity of the WHJ Guaranty. Therefore, the Court granted Origin Bank's summary judgment motion, finding that Barrett was personally liable for the breach of the WHJ Guaranty.

(7) *In re* Parks, Case No. 19-03502-NPO (Bankr. S.D. Miss. Oct. 28, 2019)

Chapter 13: The Debtor filed a voluntary petition for relief under chapter 13. One week later, the Debtor filed a motion to extend the automatic stay. The Creditor objected to the Debtor's motion

on the ground that the Debtor's bankruptcy case "was presumptively not filed in good faith and was also to delay, hinder or defraud [the Creditor] with multiple bankruptcy filings." The electronic court filing system confirmed that the Debtor had filed ten (10) bankruptcy cases over a period of nineteen (19) years. In the twelve (12) months prior to the current bankruptcy filing, the Debtor had two (2) other cases pending before the Court. Of the Debtor's five (5) most recent bankruptcy filings, four (4) cases were dismissed for failure to make plan payments. The Debtor's ten (10) bankruptcy cases were an attempt to save the Debtor's homestead, a seven (7)-acre residence with a current value of $240,000.00. In the current case, the Debtor scheduled the Creditor's secured claim in the amount of $350,000.00. The Debtor testified that although she listed her current monthly income as only $2,680.00, her monthly income then averaged $6,137.00. The Debtor did not present any evidence beyond her testimony to prove the $3,457.00 increase in her monthly income.

The Court considered the totality of the circumstances in determining whether the case had been filed in good faith. The Court concluded that the Debtor had filed the ten (10) bankruptcy cases in an attempt to keep her home that she had built in 1996, which was just four (4) years before she filed her first bankruptcy case. Of the Debtor's ten (10) previous filings, the Debtor was unsuccessful in nine (9) of the bankruptcy cases. The Court held that the Debtor had not met the burden of proof under § 362(c)(3) and sustained the Creditor's objection.

(8) *In re* Bourne, Case No. 18-52396-KMS (Bankr. S.D. Miss. Oct. 28, 2019)[2]

Chapter 13: On May 9, 2018, David C. Frazier ("Frazier"), acting as counsel for Memorial Hospital at Gulfport ("Memorial"), filed suit against the Debtor in the County Court of Harrison County, Mississippi (the "County Court Lawsuit") to collect a debt owed Memorial for unpaid medical services. On December 12, 2018, the Debtor filed a petition for relief under chapter 13. Pursuant to § 362, the filing of the petition automatically stayed all proceedings in the County Court Lawsuit. The Debtor filed a waiver of discharge, which the Court approved. Thereafter, the clerk of the bankruptcy court issued a Notice of Ineligibility to Receive Chapter 13 Discharge Pursuant to 11 U.S.C. § 1328(f)(1) and (2) (the "Ineligibility Notice") notifying creditors that as a result of a prior bankruptcy filed by the Debtor, the Debtor was ineligible to receive a discharge in the instant case and that upon completion of the chapter 13 plan, none would be issued. The Ineligibility Notice specified that the automatic stay provisions of § 362 were not affected.

Approximately six (6) months later, Frazier filed a Notice of Hearing (the "Notice")in the County Court Lawsuit related to a motion for judgment on the pleadings filed prior to the initiation of the bankruptcy case. Counsel for the Debtor asked Frazier to withdraw the motion for judgment on the pleadings on the ground the continuation of the County Court Lawsuit violated the automatic stay. That same day, Frazier withdrew the Notice.

The Debtor filed a Motion for Sanctions for Willful Stay Violation (the "Sanctions Motion") stating that the filing of the Notice violated the automatic stay provisions of § 362(a). The Debtor requested that the Court hold both Frazier and Memorial in contempt of court and award the Debtor actual damages for emotional distress and attorney's fees and costs. Frazier and Memorial denied

[2] This contested matter was transferred by Judge Katharine Samson to Judge Neil P. Olack for adjudication.

liability. In support of her damages claim, the Debtor testified at the hearing that after receiving the Notice and letter from Frazier notifying her that Memorial intended to obtain a judgment against her and garnish her wages, she felt "very upset, very nervous [and] scared" and experienced a medical condition. Frazier testified that upon receiving the Ineligibility Notice, he mistakenly believed the automatic stay had terminated, thereby allowing him to pursue the County Court Lawsuit. He denied any willful intention to violate the automatic stay. After the hearing, the Debtor submitted an itemization of her damages.

The Fifth Circuit has adopted three (3) elements that must be met in order for a stay violation to be considered willful: (1) the creditor must have known of the existence of the stay; (2) the creditor's acts must have been intentional; and (3) the creditor's acts must have violated the stay. *Young v. Repine (In re Repine)*, 536 F.3d 512, 519 (5th Cir. 2008). The Court found that all three parts of the test established by the Fifth Circuit in *Repine* were satisfied, and accordingly, the filing of the Notice constituted a willful violation of the automatic stay, entitling the Debtor to damages under § 362(k).

The Court found no evidence that Memorial lacked knowledge of Frazier's actions, and, therefore, held that they were jointly and severally liable for the Debtor's actual damages. The Court held that the Debtor was entitled to actual damages consisting of attorney's fees and emotional distress damages, but because Frazier acted promptly to remedy the stay violation, the circumstances did not warrant an award of punitive damages.

(9) *In re* VCR I, LLC, Case No. 12-02009-NPO (Bankr. S.D. Miss. Oct. 28, 2019), *appeal dismissed as moot*, 3:19-cv-00808-DPJ-FKB (S.D. Miss. Apr. 1, 2020)

Chapter 7: The bankruptcy case was initially commenced as a chapter 11 case but was later converted to a chapter 7 case. The bankruptcy case has a complex docket amassed over nearly seven (7) years and has generated two appeals before the U.S. Court of Appeals for the Fifth Circuit. In this opinion, the Court provided an extensive overview of the facts and procedural history leading up to the Trustee's Motion to Sell Property Free and Clear of Liens, Interest, Encumbrances and Claims — Church Road Property (the "Motion for Sale") and the response to the Motion for Sale filed by Dr. Pradeep Rai, the owner and manager of the Debtor. The property at issue consisted of a .45-acre tract of land ("Tract A") and an additional .384-acre tract of land ("Tract B") (collectively, the "Church Road Property"). The Church Road Property was the subject of an adversary proceeding initiated by the Trustee against Madison County, Mississippi regarding one of a number of tracts of land previously owned by the Debtor. Tract A was not included in a subsequent version of a lease agreement between Madison County and the Debtor. The Trustee and Madison County reached a settlement agreement that deeded Tract A and Tract B to the bankruptcy estate. Now undisputed property of the bankruptcy estate, the Trustee proposed to sell the Church Road Property for $40,700.00 to St. Joseph Catholic Church (the "Church"). Dr. Rai objected to the Motion for Sale. Dr. Rai argued that the Motion for Sale should be stayed pending the resolution of an appeal of the sale of four (4) separate and distinct tracts of land and that the Trustee did not market the Church Road Property. In his objection, Dr. Rai offered to purchase the Church Road Property "for more than what is being offered" but did not disclose a specific amount. The Trustee asked Dr. Rai to provide proof of funds to purchase the Church Road Property. The day before the hearing, Dr. Rai filed a proposed asset purchase agreement and a letter from U.S. Bank. Neither was offered into evidence at the hearing. Dr. Rai

offered to purchase the Church Road Property for $1,000.00 more than the Church but did not present any evidence of an intention to follow through with the purchase at the hearing. The Church appeared at the hearing with a non-certified check in the full amount of the purchase price and an authorized agent to complete the purchase if the Court granted the Motion for Sale.

The Court found Dr. Rai's arguments in the objection and at the hearing unclear and unsupported by evidence. First, Rule 8007 governs the stay of a bankruptcy judgment, order, or decree pending an appeal to the district court. Here, the district court already had affirmed this Court's decision on the sale of the other, separate tracts of land in No. 3:18-cv-00420-LG-RHW, at which point any stay under Rule 8007 would have expired anyway. Dr. Rai did not seek a stay of the district court's judgment from the district court under Rule 8025 or from the Fifth Circuit under Rule 8 of the Federal Rules of Appellate Procedure. (The Fifth Circuit later affirmed this Court in *Rai v. Henderson*, No. 19-60163 (5th Cir. Dec. 19, 2019)). The Court also explained that the Church Road Property was separate from the four (4) tracts of land at issue pending before the Fifth Circuit. Second, Dr. Rai argued that the "property proposed to be sold has not been marketed." The Trustee, after notice and hearing, may sell property of the bankruptcy estate pursuant to § 363(b)(1). The sale of property is subject to court approval and must be "supported by an articulated business justification, good business judgment, or sound business reasons." *The Cadle Co. v. Mims (In re Moore)*, 608 F.3d 253, 263 (2010). The Church and the Trustee presented extensive evidence to justify the Motion for Sale. The Court found the Trustee's testimony that the expense to advertise and orchestrate a public auction for the Church Road Property, the last asset of the bankruptcy estate, was unlikely to yield a significantly higher sale price. The Court found that the small, triangular-shaped Church Road Property that is constricted by setbacks and zoning requirements has only a small usable portion. Further complicating the marketability of the Church Road Property was access. The Court found the evidence presented by the Church and the Trustee demonstrated the Trustee's sound business judgment in accepting a slightly lower price and avoiding the administrative costs associated with another form of sale. The Court approved the sale and overruled the objection.

Dr. Rai appealed the sale order but did not seek a stay. The Trustee finalized the sale of the Church Road Property on December 2, 2019. Thereafter, the district court dismissed the appeal as moot under § 363(m).

(10) *In re* Graves, Case No. 19-01345-NPO (Bankr. S.D. Miss. Nov. 19, 2019)
Chapter 13: In her bankruptcy schedules, the Debtor disclosed that her residence was encumbered by two (2) mortgages securing separate loans owed to the same bank. In her chapter 13 plan, she proposed to continue paying the first mortgage and to treat the second mortgage as a wholly unsecured claim. The Debtor did not propose to make any payments to her unsecured creditors. The bank objected to confirmation of the plan on the ground that the plan violated § 1322(c)(2) by proposing to "strip the lien" created by the second loan.

The U.S. Supreme Court in *Nobelman v. Am. Savings Bank*, 508 U.S. 324, 327 (1993), construed § 1322(b), which prohibits the modification of any claim secured only by an interest in the debtor's residence, as prohibiting the bifurcation of an under-secured home mortgage into its secured and unsecured portions. But if the deed of trust or mortgage is a junior lien and the value of the residence securing the junior lien is less than the amount owed on the senior lien, the junior lien is

wholly unsecured. In that event, the Fifth Circuit Court of Appeals has held that the junior lien is not protected by § 1322(b). *Bartee v. Tara Colony Homeowners Ass'n (In re Bartee)*, 212 F.3d 277, 291 (5th Cir. 2000).

The bank disputed that the value of the residence was less than the balance of the first mortgage. The sole issue before the Court was whether the value of the residence was equal to or less than $76,931.91, the debt owed on the first mortgage. If so, the bank would be left with a wholly unsecured claim as to the second mortgage. Conversely, if the residence was worth more than $76,931.91, even if by only $1.00, then § 1322(b)(2) prevented the debtor from modifying the bank's second mortgage.

At the hearing, the Debtor and the bank both presented the testimony of a Mississippi-certified real estate appraiser as to the value of the residence. Both adopted the sales comparison approach. The Debtor's expert valued the residence at $65,000.00, whereas the bank's expert valued the residence at $104,000.00. The Debtor's expert relied largely on a foreclosure sale in reaching his opinion. The Court found that his choice of a foreclosure sale was inappropriate for a valuation under § 506(a) because the Debtor intended to remain in her home. *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 963 (1997). The Court found that the remaining comparable sales in his analysis, which were not foreclosure sales, provided a more reliable fair market value of the Debtor's residence except that the Court disagreed with the downward adjustment for an "entrepreneurial profit" of $10,000.00. The Court found that those sales without the $10,000.00 downward adjustment, when averaged, provided a fair market value of the residence of $76,750.00. The Court rejected the appraisal of the bank's expert of $104,000.00 because all of the homes that he relied on in reaching his opinion had been remodeled and, thus, were not substantially similar to the Debtor's residence. The Court also found that his estimate of repair costs was unreasonably low.

(11) *In re* Owens, Case No. 18-04738-NPO (Bankr. S.D. Miss. Dec. 12, 2019)
Chapter 13: The Debtor purchased and financed a vehicle with the Creditor. The Debtor agreed to make bi-weekly payments and, among other things, to maintain collision insurance on the vehicle with the Creditor named as the loss payee. The same day as the purchase, the Debtor attempted to relinquish possession of the vehicle to the Creditor because the transmission was malfunctioning, and the odometer was not working. The Creditor, however, refused to accept the vehicle, refund the down payment, or repair the vehicle. Two (2) months later, the Debtor again attempted to return the vehicle to the Creditor because the vehicle still was not working properly. The Creditor kept the vehicle for three (3) to four (4) months to repair the problems. The Creditor represented to the Debtor that the vehicle was fixed, but the Debtor continued to have issues with the vehicle. At some point after purchasing the vehicle but before filing the bankruptcy case, the Debtor allowed the collision insurance to lapse on the vehicle.

In her chapter 13 plan, the Debtor identified the vehicle as a "910" motor vehicle that she intended to retain and pay the Creditor the amount of its secured claim in full. After confirmation of the plan, the vehicle completely stopped working and could not reasonably be repaired. The Debtor filed a motion asking the Court for permission to modify the plan to surrender the vehicle to the Creditor and cease payments to the Creditor. The Creditor filed a response opposing modification of the confirmed plan.

The Court recognized that there is a split among courts regarding a debtor's ability to modify a plan to surrender collateral and treat any deficiency as an unsecured claim. The Court previously had joined the majority view that such action is authorized by § 1329(a)(1) and (3) and is consistent with § 502(j) as to the reclassification and reconsideration of secured claims. In that regard, § 1329(a)(1) allows a debtor to modify a plan to "increase or reduce the amount of payments on claims of a particular class provided for by the plan." Section 1329(a)(3) allows a debtor to "alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan." Finally, § 502(j) allows for reconsideration of a claim if "cause" has been shown according to the requirements of Rule 60(b) of the Federal Rules of Civil Procedure and if the "equities of the case" support reconsideration. The Court found that the undisputed evidence established that the Debtor proposed the plan in good faith and intended in good faith to continue driving the vehicle. Although the Debtor allowed the collision insurance to lapse on the vehicle at some point, the Court rejected the view that a lapse of insurance creates a *per se* showing of bad faith. The Court found that there was cause to reconsider the claim and necessary relief because the surrender of the vehicle demanded a change in the treatment of the Creditor's claim in the plan. The Court held that the equities of the case weighed in favor of the modification. The Court granted the motion and allowed the Debtor to surrender the vehicle and treat any deficiency as an unsecured claim.

The opinion summaries at numbered paragraphs (12) and (13) relate to the following bankruptcy case:

***In re* Great Southern Golf Club, Inc., Case No. 19-51282-NPO (Bankr. S.D. Miss.)**
Chapter 11: The debtor in possession ("DIP") owned a one hundred and twenty-nine (129)-acre parcel of property in Gulfport, Mississippi comprised of two (2) tracts. The DIP utilized the property as a golf course with a five thousand (5,000) square foot clubhouse containing a bar and grill and a golf pro shop. The property also housed maintenance buildings for the necessary equipment. The DIP voluntarily filed the petition for relief under chapter 11. In the original petition, the DIP designated its business as "Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))." The Court signed the Agreed Scheduling Order (the "Scheduling Order") that extended the ninety (90)-day deadline for filing a disclosure statement and a confirmable plan of reorganization. The Creditor filed a motion seeking relief from the automatic stay (the "Stay Motion") arguing that "the collateral is diminishing and what little equity cushion existed as of the filing date has been lost." The Creditor also argued that the DIP "has no equity in the property and said property is not necessary for an effective reorganization." The Creditor further argued that the DIP has "failed to file a reasonable plan of reorganization within 90 days of the filing of the petition and the Court did not extend the time to file during the 90 day period" and that "[t]here is no feasible plan the [DIP] can file that has a likelihood of being confirmed." Finally, the Creditor alleged that the DIP failed to commence the monthly payments required of "single asset real estate" debtors by § 362(d)(3). The DIP filed a disclosure statement and plan of reorganization within the deadline set forth in the Scheduling Order. In its response to the Stay Motion, the DIP denied that § 362(d)(3) applied. In that regard, the DIP filed an amended petition removing the "Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))" designation. At a telephonic hearing on a motion to continue filed by the DIP, counsel for the DIP argued that the Stay Motion did not cite § 362(d)(2) and, therefore, the pleading was insufficient to proceed under that Code section or any

other statutory provision except § 362(d)(3). The Court ruled that the averments in the Stay Motion tracked language in § 362(d)(2) not found in § 362(d)(3) and were sufficient to allow the Creditor to proceed under § 362(d)(2). The Court then instructed the parties to file briefs with the Court on the purely legal issue under § 362(d)(3), which would determine whether a hearing on the Stay Motion would encompass both § 362(d)(3) and § 362(d)(2) or only § 362(d)(2). The two opinions summarized below resolved the dispute.

(12) (Dec. 16, 2019)
The Creditor sought relief from the automatic stay so that it could proceed under non-bankruptcy law to foreclose upon and obtain possession of the DIP's property. Under § 362(d)(3) a creditor is entitled to relief from a stay against single asset real estate debtors unless within ninety (90) days after entry of the order for relief or such later time as the court may determine for cause within that ninety (90) day period, the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time or the debtor has commenced monthly payments that satisfy certain statutory requirements. The DIP denied that it was a single asset real estate debtor and contended that the designation in the original petition was in error. The Court had to determine if the DIP was a single asset real estate debtor and, if not, how amending the petition to remove the designation impacted the bankruptcy proceeding.

It was undisputed that the DIP's operations were more substantial than the narrow scope of a single asset real estate case. The Court found that Rule 1009 states that a voluntary petition "may be amended by the debtor as a matter of course at any time before the case is closed." The Court held that because the amendment to the petition removed the single asset real estate designation, § 362(d)(3) did not apply to the DIP. The Creditor argued that the Court should not consider the amendment to the petition for purposes of the Stay Motion because the amendment was outside the ninety (90) day period set forth in § 362(d)(3). The Creditor failed to address that the Scheduling Order, entered within the initial ninety (90) day period, extended the deadline to file a disclosure statement and a confirmable plan of reorganization. The Creditor also argued that the DIP did not file a confirmable plan of reorganization under § 362(d)(3)(A). The Court found that when the Creditor filed the Stay Motion, the DIP had not yet filed a proposed plan, and at the time the Creditor filed the Stay Motion, it could not have had sufficient facts to allege that the plan did not have "a reasonable possibility of being confirmed" or was not "confirmable." The Court denied the Creditor relief under § 362(d)(3) and scheduled a hearing on the remaining issues under § 362(d)(2).

(13) (Jan. 23, 2020)
The Court held a hearing on the remaining issue under § 362(d)(2). Section 362(d)(2) requires the court to grant relief from the stay if "the debtor does not have equity in such property" and "such property is not necessary to an effective reorganization." The party opposing relief from the stay has the burden of proof on all issues other than the issue of the debtor's equity in the property. § 362(g). The parties stipulated that the property was encumbered by a debt of $4,242,034.59 with interest and attorney fees continuing to accrue. At the hearing, the Creditor offered the testimony and written report of Everette E. Ladner, III ("Ladner"), a Mississippi-certified real estate appraiser, and the DIP offered the testimony and written report of Stacy R. Breland ("Breland"), also a Mississippi-certified real estate appraiser.

In determining the equity question, courts generally consider the debtor's proposed disposition and use while considering the debtor's prospect for actually accomplishing the proposed disposition, the extent that the debtor's proposal jeopardizes the secured creditor's interests, and the costs associated with the proposed disposition. The DIP's plan proposed to restructure the debt or liquidate the DIP's assets for the benefit of all creditors. To maximize the potential value of the DIP's assets, the DIP requested a twelve (12)-month period to pursue either a sale of all or a portion of the property and/or negotiations with investor groups willing to develop a portion of the property.

The Creditor bore the burden of proof in demonstrating to the Court that the DIP lacked equity in the property. Ladner's valuation on behalf of the Creditor was only roughly $352,000.00 less than the $4,242,034.59 debt on the property. The Court was unconvinced that the valuation's $352,000.00 shortfall was not covered by the flawed decision to value the entire property, including the most valuable beachfront tract, at a single value per acre. Ladner only considered the sale of the property as single-family residential properties. In fact, Ladner testified that he had not even read the DIP's proposed plan. The Court still considered Ladner's report and testimony in making its decision but put little weight in the final figure that valued the entire 129-acre tract at the same value per acre. Further discounting Ladner's approach of valuing the entire property at the same per acre value was a previous valuation that he prepared seven (7) years earlier for the DIP. In the earlier report, Ladner employed a valuation analysis that more closely aligned with the use and disposition outlined in the DIP's proposed plan and the methodology employed by Breland. The earlier report and Breland's valuation analysis divided the property into three (3) different categories and assigned different values to each category of acreage. Ladner did not provide a convincing explanation for his change in opinion on segmenting the property for purposes of valuation. The Court was also not convinced by Ladner's assertion that the railroad tracks and potential access issues became a substantial detriment to the value of the property between his previous valuation and his current valuation.

The Court ultimately held that the Creditor did not meet its burden in proving that the DIP lacked equity in the property. The Court's decision relied heavily on its analysis of the amount in controversy to determine equity and its understanding of the disputed evidence. In making its decision, the Court found that even assigning a zero value to the most valuable acreage of the property and employing Breland's price per acre for the remaining acreage would support a finding that there was equity in the property. The Court, therefore, found it unnecessary to address the second prong of § 362(d)(2).

(14) Beher Holdings Trust v. Frascogna (*In re* Frascogna), Adv. Proc. 18-00128-NPO (Dec. 20, 2019)

Chapter 7: Beher Holdings Trust ("BHT") filed an adversary complaint (the "Complaint") against the Debtor, an attorney who BHT alleged was the custodian of approximately seven hundred (700) second mortgages (the "Loan Notes") with an original principal balance of approximately $10.6 million. The Loan Notes are one part of the complex and litigious business relationship between Community Home Financial Services, Inc. ("CHFS"), a mortgage servicing company, and William D. Dickson ("Dickson"), the chief executive officer and owner of CHFS, on the one hand, and Charles C. Edwards ("Edwards") and BHT on the other hand. The Loan Notes were stored in a filing cabinet in office space shared by the Debtor and Dickson. At some point, however, Dickson

moved the Loan Notes to a warehouse in Panama, the whereabouts of which remain unknown to this day. (After CHFS filed its own bankruptcy case, Dickson transferred more than $9 million from CHFS's account and in 2015 pleaded guilty to bankruptcy fraud.)

In the Complaint, BHT alleged that the Debtor owed contractual and fiduciary duties to BHT to hold the Loan Notes, that he breached his duties when he allowed Dickson to remove the Loan Notes, and that his breach of duties was the proximate cause of losses and damages sustained by BHT in the amount of $9,826,585.00. BHT further alleged that the debt was nondischargeable under either § 523(a)(4) or § 523(a)(6). The Debtor filed an answer generally denying any liability to BHT.

At the trial, the parties provided evidence and testimony about the transaction relating to the Loan Notes. The background is complex and extensive. Dickson and Edwards did not conduct their business in a professional manner. Dickson employed a disbarred attorney to draft paperwork for transactions using papers prepared for different transactions. The evidence suggested that Dickson and Edwards would regularly make modifications to agreements without executing documents that reflected the changes. Edwards would rely on Dickson's representations without performing any due diligence. In 2011, entities owned and/or purportedly controlled by Edwards provided approximately $9 million for CHFS to purchase seven (7) mortgage portfolios of approximately 2,000 subprime loans. "Portfolio # 7" consisted of the Loan Notes at issue in the Complaint. As part of the transaction, CHFS and BHT agreed that "[t]he custodian selected by [BHT] will hold the original Notes and Assignments to [BHT] for all loans in the portfolio and will be entitled to physically retain the original notes until they are paid." Dickson and Edwards agreed that the Loan Notes would be held by a third-party custodian. Edwards and Dickson had previously employed Harold B. McCarley, Jr. PLLC (the "McCarley Firm"), as the custodian of similar portfolios. The McCarley Firm's Custodial Agreement (the "Custodial Agreement") for the similar portfolios was a twelve (12)-page document signed by Dickson on behalf of CHFS, Edwards on behalf of the lender, and a designated agent from the McCarley Firm. The Custodial Agreement contained twenty-one (21) defined terms and referenced at least six (6) exhibits. The McCarley Firm had a complex agreement that set forth definite terms, obligations, and duties between the McCarley Firm and the lender. When approached about serving in a similar role for "Portfolio #7," the McCarley Firm refused to conduct business with Dickson. Dickson suggested to Edwards that the Debtor serve as the custodian. Neither Edwards nor BHT produced any evidence of an agreement with the Debtor, that BHT or Edwards had spoken directly to the Debtor, or that the Debtor maintained the required licensing and malpractice insurance. Instead, a series of emails entered into evidence at trial demonstrated that Edwards and BHT relied solely on Dickson's representations. The Debtor explained that at the time of his interaction with the Loan Notes, Dickson was operating a business out of a defunct country club in south Jackson, Mississippi. Dickson employed the Debtor only to "attest that each of th[e] [Loan] Notes had in fact been received." The Debtor agreed to attest to the receipt of the Loan Notes on four separate occasions and sign certifications attesting to the receipt of the Loan Notes. The Debtor was compensated $500.00, for a total of $2,000.00, from an account owned by CHFS, for his services. Neither Edwards nor any representative from BHT communicated with the Debtor about the transaction until the Loan Notes were missing and Dickson was not responding to Edwards's and BHT's demands. The Debtor did not provide any of the monthly reports to BHT on the Loan Notes and did not have any further involvement that indicated he had assumed the same responsibilities that

the McCarley Firm previously provided. When BHT contacted the Debtor and demanded the Loan Notes, the Debtor attempted to assist BHT by obtaining assurances from Dickson that they would be returned but was ultimately unsuccessful.

Before the Court could consider liability and dischargeability, the Court had to determine if BHT established the existence and amount of a debt. To make this determination, the Court considered the liquidation of BHT's claim for breach of contract and breach of a fiduciary duty under state law. The Court found there was no written agreement signed by both parties, there was no meaningful communication between the parties, and the only document that both parties acknowledged were the certifications the Debtor provided to Dickson. The certifications did not indicate the duration of the relationship or any other duties, obligations, or expectations regarding the Loan Notes. The Court found that the certifications were ambiguous. Since the Court determined the certifications were ambiguous, the Court looked at the parties' conduct and found no evidence to support a contractual relationship or any mutual assent to be bound. The Court further found no evidence of a fiduciary relationship between BHT and the Debtor under Mississippi law. The Court held that the Debtor did not breach a contract or breach a fiduciary duty entitling BHT to damages. The Court's finding rendered a determination of the other claims in the Complaint unnecessary.

(15) *In re* Pioneer Health Services, Inc., No. 16-01119-NPO (Bankr. S.D. Miss. Feb. 28, 2020)

Chapter 11: In early 2016, Pioneer Health Services, Inc. ("PHS") filed chapter 11 bankruptcy petitions on its own behalf and on behalf of its subsidiaries, including Medicomp, Inc. ("Medicomp") (Case No. 16-01126-NPO). The goal of PHS in filing the chapter 11 bankruptcy cases was to liquidate its assets and the assets of its subsidiaries and to cease all business operations. These affiliated cases were consolidated into the lead bankruptcy case of PHS.

When Medicomp commenced its bankruptcy case, Medicomp provided physical therapy and other rehabilitation services at twenty-six (26) facilities, most of which were in Mississippi. Medicomp's assets included real and personal property leases, furniture, fixtures, equipment, cash, business records, patient records, and accounts receivable. At an auction on November 21, 2017, EnduraCare Acute Care Services, LLC ("EnduraCare") purchased substantially all of Medicomp's business assets. The asset purchase agreement entered into by PHS, Medicomp, and EnduraCare (the "EnduraCare APA") itemized the specific categories of assets that were included in the sale.

In early 2018, PHS, its affiliates, including Medicomp, and the Official Committee of Unsecured Creditors of Pioneer Health Services filed a joint liquidating chapter 11 plan. The testimony at the confirmation hearing focused on the financial ability of each debtor to comply with § 351 and applicable non-bankruptcy federal and state law regarding the storage and/or destruction of patient records. Section 351 provides a process for the disposal of patient records within a relatively short period when the debtor otherwise does not have enough funds to pay for their long-term storage as proscribed by applicable federal and/or state law.

The joint liquidating chapter 11 plan, as amended, was confirmed by the Court. With respect to the patient records of Medicomp, the confirmation order provided that "notice to former patients of . . . Medicomp regarding such patients' records is not required under Section 351 of the

Bankruptcy Code and Rule 6011 of the Bankruptcy Rules because the patient records held and maintained by [Medicomp] after the Petition Date were sold to and assumed by the purchaser[] of [Medicomp's] healthcare facilities and operations during the course of the Bankruptcy Cases."

In June of 2019, the liquidating trustee for the trusts of PHS and Medicomp (the "Liquidating Trustee"), contacted EnduraCare to finalize the transfer of Medicomp's patient records. EnduraCare, however, declined to take possession of "historical records relating to patients who were never served by EnduraCare" because it maintained that it had purchased only the records of those patients who were being served by Medicomp as of the date of the closing of the sale and who continued being served by EnduraCare after the date of the sale. The Liquidating Trustee subsequently filed a motion asking the Court to compel EnduraCare to assume custody of, and accept responsibility for, all of Medicomp's patient records.

The Court resolved the parties' dispute based on an examination of the language contained within the "four corners" of the EnduraCare APA. Relying on Mississippi's three-step approach to contract interpretation, the Court noted that the EnduraCare APA was unequivocal in its identification of "all Patient Records" as a category of "Purchased Assets." The Court further noted that the EnduraCare APA treated patient records separately from all other categories of assets. This separate placement indicated that the parties did not intend any of the other subsections regarding Medicomp's business documents to apply to patient records. The Court noted that if EnduraCare had desired that Medicomp retain historical patient records, then it would have been a simple matter to add language limiting the definition of patient records. As written, however, the EnduraCare APA unambiguously conveyed all patient records, including historical patient records, to EnduraCare.

(16) Baptist Memorial Health Care Corp. v. Webb (*In re* Webb), Adv. Proc. 19-00025-NPO (Bankr. S.D. Miss. Mar. 3, 2020)

Chapter 7: Baptist Memorial Health Care Corporation ("Baptist") required its employees to receive training and pass a certification exam for Epic Systems Corporation's electronic medical record software system (the "Epic Software"). In March of 2017, Baptist hired the Debtor on the condition that the Debtor secure a certification in Epic Software. Baptist and the Debtor entered into a Memorandum of Agreement (the "Agreement") in which Baptist agreed to incur costs totaling approximately $12,000.00 for the Debtor's Epic Software training. Baptist agreed to forgive repayment of the costs if the Debtor continued working for Baptist in a full-time position for at least three (3) years from the date she obtained the required certification. On July 6, 2018, approximately thirteen (13) months after the Debtor completed the training and obtained her certification, the Debtor voluntarily resigned her employment with Baptist. Her resignation before the expiration of three (3) years constituted a breach of the Agreement for which the Debtor owed Baptist a total of $7,666.66 (the "Epic Certification Debt"). Baptist then filed a lawsuit in the General Sessions Court of Shelby County, Tennessee, seeking to recover the Epic Certification Debt, as well as attorneys' fees and costs. The Debtor filed a petition for relief under chapter 7 on March 8, 2019.

Baptist initiated the adversary proceeding against the Debtor asking the Court to enter an order excepting the Epic Certification Debt from discharge as an "Educational Benefit Loan" pursuant to § 523(a)(8). The Debtor filed an answer admitting the existence and amount of the Epic

Certification Debt but denying that the Epic Certification Debt was nondischargeable. The Debtor then filed a motion for summary judgment asserting that the Epic Certification Debt was not a loan for educational purposes under § 523(a)(8) as a matter of law and, therefore, was dischargeable. Baptist asserted that a genuine issue of material fact existed as to whether the Epic Certification Debt was nondischargeable because the purpose of the loan was to obtain the required education and training necessary to obtain certification in the Epic Software used at Baptist. Baptist further asserted that the Debtor's education for the position to which she was hired was not complete without receiving additional education in order to pass the certification exam. The Debtor responded, alleging that Baptist did not incur the Epic Certification Debt for an educational purpose but to entice the Debtor to accept employment by paying for the training required for the job. The Debtor further asserted that Baptist paid the Epic Certification Cost for the purpose of creating qualified long-term employees.

Once a summary judgment movant presents sufficient, competent evidence to entitle it to summary judgment as a matter of law, the nonmovant cannot rest merely on bare allegations in its pleadings but must set forth specific facts demonstrating a genuine issue for trial. The Court found that Baptist failed to make a sufficient showing on the essential element of its case with respect to which it had the burden of proof. Baptist's purpose in incurring the Epic Certification Debt was not to enable the Debtor to pursue an education. Baptist had a business purpose—to provide the Debtor the training necessary for her to use the Epic Software. The Court ruled that Baptist failed to show a genuine dispute that the Epic Certification Debt was educational in purpose within the meaning of § 523(a)(8)(A)(i). The Court, therefore, found that the Debtor was entitled to summary judgment as a matter of law that the Epic Certification Debt was dischargeable.

(17) *In re* On-Site Fuel Service, Inc., Case No. 18-4196-NPO (Bankr. S.D. Miss. May 8, 2020)

Chapter 7: Capital South Partners SBIC Fund III, LP ("Capitala III") filed a motion seeking authorization to assert claims allegedly held by the bankruptcy estate of On-Site Fuel Service, Inc. ("On-Site Fuel Service") against Mansfield Oil Company of Gainesville, Inc. ("Mansfield") for breaches of a Strategic Alliance Agreement (the "SAA") entered into by On-Site Fuel Service and Mansfield and torts arising out of Mansfield's wrongful acts. In response, the Trustee stated that "the proposition of bringing the contract claims" against Mansfield was discussed with Capitala III but that the Trustee "verbally refused" because such claims lacked merit. The Trustee nevertheless did not oppose the standing of Capitala III, "[s]ubject to approval of the Court," to pursue some of the contract claims against Mansfield "however unlikely the chance of success." The Trustee initially opposed standing to assert any tort claims but later indicated that she did not oppose Capitala III's standing to pursue tort claims as long as any recovery would inure to the benefit of On-Site Fuel Service's bankruptcy estate and any litigation expenses would be borne initially by Capitala III.

The Court denied Capitala III's request for derivative standing given the absence of clear, unequivocal consent to standing by the Trustee and the lack of any clear, colorable claim against Mansfield. *See La. World Exposition v. Fed. Ins. Co. (In re La. World Exposition)*, 858 F.2d 233 (5th Cir. 1988). In addition, the Court noted that a conflict of interest would arise if Capitala III and its attorneys were allowed to pursue claims on behalf of the Trustee because of the adversary initiated by the Trustee in which she asserted equitable subordination claims against Capitala III

and other defendants. Because the operative facts that would support the contract and tort claims that Capitala III proposed to assert against Mansfield and those operative facts that the Trustee asserted in support of her equitable subordination claims were irreconcilable, allowing Capitala III to pursue the contract and tort claims against Mansfield would place Capitala III and its attorneys "on both sides of the v."

The opinion summaries at numbered paragraphs (18) and (19) relate to the following consolidated adversary proceedings:

Mansfield v. Capitala (*In re* On-Site Fuel Service, Inc.), Adv. Proc. 19-00059-NPO, *consolidated with* Shaffer v. Diesel Direct, Inc. (*In re* On-Site Fuel Service, Inc.), Adv. Proc. 20-00007-NPO (Bankr. S.D. Miss.)

Chapter 7: Capitala Finance Corp., Capital South Partners Fund II, LP, Capital South Partners SBIC Fund III, LP (collectively, "Capitala") and Harbert Mezzanine Partners III, LP, f/k/a Harbert Mezzanine Partners III SBIC, LP ("Harbert") are private equity firms and together are the majority owners of On-Site Fuel Service, Inc. ("On-Site Fuel"), a tank wagon fuel supply business. Mansfield Oil Company of Gainesville, Inc. ("Mansfield") is a nationwide supplier of petroleum products. On April 12, 2018, Mansfield and On-Site Fuel Service entered into the Strategic Alliance Agreement (the "SAA") whereby Mansfield would sell petroleum products directly to On-Site Fuel Service's customers, and On-Site Fuel Service would focus on the delivery side of its business. On-Site Fuel Service's senior lender, PNC Financial Services Group, Inc. ("PNC Bank"), would not consent to the SAA unless there was an agreement in place for On-Site Fuel Service to pay off PNC Bank's loan. Mansfield agreed to advance On-Site Fuel Service $4.8 million for that purpose, and on May 12, 2018, Mansfield, On-Site Fuel Service, and PNC Bank entered into the Tri-Party Agreement (the "TPA"), at which time the SAA became effective. Pursuant to the TPA, On-Site Fuel Service agreed to repay the debt to Mansfield within 120 days of the effective date of the SAA.

On October 23, 2018, On-Site Fuel Service ceased operations, and Mansfield filed a chapter 7 involuntary petition (the "Involuntary Petition") against On-Site Fuel Service on October 30, 2018. The next day, On-Site Fuel Service sold its operating assets to Diesel Direct, Inc. pursuant to an asset purchase agreement (the "APA"). The Involuntary Petition was contested and litigated for several months. On May 24, 2019, the Court entered an order granting the Involuntary Petition (the "Order for Relief"). Mansfield and the Trustee initiated separate adversary proceedings that the Court later consolidated for discovery and trial purposes.

Mansfield Adversary (No. 19-00059-NPO): Mansfield sued Capitala, John F. McGlinn ("McGlinn" or, together with Capitala, the "Capitala Defendants"), Harbert, and John C. Harrison ("Harrison" or, together with Harbert, the "Harbert Defendants"). In its complaint, Mansfield sought a judgment against the Capitala Defendants and the Harbert Defendants, jointly and severally, for compensatory and punitive damages under common-law claims of fraud, negligent misrepresentation, tortious interference with contract, aiding and abetting, and civil conspiracy. Mansfield also sought treble damages under North Carolina's Unfair and Deceptive Trade Practices Act.

In support of its claims, Mansfield alleged that Capitala and Harbert managed their investment in On-Site Fuel Service as a joint venture by controlling On-Site Fuel Service's board of directors. McGlinn, a senior manager at Capitala, served as chairman of On-Site Fuel Service's board of directors. Similarly, Harrison, a senior manager at Harbert, served as Harbert's representative on On-Site Fuel Service's board of directors. Mansfield contended that McGlinn and Harrison voted as one block to control the operations, finances, and strategic decisions of On-Site Fuel Service for the benefit of Capitala and Harbert. Mansfield further maintained that during the pre-SAA discussions, McGlinn provided financial information about On-Site Fuel Service that he knew or should have known was materially inaccurate in order to persuade Mansfield to sign the SAA.

Mansfield alleged that after On-Site Fuel Service defaulted on its obligation to pay-off the debt, it disclosed downward adjustments that had been made to reflect negative EBITDA performance for the 2017 and 2018 years that had not been previously disclosed to Mansfield. According to Mansfield, when it met with representatives of On-Site Fuel Service to discuss the restated financial reports, On-Site Fuel Service revealed that it had experienced a seven percent (7%) drop in fuel sales volume beginning in late 2017.

Trustee Adversary (No. 20-00007-NPO): On February 3, 2020, the Trustee filed a separate adversary proceeding against Diesel Direct, Inc., Capitala, and Harbert. The Trustee sought to subordinate the secured claims purportedly held by Capitala and Harbert in the principal amount of $17,044,999.85 pursuant to § 510(c). She also asked the Court to avoid the "fire sale" of On-Site Fuel Service's assets to Diesel Direct, Inc. pursuant to § 549(a) and (b) to the extent of damages in the amount of $3,519,335.00, representing the difference between the fair value of the assets and the consideration paid by Diesel Direct, Inc.

The Trustee's allegations in support of the equitable subordination claims mirrored closely those in Mansfield's complaint. In general, the Trustee alleged that Capitala and Harbert exercised control over On-Site Fuel Service's assets and business decisions through their appointment of four of five members of On-Site Fuel Service's board of directors. She included additional allegations regarding the circumstances surrounding On-Site Fuel Service's decision to cease business operations and sell its assets. According to the Trustee, McGlinn abandoned his fiduciary duty to act in the best interests of On-Site Fuel Service when all customers were informed on October 22, 2018 that On-Site Fuel Service would no longer service their fuel needs, thus causing a *de facto* dissolution of On-Site Fuel Service's business. She also asserted that McGlinn breached his fiduciary duty by later disposing of On-Site Fuel Service's assets in a manner that minimized their value and that placed the interests of Capitala and Harbert over the interests of On-Site Fuel Service's other creditors. The Trustee also alleged that Capitala and Harbert structured the APA so that the consideration paid by Diesel Direct, Inc. would be routed directly to Capitala and Harbert and bypass On-Site Fuel Service.

(18) (May 14, 2020) (Mansfield Adversary)

The Capitala Defendants and the Harbert Defendants each filed a motion to dismiss all claims in Mansfield's complaint. In both motions to dismiss, the Capitala Defendants and the Harbert Defendants sought dismissal of all claims asserted against them under Rule 12(b)(7) of the Federal Rules of Civil Procedure ("Rule 12") for failure to join On-Site Fuel Service as a necessary and indispensable party. In the alternative, the Capitala Defendants asked the Court to dismiss all

claims under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The Harbert Defendants additionally sought a judgment on the pleadings under Rule 12(c). The Court ruled that Mansfield's claim of aiding and abetting breach of duty failed to state a claim for relief and dismissed the claim against the Capitala Defendants under Rule 12(b)(6) and granted the Harbert Defendants a judgment on the pleadings as to this claim. The Court denied the motions to dismiss as to all other claims.

(19) (Aug. 23, 2020) (Consolidated Adversaries)
The Trustee filed a motion seeking the disqualification of K&L Gates, LLP ("K&L Gates") as counsel for the Capitala Defendants. The Trustee argued that "KLG's participation as counsel in the consolidated adversaries, in which its former and current clients are materially adverse, coupled with the substantial relationship between its prior representation of On-Site and the facts on which the Trustee's claims are based, require the disqualification of KLG's participation in these actions under Rules 1.9 and 1.10 of the Mississippi Rules of Professional Conduct." The Trustee alleged that K&L Gates represented both the Capitala Defendants and On-Site Fuel Service before the filing of the Involuntary Petition and thereafter until entry of the Order for Relief on four legal matters: (1) the negotiation of the SAA and the related TPA; (2) On-Site Fuel Service's October 31, 2018 letter to Mansfield terminating the SAA; (3) On-Site Fuel Service's sale of assets to Diesel Direct, Inc.; and (4) the litigation of On-Site Fuel Service's involuntary bankruptcy proceeding. The Trustee sought the disqualification only of the lawyers affiliated with K&L Gates that had been admitted *pro hac vice* and not the disqualification of local counsel.

In support of its position that it did not represent On-Site Fuel Service in any of these matters, K&L Gates pointed out that there was no formal written agreement establishing an attorney-client relationship between On-Site Fuel Service and K&L Gates and that during the period in question, the law firms of Baker Donelson and Jones Walker had represented On-Site Fuel Service. The Court found that Mississippi law did not require proof of a written employment agreement, and, moreover, K&L Gates's inability to produce a copy of its employment agreement with On-Site Fuel Holdings showed that it did not always require a formal written agreement before providing legal services. Moreover, the Court found that the representation of On-Site Fuel Service by other counsel did not preclude the possibility of joint representation by K&L Gates.

The Court rejected the Trustee's argument that On-Site Fuel Service's payment of K&L Gates's fees for legal services established the existence of an attorney-client relationship *per se*. The payments were made by On-Site Fuel Service pursuant to a provision in a purchase agreement in which On-Site Fuel Service agreed to pay Capitala's fees and expenses, an arrangement that McGlinn described as "standard practice in the private equity sector."

According to the Trustee, numerous emails and timesheets demonstrated the implicit creation of an attorney-client relationship between K&L Gates and On-Site Fuel Service. The Trustee argued that the manifestation of an attorney-client relationship occurred each time that McGlinn asked K&L Gates to perform legal services and K&L Gates, in turn, performed those legal services. The Court, however, found that the Trustee's argument was premised on the assumption that McGlinn acted as On-Site Fuel Service's board chairman rather than as Capitala's senior manager during his communications with K&L Gates. McGlinn testified that he asked K&L Gates to provide legal services on behalf of Capitala, not On-Site Fuel Service. The Court concluded that the emails did

not manifest an intent by McGlinn to establish an attorney-client relationship between K&L Gates and On-Site Fuel Service or an intent by K&L Gates to provide legal services to On-Site Fuel Service.

The Trustee also relied on a series of emails exchanged between Jones Walker and K&L Gates as well as the timesheets of Jones Walker during the trial of the Involuntary Petition. The Trustee argued that the litany and frequency of the communications between the two law firms suggested that K&L Gates was acting "as a sort of counsel *sub rosa*" to Jones Walker. The Court found, however, that Capitala and On-Site Fuel Service shared a common legal interest and that the communications demonstrated a collaboration among attorneys of different law firms representing separate clients. The Court also concluded that the emails and timesheets submitted by the Trustee did not manifest an intent by McGlinn to retain K&L Gates on behalf of On-Site Fuel Service or an intent by K&L Gates to represent On-Site Fuel Service in the trial of the Involuntary Petition. Finally, the Court rejected the Trustee's suggestion that On-Site Fuel Service and On-Site Fuel Holdings should be treated as a single entity for conflict-of-interest purposes. Guided by the American Bar Association's construction of Rule 1.7 of the Model Rules of Professional Conduct, the Court found that the Trustee had not provided sufficient evidence of an interdependent relationship between On-Site Fuel Service and On-Site Fuel Holdings. In denying the Trustee's motion to disqualify K&L Gates, the Court noted the absence from the record of any statement by On-Site Fuel Service's lawyers at Baker Donelson or Jones Walker about the conflict of interest issue.

The opinion summaries at numbered paragraphs (20) and (21) relate to the following involuntary bankruptcy case:

***In re* Gutierrez, Case No. 20-50129-NPO (Bankr. S.D. Miss.)**
Chapter 7: On January 2, 2019, a state court awarded Hancock Whitney Bank ("Hancock Whitney") a judgment against the Alleged Debtor in the amount of $1,191,293.51. Nearly one year later and amidst an ongoing state court action to collect the judgment, Hancock Whitney filed an involuntary petition (the "Involuntary Petition") against the Alleged Debtor. The Alleged Debtor filed the Motion to Dismiss Involuntary Petition and Alternatively for Abstention under § 305 and Other Relief (the "Motion to Dismiss") arguing that the Involuntary Petition should be dismissed because: (1) Hancock Whitney could not show that the Alleged Debtor was not generally paying her debts as they became due at the time of the filing of the Involuntary Petition; (2) Hancock Whitney filed the Involuntary Petition for the improper purpose of substituting involuntary bankruptcy proceedings for customary collection remedies; (3) Hancock Whitney filed the Involuntary Petition for the improper purpose of using it as a litigation tactic; (4) Hancock Whitney failed to exhaust state court remedies before resorting to the filing of the Involuntary Petition; and (5) the subject of the Involuntary Petition was a two party dispute. In the alternative, the Alleged Debtor contended that the Court should abstain from exercising jurisdiction under § 305(a).

(20) (May 15, 2020)
At a status conference, the parties agreed to limit their arguments at the hearing to the issues raised in the Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)") and not to present any testimony or other evidence at the hearing. If the Court denied the Motion to Dismiss, then the parties would proceed with any remaining issues at a trial on the Involuntary Petition. The Motion to Dismiss was styled more as an answer to the Involuntary Petition than as a traditional motion to dismiss for failure to state a claim upon which relief can be granted.

In determining if the Involuntary Petition withstood the Motion to Dismiss, the Court looked to the substantive requirements under § 303. Pursuant to § 303, the petitioning creditor must establish: (1) that the alleged debtor can be a debtor under chapter 7 or 11 of the Bankruptcy Code; (2) that the petitioning creditor has standing to file an involuntary petition under § 303(b); and (3) that the alleged debtor is generally not paying her debts as they become due and the debts are not the subject of a bona fide dispute as to liability or amount. 303(a), (b), (h). The Alleged Debtor conceded the first factor and did not dispute the second factor. In deciding the third factor, the Court's decision focused on the limited issue before the Court at the hearing. The parties previously agreed that the Court would only consider the arguments under Rule 12(b)(6). In doing so, the Court was required to take the allegations in the Involuntary Petition as true. By utilizing Official Form 105, Hancock Whitney incorporated § 303(b)(2) language and alleged that the Alleged Debtor was not paying her debts as they became due and that the debts were not the subject of a bona fide dispute. The Court held that the mandate in Rule 9009(a) that a party use the Official Forms suggested that the use of Official Form 105 was legally sufficient to state a claim and that requiring additional information outside the Official Form would suggest the Official Form was somehow deficient. The Court concluded that the purposes of Rule 12(b)(6) are not necessarily served by dismissal of a contested involuntary petition prior to a trial on the merits. The Court denied the relief requested in the Motion to Dismiss under Rule 12(b)(6) and scheduled a trial on the Involuntary Petition (the "Trial").

(21) (July 6, 2020)
After the Court denied the requested relief in the Motion to Dismiss under Rule 12(b)(6), the Alleged Debtor filed an answer to the Involuntary Petition. The Court held the Trial on the Involuntary Petition, the remaining matters in the Motion to Dismiss, and the answer. The pretrial order stated that the issues remaining for Trial included: (1) whether the Alleged Debtor was generally not paying such debts as they became due pursuant to § 303(h); (2) whether bad faith is a ground for dismissal of the Involuntary Petition and, if so, whether Hancock Whitney filed the Involuntary Petition in bad faith; (3) whether cause exists for the Court to abstain under § 305(a); and (4) whether the Alleged Debtor is entitled to fees, costs, and damages under § 303(i) or other relief under § 303(k).

The Alleged Debtor conceded that she may be the subject of an involuntary petition pursuant to § 303(a); that Hancock Whitney was an eligible creditor under § 303(b)(2); and that Hancock Whitney's judgment against the Alleged Debtor was not the subject of a bona fide dispute as to liability or amount. The Court first determined whether the Alleged Debtor was generally not paying her debts as they became due pursuant to § 303(h), and whether Hancock Whitney met its burden of proving the statutory requirements for an order for relief. The Court would then turn to

the Alleged Debtor's arguments regarding bad faith, abstention, and the recovery of her costs, fees, and damages and other relief.

The Court found that although the Alleged Debtor only had one debt, the Hancock Whitney judgment, the judgment amount was significant and comprised the Alleged Debtor's total liabilities so as to fulfill the requirements of § 303(h). The Court noted that bankruptcy courts in the Fifth Circuit have held that a finding that an alleged debtor is not generally paying her debts may be appropriate "when [she] is not paying one hundred percent of [her] debts to only one creditor, or [when she is] paying most of [her] debts in number to small recurring creditors, but is not paying a few creditors that make up the bulk of [her] debts." *See In re Kennedy*, 504 B.R. 815 (Bankr. S.D. Miss. 2014) (internal citations & quotations omitted). Although the Debtor asserted that Hancock Whitney should have first foreclosed on the property that secured the note before obtaining a final judgment, a lender has multiple remedies upon the default of a promissory note and may choose to proceed with a collection suit against a borrower without first foreclosing on the deed of trust. *West Point Corp. v. New N. Miss. Fed. Savs. & Loan Ass'n*, 506 So. 2d 241, 242 (Miss. 1987). Having found that Hancock Whitney met the statutory requirements under § 303 (b) and (h) for entry of an order for relief, the burden shifted to the Alleged Debtor to show that the Involuntary Petition was filed in bad faith or that cause existed for the Court to abstain.

In *In re On-Site Fuel Serv., Inc.*, No. 18-04196-NPO, 2019 WL 2252003 at *9-10 (Bankr. S.D. Miss. May 24, 2019), the Court held that it lacked the authority to impose nonstatutory requirements on involuntary bankruptcy proceedings. As the Court previously held, the Court found here that if the petitioning creditor satisfied "the prerequisite requirements under § 303, 'a finding of bad faith [is] inappropriate.'" *In re Kennedy*, 504 B.R. at 824 (quoting *Aigner v. McMillan*, No. 11-47029-DML-7, 2013 WL 2445042, at *4 (Bankr. N.D. Tex. June 4, 2013)). The Alleged Debtor also argued that the Court should exercise its power to decline jurisdiction over a case pursuant to § 305(a). Despite the Alleged Debtor's assertion, the Alleged Debtor did not meet the substantial burden of proof necessary to invoke abstention under § 305(a). The Court, therefore, granted the order for relief under chapter 7 and denied the remaining relief requested in the Motion to Dismiss.

(22) *In re* Vaughn, Case No. 20-01179-NPO, (Bankr. S.D. Miss. June 4, 2020)
Chapter 7: In his chapter 7 bankruptcy case, the Debtor filed a Motion to Avoid Non-Possessory, Non-Purchase Money Lien held by OneMain Financial (the "Motion to Avoid Lien"). On the Debtor's Schedule A/B: Property, the Debtor listed a 2004 Hummer H2 with a current value of $10,000.00. On Schedule C: The Property You Claim as Exempt, the Debtor claimed as exempt $5,000 of the value of the Hummer pursuant to MISS. CODE ANN. § 85-3-1(a). In Schedule E/F: Creditors Who Have Unsecured Claims, the Debtor indicated that OneMain Financial held a nonpriority, unsecured claim in the amount of $8,662.00 for a loan made to the Debtor (the "Claim"). But in the Motion to Avoid Lien, the Debtor stated that a security agreement encumbered the Hummer for the debt owed OneMain Financial. The Debtor described the lien as a nonpurchase-money security interest and sought to avoid the lien pursuant to § 522(f)(2). The Proposed Order Avoiding Nonpossessory Nonpurchase-Money Security Interest submitted by the Debtor provided "that the nonpossessory, nonpurchase-money security interest of One Main Financial in [the] Debtor's vehicle . . . is, declared null and void." Accordingly, the Debtor proposed to treat the Claim as fully unsecured.

The Court found that pursuant to the exemptions set forth under Mississippi law in MISS. CODE ANN. § 85-3-1(a), a debtor may exempt motor vehicles as well as other personal property, but not every asset that a debtor may claim as exempt under state law, however, is eligible for lien avoidance under § 522(f)(1)(B). To avoid a lien under § 522(f)(1)(B), the asset not only must be exempt under state law but also must fall within one of the specific types of property listed in the bankruptcy statute. Accordingly, even assuming that the lien on the Hummer was a nonpossessory, nonpurchase-money security interest that impaired the Debtor's exemption under Mississippi law, the Debtor could not avoid the lien on the Hummer unless it fell within the type of property included in one of the specified categories set forth in § 522(f)(1)(B). None of the specified categories in § 522(f)(1)(B)(i)-(iii) included a motor vehicle. Moreover, § 522(f)(4)(B) specifically excluded a "motor vehicle" from the definition of "household goods" for purposes of § 522(f)(1)(B). The Court, therefore, denied the Motion to Avoid Lien on the ground that the Debtor sought to avoid a lien on a type of property that was ineligible for lien avoidance under § 522(f)(1)(B).

(23) *In re* Amazing Energy MS, LLC, Case No. 20-01243-NPO (Bankr. S.D. Miss. June 25, 2020)

Chapter 11: Amazing Energy MS, LLC ("AEMS"), Amazing Energy, LLC ("AEL"), and Amazing Energy Holdings, LLC ("AEH") each filed petitions for relief under chapter 11. The alleged basis for venue was by virtue of the AEMS Case, the first of the bankruptcy cases to be filed on the Court's docket. AEMS is domiciled in Mississippi. 28 U.S.C. § 1408(1). The alleged basis for venue of the bankruptcy cases filed by AEL and AEH was because of their status as "affiliates" of AEMS. AEMS is a wholly-owned subsidiary of Amazing Energy Oil & Gas, Co. ("AEOG"), the non-debtor parent company of all three debtors. 28 U.S.C. § 1408(2).

Alleged creditors filed motions asking the Court to dismiss the cases filed by AEL and AEH or, in the alternative, transfer the cases to a bankruptcy court in Texas. The creditors argued that AEL and AEH are not "affiliates" of AEMS because AEMS does not own, control, or hold the power to vote shares of AEL or AEH.

The Court found that because AEMS is domiciled in Mississippi, Mississippi was a proper venue for AEMS to commence its bankruptcy case under 28 U.S.C. § 1408(1). The Court also found that because the definition of "affiliate" in § 101(2)(B) includes a horizontal relationship, such as when a debtor and an entity share a common parent, venue of the bankruptcy cases of AEL and AEH in Mississippi was proper since they are corporate siblings of AEMS. *In re Reichmann Petroleum Corp.*, 364 B.R. 916, 920 (Bankr. E.D. Tex. 2007).

Although the Court found that venue was proper in Mississippi under 28 U.S.C. § 1408 for all three bankruptcy cases, the Court concluded that the cases should be transferred to a Texas bankruptcy court under 28 U.S.C. § 1412 "in the interest of justice" and "for the convenience of the parties."

(24) *In re* Carter, Case No. 20-00653-NPO (Bankr. S.D. Miss. June 26, 2020)

Chapter 13: Mr. Carter and Mrs. Carter (together, the "Debtors") filed a joint petition for relief under chapter 13 on February 25, 2020. The Debtors disclosed aggregate unsecured debt of

$518,190.21, and of this aggregate debt, $12,047.51 was owed jointly. The general unsecured debt attributable solely to Mr. Carter was $178,609.00, and the general unsecured debt attributable solely to Mrs. Carter was $327,533.70. On April 28, 2020, the Trustee filed a motion asserting that the bankruptcy case should be dismissed because the Debtors' aggregate unsecured debt exceeded the limit of $419,275.00 in § 109(e), thereby rendering them ineligible to be chapter 13 debtors in a joint case. The Debtors argued that § 109(e) allowed them to maintain a joint chapter 13 case because their separate, unsecured debt was below the limit for individuals. The Court concluded that the language of § 109(e) was clear and unambiguous: a debtor who files an individual case and debtors who file a joint case are subject to the same unsecured debt limit. Thus, the statute expressly treated the unsecured debts of joint debtors in the aggregate and did not provide for separate treatment of unsecured debts owed by joint debtors who would qualify individually.

Because the Debtors' aggregate unsecured debt exceeded $419,275.00, they were not eligible to be debtors in a joint chapter 13 case, regardless of their eligibility to file individual chapter 13 cases, pursuant to the plain meaning of § 109(e). Though the Trustee sought dismissal of the bankruptcy case, the Court found there were alternatives to dismissal. Therefore, before dismissing the bankruptcy case, the Court provided the Debtors with an opportunity to sever or convert the bankruptcy case or exercise some other option.

(25) Clay v. Whitten (*In re* Whitten), Case No. 19-00038-NPO (Bankr. S.D. Miss. July 10, 2020)

Chapter 7: The facts at issue in the adversary arose from a verbal agreement between the Plaintiffs and the Debtor regarding the purchase of real property (the "Property"). After paying the Debtor $2,000.00 per month for nearly two years, the Plaintiffs discovered that a judgment lien encumbered the Property. They filed a complaint in state court asserting common-law causes of action against the Debtor for conversion, breach of contract, equitable estoppel, unjust enrichment, and fraud. The Debtor filed an answer and was represented by counsel. The Plaintiffs filed a motion for summary judgment pursuant to Rule 56 of the Mississippi Rules of Civil Procedure seeking judgment as a matter of law on their claims for conversion, unjust enrichment, and fraud. The state court granted the summary judgment motion and entered a final judgment awarding the Plaintiffs $43,000.00 in compensatory damages and $5,901.26 in prejudgment interest, plus post-judgment interest at the rate of eight percent (8%) per annum. Because the Debtor was liable for fraud, the state court provided the Plaintiffs an opportunity to file a motion for an award of punitive damages and/or attorney's fees. Instead, the Plaintiffs filed a motion seeking approval to present the issue of punitive damages to a jury. The Debtor opposed the motion. Before the matter could be resolved, the Debtor commenced the bankruptcy case. In the bankruptcy case, the Plaintiffs filed a motion asking the Court to terminate the automatic stay to allow the state court to rule on the issues of punitive damages and/or attorney's fees. The Court granted the motion terminating the stay to allow the state court to rule but instructed the Plaintiffs to return to the bankruptcy court for a determination of dischargeability issues under § 523(a).

The Plaintiffs returned to the bankruptcy court and filed a proof of claim in the amount of $110,200.98. The Plaintiffs then filed an adversary complaint to determine dischargeability. The record demonstrated that the Plaintiffs and the Debtor were opposing parties in the previous state court action and that the transaction regarding the sale of the Property was essential to the entry of

the final judgments in state court against the Debtor. The final judgments in state court adopted the facts as presented by the Plaintiffs. The Debtor did not dispute or appeal the judgments and they became final. In the adversary, the Plaintiffs filed a motion asserting that they were entitled to summary judgement as a matter of law that the debt created by the final judgments was nondischargeable pursuant to § 523(a)(2)(A).

The doctrines of *Rooker-Feldman* and collateral estoppel required the Court to apply whatever preclusive effect a Mississippi court that rendered the judgment would afford that judgment. Under Mississippi law, a party is collaterally estopped from raising an issue that was: "(1) actually litigated in the former action; (2) determined by the former action; and (3) essential to the judgment in the former action." *Gibson v. Williams, Williams & Montgomery, P.A.*, 186 So. 3d 836, 345 (Miss. 2016). Here, the record demonstrated that the Plaintiffs and the Debtors were opposing parties in the state court action and the transaction regarding the sale of the Property was essential to the entry of the final judgments on the merits. Although the Debtor asserted that the final judgments did not consider numerous significant factors, the doctrine of collateral estoppel applied to a previous default judgment "where personal jurisdiction of a defendant has been obtained[,]" and the debtor had a meaningful opportunity to participate. *Sanders v. Nunley (In re Nunley)*, 237 B.R. 907, 912-13 (Bankr. N.D. Miss. 1999).

Finding that the doctrines of *Rooker-Feldman* and collateral estoppel applied to the final judgments, the Court then considered whether the elements for false representation and/or actual fraud under § 523(a)(2) were met by the elements for common-law fraud on which the final judgments were premised. The Court found that the finding of facts in the state court action rendered the final judgments nondischargeable under § 523(a)(2)(A) and that the consideration of the Debtor's additional evidence would have required the Court to modify or reverse the findings of fact of the state court.

(26) *In re* Mangum-Barnes, 19-04069-NPO (Bankr. S.D. Miss. July 10, 2020)
Chapter 13: After the deadline for non-governmental creditors to file a proof of claim had expired, the Creditor filed an amended proof of claim (the "Amended POC") on January 30, 2020 in the bankruptcy case. The Creditor had timely filed its original proof of claim (the "Original POC"), indicating that it had a claim in the amount of $13,096.48, secured by a lien on a 2013 Chevrolet Malibu (the "Collateral"). The Creditor repossessed the Collateral in September 2019, approximately two months prior to the Debtor's bankruptcy filing. On January 16, 2020, the Creditor sold the Collateral for $3,800.00, resulting in a deficiency balance of $9,887.98. The Amended POC was filed to recover this deficiency balance. The Trustee moved to allow the late-filed Amended POC, and the Debtor filed an objection.

The Court applied the two-step test promulgated in *United States v. Kolstad (In re Kolstad)*, 928 F.2d 171 (5th Cir. 1991), to determine whether the late-filed Amended POC should be permitted. The *Kolstad* test asks: (1) whether the creditor is attempting to stray beyond the perimeters of the original proof of claim to effectively file a "new" claim, unforeseeable from the earlier claim; and (2) the degree and incidence of prejudice, if any, caused by the amending party's delay. Because the Creditor did not attempt to stray beyond the parameters of the Original POC, its timely filing of the Original POC provided sufficient notice to the Debtor as to the total amount of its claim. The Creditor recharacterized and reallocated pre-existing debt from the Original POC and did not

attempt to claim a new, unforeseen dollar amount. Therefore, the Amended POC was foreseeable, in satisfaction of the first prong of the *Kolstad* test. With respect to the second prong of the *Kolstad* test, the Debtor argued that the late filing of the Amended POC caused her to lose her right to a hearing on an objection to confirmation of her chapter 13 plan (the "Confirmation Objection") filed by the Trustee in December 2019. Prior to the hearing on the Confirmation Objection (the "Confirmation Hearing"), the Trustee and the Debtor entered into an agreement, and the plan was confirmed without a hearing. The Court found that the Debtor, while represented by counsel, made the decision to resolve the Confirmation Objection and forego the Confirmation Hearing. Because the Debtor was given proper notice of the Original POC as to the amount of the Creditor's claim, as well as an opportunity to be heard at the Confirmation Hearing, the late-filed Amended POC did not unduly prejudice the Debtor. Therefore, the Amended POC satisfied the Fifth Circuit's *Kolstad* test, and the Debtor's objection was overruled.

(27) *In re* Holmes, Case No. 20-00484-NPO (Bankr. S.D. Miss. July 13, 2020)
Chapter 13: The Debtor's mother, Thelma Holmes, signed a Fixed Rate Home Equity Conversion Note in the maximum principal amount of $75,000.00 secured by a deed of trust on her residence. When Thelma Holmes died, the Debtor inherited the property and the loan became due immediately. The Debtor filed a petition for relief under chapter 13 and listed the property as his principal residence. He proposed to pay the entire amount owed on the reverse mortgage ($51,790.98) through his chapter 13 plan over sixty (60) months. The Debtor valued the property in his bankruptcy schedules as $62,448.00. The mortgage lender sought relief from the automatic stay under § 362(d)(1) on the ground its interest in the property was not adequately protected. The mortgage lender argued that the Debtor could not include the mortgage in his proposed chapter 13 plan because the debt had been accelerated by the death of Thelma Holmes, the Debtor was not a "surviving borrower" on the note, and there was no privity of contract between the Debtor and the mortgage lender. Adopting the holding of the bankruptcy court in *In re Winstead*, No. 19-503017-KMS, 2019 WL 3491653 (Bankr. S.D. Miss. July 31, 2019), the Court ruled that the debtor-heir of a reverse mortgage borrower may pay the mortgage through his chapter 13 plan even though he has no personal liability. Accordingly, the Court found that the mortgage lender's interest in the property was adequately protected and denied its motion for relief from the automatic stay.

(28) *In re* Pahwa, Case No. 20-00103-NPO (Bankr. S.D. Miss. July 28, 2020)
Chapter 13: The Creditor initiated a civil action against the Debtor in the U.S. District Court for the Southern District of Mississippi (the "District Court Action"). The Creditor alleged that on January 6, 2020, the Debtor made an "unusual" offer to settle the District Court Action and unless the Creditor accepted the settlement offer, the Debtor would file for bankruptcy. The Creditor did not accept the purported offer. The Debtor commenced the bankruptcy case on January 10, 2020, and that same day, Debtor filed his bankruptcy schedules, statement of financial affairs, and other required forms. The Debtor's bankruptcy filing automatically stayed the District Court Action.

In the bankruptcy case, the Court granted a Motion for 2004 Examination (the "Motion") filed by the Creditor, seeking an order requiring the Debtor to appear for an examination and to produce certain documents (the "Rule 2004 Documents"). Two days before the deadline to produce the Rule 2004 Documents, the Debtor asked the Creditor for an extension of time to produce the documents on the ground that he was out of state and his return to Mississippi to retrieve the documents during the COVID-19 pandemic would pose a tremendous risk to his health. Then,

one day before the deadline to produce the Rule 2004 Documents, the Debtor filed a motion to dismiss his bankruptcy case. The Court entered an order granting the motion to dismiss, and the Creditor filed an objection. *See* MISS. BANKR. L.R. 1017-1(f)(2)(C) (allowing any party in interest to file an objection to a chapter 13 debtor's motion to dismiss within fourteen (14) days after entry of an ex parte order). The Creditor did not oppose the dismissal of the bankruptcy case but requested that the Court sanction the Debtor for his alleged bad faith conduct in commencing the bankruptcy case. The Creditor sought sanctions pursuant to Rule 9011 and the inherent powers of the bankruptcy court as articulated by the U.S. Supreme Court in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). The Creditor requested an award of its attorney's fees and costs in an amount the Court deemed appropriate and an order barring the Debtor from filing another bankruptcy case for 120 days following the conclusion of the District Court Action and the exhaustion of any appeals.

Because the Creditor's request for Rule 9011 sanctions was contained within its objection and not filed as a separate pleading, it did not comply with Rule 9011's requirement of a separate motion. Therefore, the request for sanctions under Rule 9011 was not properly before the Court. With respect to the Creditor's request for sanctions under § 105(a) and the Court's inherent power to sanction, it was not clear from the record that the Debtor commenced the bankruptcy case for the sole purpose of avoiding a jury trial in the District Court Action. The Debtor did not file a "barebones" petition for relief without any accompanying schedules. Further, the Debtor did provide a plausible explanation as to his inability to produce the Rule 2004 Documents by the deadline. Given the totality of the circumstances, the Debtor's conduct did not rise to the level of dishonesty and intent evident where courts have used their inherent powers to impose sanctions in the form of attorneys' fees. Therefore, the Court denied the Creditor's request for attorney's fees and costs. The Court did find, however, that any second bankruptcy filing soon after the dismissal of the bankruptcy case would be problematic, as counsel for the Debtor conceded at the hearing. The Creditor requested a 120-day filing bar following the conclusion of the District Court Action and any resulting appeals. That type of filing bar had no readily ascertainable start or end date, and, therefore, was procedurally improper. Rather, the Court found that imposing a filing bar for 180 days following the date of the order was proper under the circumstances.

Opinions for which there is no longer a pending appeal that have not been summarized in any previous edition of the* Mississippi Bankruptcy Conference Newsletter *include the following:

(29) Smith v. Dynasty Group, Inc. (*In re* Heritage Real Estate Investment, Inc.), Adv. Proc. 16-00040-NPO (Bankr. S.D. Miss. Oct. 17, 2017), *aff'd*, Case No. 3:17-cv-00883-LG-LRA (S.D. Miss. Sept. 25, 2018), *aff'd*, 783 F. App'x 403 (5th Cir. 2019)

Chapter 7: Heritage Real Estate Investment, Inc. ("Heritage") commenced bankruptcy on November 6, 2014. At that time, Heritage held record title to approximately eighty (80) acres of land in Kemper County, Mississippi (the "Kemper Property"). Months after the bankruptcy filing, Dynasty Group, Inc. ("Dynasty") recorded a quitclaim deed in the Office of the Chancery Clerk of Kemper County. The quitclaim deed purportedly showed the conveyance of the Kemper Property from Heritage to Dynasty in 2008. The Trustee filed an adversary proceeding seeking to set aside the conveyance under § 544 and § 362. After a trial, the Court found that the quitclaim deed was facially invalid and void as a matter of law because the purported grantor, Heritage, had not signed it. Even assuming the validity of the quitclaim deed, the Court ruled that the Trustee was entitled to avoid the quitclaim deed as a hypothetical bona fide purchaser for value without

notice of the unrecorded quitclaim deed under § 544(a)(3). Finally, the Court held that Dynasty's post-petition recording of the quitclaim deed violated the automatic stay imposed by § 362 and, therefore, was void. On appeal, the District Court affirmed the Court's ruling. The Fifth Circuit Court of Appeals likewise affirmed the Court's ruling. The Fifth Circuit rejected Dynasty's argument that a hypothetical bona fide purchaser would have been on inquiry notice of the 2008 transfer at the time Heritage filed its bankruptcy petition. "For Dynasty to prevail on these arguments, Mississippi law would have to impose on prospective buyers an obligation to investigate every aspect of a prospective purchase even if the record chain of title and facts known to the prospective buyer reveals nothing that would call into question the true owner of an estate." *Smith v. Dynasty Group, Inc. (In re Heritage Real Estate Inv., Inc.)*, 783 F. App'x 403, 406 (5th Cir. 2019).

(30) Willis v. Tower Loan of Mississippi, LLC (*In re* Willis), Adv. Proc. 17-00025-NPO (Bankr. S.D. Miss. Dec. 12, 2017), *aff'd*, Case No. 3:17-cv-01024-CWR-FKB (S.D. Miss. Apr. 11, 2018), *rev'd,* 944 F.3d 577 (5th Cir. 2019), *cert. denied*, No. 19-1165 (June 1, 2020)

Chapter 7: The Debtor filed the complaint alleging that Tower Loan of Mississippi, LLC ("Tower Loan") violated the Truth in Lending Act ("TILA") by providing misleading and incorrect disclosures in an installment loan agreement (the "Loan Agreement"). For example, the Debtor alleged that Tower Loan did not pay to the appropriate insurance company the amounts required for the Debtor's life insurance, disability insurance, and property insurance. The Debtor further asserted that Tower Loan received an undisclosed commission from those charges. Tower Loan denied that it violated the TILA and filed the Motion to Dismiss or to Compel Arbitration (the "Motion to Compel Arbitration"). The Debtor had signed two arbitration agreement in connection with the Loan Agreement. At issue in the adversary was whether the parties entered into a valid agreement to arbitrate "some set of claims" and, if so, whether that agreement contained a delegation clause requiring the TILA claim to proceed to arbitration "for gateway rulings on threshold arbitrability issues."

The two (2) arbitration agreements presented to the Court at the hearing contained conflicting provisions involving the number of arbitrators, how the arbitrator(s) would be selected, the notice required to arbitrate, the location of the arbitration, who paid the costs of the arbitration, who would be entitled to attorneys' fees and on what showing, and when arbitration proceedings need not be initiated. The Debtor argued that because the arbitration agreements govern "all claims and disputes between the parties" but contained different and conflicting terms, there was no meeting of the minds between the parties. Tower Loan, however, argued that the parties reached a meeting of the minds with respect to arbitration and that the first arbitration agreement governed the Loan Agreement while the second arbitration agreement related only to disputes concerning insurance companies and policies.

After reviewing the Loan Agreement and the arbitration agreements, the Court found that the arbitration agreements governed claims against Tower Loan both arising under the Loan Agreement and out of insurance policies. Because the arbitration agreements contained several material conflicting terms and inconsistencies, however, the Court followed the decision of the Tenth Circuit Court of Appeals in *Ragab v. Howard*, 841 F.3d 1134 (10th Cir. 2016), and held that there was no meeting of the minds with respect to arbitration.

On appeal, the district court affirmed the Court's denial of the Motion to Compel Arbitration. A panel majority of the Fifth Circuit Court of Appeals reversed, with one panel member dissenting. The majority panel held that the parties had reached a valid agreement to arbitrate and had delegated threshold arbitrability issues to the arbitrator. *Tower Loan of Miss., L.L.C. v. Willis (In re Willis)*, 944 F.3d 577 (5th Cir. 2019). Applying the two analytical steps that it had previously set forth in *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016), the majority panel determined that the two arbitration agreements should be considered as one contract and, further, that the parties had entered into a valid contract to arbitrate despite inconsistencies in the contractual terms. The majority panel held that the arbitrator should decide whether the Debtor's TILA claim was arbitrable. Therefore, the majority panel reversed and remanded. The U.S. Supreme Court denied the petition for writ of certiorari filed by the Debtor.

(31) Reach, Inc. v. Smith (*In re* Alabama-Mississippi Farm, Inc.), Adv. Proc. 17-00038-NPO (Bankr. S.D. Miss. May 14, 2018), *appeal dismissed as moot*, Case No. 3:18-cv-00350-DPF-FKB (S.D. Miss. Feb. 25, 2019), *aff'd,* 791 F. App'x 466 (5th Cir. 2019)

Chapter 7: After the Trustee sold one of the Debtor's assets, a farm, free and clear of any interests, Reach, Inc. ("Reach") filed an adversary complaint, attempting to stop the sale and claiming a security interest in the farm. The relief sought by Reach was the same relief it sought in its late-filed objection to the Trustee's sale motion in the Debtor's bankruptcy case. The Trustee asserted that the complaint should be dismissed "on the basis of prior Court orders approving and confirming the sale of the property free and clear of all liens to which no objection was timely filed by Reach." The issues raised by Reach in the adversary were: (1) whether the sale of the property should be stayed until the Court determined whether the property was property of the Debtor's estate; and (2) whether Reach had a valid, security interest in the property. At the trial, the Trustee moved for "judgment as a matter of law" at the close of Reach's case-in-chief, which the Court granted. The Court found that the auction and sale of the property already had concluded so no injunctive relief could be granted, and that Reach did not have a security interest in the property because the order disallowing Reach's proof of claim in the bankruptcy case was final and non-appealable.

The district court dismissed Reach's appeal as moot, and the Fifth Circuit Court of Appeals affirmed the Court's ruling. *Reach, Inc. v. Smith (In re Ala.-Miss. Farm Inc.)*, 791 F. App'x 466 (5th Cir. 2019). The Fifth Circuit ruled that Reach's request for the injunction barring the sale was moot, but Reach's request for a security interest in the proceeds was not, reasoning that § 363(m) does not explicitly bar appellate courts from reviewing consummated sales. Reach, however, could not reargue the merits of its request for a claim secured by the farm—or its proceeds—by prosecuting an adversary proceeding. Reach raised the same issue when it filed its proof of claim, and the Court resolved the issue by disallowing the claim. The Fifth Circuit ruled that because Reach did not file a timely appeal, Reach could not then use a collateral attack to circumvent the normal appellate process.

(32) Smith v. Johnson (*In re* Heritage Real Estate Investment, Inc.), Adv. Proc. 16-00035-NPO (Bankr. S.D. Miss. Sept. 13, 2018), *aff'd in part & remanded in part,* Case No. 3:18-cv-00675-DPJ-FKB (S.D. Miss. Mar. 31, 2020)

Chapter 7: In 2011, Bruce L. Johnson ("Johnson"), William Harrison ("Harrison"), and Michael L. King ("King" or collectively, the "Johnson Defendants") obtained a default judgment in the amount of $6,599,648.00 (the "Alabama Default Judgment") against the debtor, Heritage Real Estate Investment, Inc. ("Heritage"), Luke Edwards, Alabama-Mississippi Farm Inc., and Apostolic Advancement Association, Inc. in the Circuit Court of Greene County, Alabama. At a sheriff's sale in 2014, the Johnson Defendants purchased real property in Greene County, Alabama used by Heritage to operate a cemetery (the "Cemetery"). Under Alabama law, Heritage had one year to redeem the property. During that one-year period, Heritage commenced a bankruptcy case and executed a quitclaim deed purportedly conveying its interest in the Cemetery to Greater Christ Temple Apostolic Church (the "Church"). Apostolic Association Assemblies, Inc. ("AAA") and the Church then tendered a $96,750.00 check to redeem the Cemetery from the sheriff's sale (the "Redemption Proceeds").

The Trustee initiated an adversary proceeding against the Johnson Defendants, the Church, and AAA asking the Court to set aside the quitclaim deed from Heritage to the Church under § 549 and to determine the rights of the parties to the Cemetery and the Redemption Proceeds. Only Harrison answered the Trustee's complaint, and the clerk of the bankruptcy court issued entries of default against all defendants except Harrison.

AAA and the Church filed motions to set aside the entries of default, which the Court denied. The entries of default required the Court to accept as true the factual allegations in the Trustee's complaint. Based on those facts, the Court entered default judgments ruling that Heritage lacked authority to execute the quitclaim deed in favor of the Church, the Trustee was entitled to a judgment setting aside the quitclaim deed under § 549, the Redemption Proceeds belonged to Heritage, and Johnson and King were entitled to retain the Cemetery in partial satisfaction of the Alabama Default Judgment.

The Trustee thereafter reached an agreement with Harrison. The Trustee agreed to quitclaim any interest he may have in the Cemetery to the Johnson Defendants and Harrison agreed to relinquish any claim he may have to the Redemption Proceeds. In addition, Harrison agreed to amend the proof of claim in the bankruptcy estate to reduce the debt based on the Alabama Default Judgment by $96,750.00. The Trustee filed a motion seeking the Court's approval of the settlement. AAA and the Church objected to the settlement, arguing that the Redemption Proceeds should be returned to the Church. The Court approved the settlement pursuant to Rule 9019.

AAA and the Church appealed the Court's denials of the motions to set aside the entries of default, the default judgments, and the order approving the settlement with Harrison, raising the following issues: (1) whether Clifton Dawson ("Dawson"), the person who accepted service of process of the Trustee's complaint and summons, had apparent authority to do so; (2) whether the entries of default should have been set aside; (3) whether AAA and the Church were entitled to the Redemption Proceeds; and (4) whether AAA and the Church have standing to challenge the constitutionality of Rule 7012(a).

The District Court affirmed the Court's finding that Dawson exercised apparent authority to accept service of process for the Church based on the following evidence: the process server went to the Church on a non-worship day and told the first person he saw that he needed someone authorized to accept service for the Church and AAA; that unnamed individual returned with Dawson, who introduced himself to the process server as a bishop; Dawson was one of the Church's ministers who sometimes preached on Sundays; and after the process server informed Dawson he had legal documents to serve on the Church and after Dawson confirmed that he had authority to accept the documents, the process server presented the complaint and summons to Dawson. The District Court found that it was not an abuse of this Court's discretion to find that Dawson exercised apparent authority to accept service of process for the Church. The District Court, however, ruled that the process server's testimony showed that Dawson claimed authority to accept service of process for Apostolic *Advancement* Association, not AAA. The District Court also found insufficient evidence in the record on appeal showing the affiliation between the Church and AAA. The District Court, therefore, reversed and remanded the issue as to whether apparent authority existed absent evidence that Dawson claimed to have authority for AAA. As to the Redemption Proceeds, the District Court remanded the issue as to whether they should remain property of the estate. The District Court noted that this Court was not required to accept the assertion in the Trustee's complaint that the funds used to redeem the Cemetery belonged to Heritage "as a result of" the transfer of the Cemetery by Heritage to the Church. Finally, the District Court agreed that AAA and the Church lacked standing to challenge the constitutionality of Rule 7012(a). In the end, the District Court, noting the limited resources of this Court, ordered the parties to contact U.S. Magistrate Judge Keith Ball for a settlement conference.

Opinions pending on appeal include the following:

(33) ***In re* Community Home Financial Services, Inc., Case No. 12-01703-NPO,** Memorandum Opinion and Order on Remand Regarding Fee Applications of Derek A. Henderson and Wells Marble & Hurst, PLLC, Including: Fourth Application of Attorney for the Debtor for Allowance of Fees and Allowance of Costs and Expenses; Fifth Application of Attorney for the Debtor for Allowance of Fees and Allowance of Costs and Expenses; and Application of Attorney for the Debtor for Allowance of Fees and Allowance of Costs and Expenses**, *rev'd*, Case No. 3:18-cv-00158-CWR-LRA (S.D. Miss. Aug. 7, 2020), *appeals filed*, No. 20-60718 (5th Cir. Aug. 2020)**

(34) **Johnson v. Edwards Family Partnership, LP (*In re* Community Home Financial Services, Inc.), Adv. Proc. 12-00091-NPO; Johnson v. Edwards (*In re* Community Home Financial Services, Inc.), Adv. Proc. 13-00104-NPO, Johnson v. Edwards Family Partnership, LP (*In re* Community Home Financial Services, Inc.) Adv. Proc. 15-00080-NPO (Bankr. S.D. Miss. Feb. 27, 2018),** Memorandum Opinion and Order on Third Amended Complaint in Adversary Proceeding 12-00091-NPO; Consolidated Amended Complaint in Adversary Proceeding 13-00104-NPO; Amended Complaint for Turnover, Recovery of Property Transferred Post-Petition, Damages, Declaratory Relief, Equitable subordination, and Other Relief in Adversary Proceeding 15-00080-NPO; and

Consolidated Contested Matters, ***appeal filed*, Case No. 3:18-cv-00154-CWR-LRA (S.D. Miss. Mar. 13, 2018)**

(35) ***In re* Thompson, Case No. 10-01515-NPO (Bankr. S.D. Miss. Feb. 26, 2019)**, Order Denying Motion to Reopen Bankruptcy Case, ***appeal dismissed*, Case No. 3:19-cv-00179-DPJ-FKB (S.D. Miss. Apr. 1, 2020), *appeal filed*, No. 20-60358 (5th Cir. May 1, 2020)**

(36) ***In re* McCoy, Case No. 18-01569-NPO (Bankr. S.D. Miss. Feb. 3, 2020),** Memorandum Opinion and Order on: (1) Motion to Dismiss; (2) Motion to Request to Amend Complaint; (3) Request for Motion to Amend Adversary Complaint; (4) Motion to Request Show Cause; (5) Motion to Show Cause (2015 Tax and Unlawful collection); and (6) Request Motion to Reopen Bankruptcy, ***appeal filed*, Case No. 3:19-cv-00082 (S.D. Miss. Feb. 12, 2020)**

The opinions at numbered paragraphs (37) through (40) relate to five post-judgment motions filed in the same adversary proceeding after the Court's entry of the Memorandum Opinion and Order on: (1) Motion to Dismiss; (2) Motion to Request to Amend Complaint; (3) Request for Motion to Amend Adversary Complaint; (4) Motion to Request Show Cause; (5) Motion to Show Cause (2015 Tax and Unlawful collection); and (6) Request Motion to Reopen Bankruptcy:

McCoy v. Mississippi Department of Revenue (*In re* McCoy), Adv. Proc. 19-00019-NPO (Bankr. S.D. Miss.)

(37) **(Mar. 26, 2020)** Order Denying Emergency Motion for Preliminary Injunction, ***appeal dismissed*, Case No. 3:19-cv-00308-TSL-RHW (S.D. Miss. July 15, 2020), *appeal filed*, No. 20-60679 (5th Cir. July 24, 2020)**

(38) **(Apr. 22, 2020)** Order Denying Request to Reconsider Order Denying Emergency Motion for Preliminary Injunction, ***appeal dismissed*, Case No. 3:19-cv-00308-TSL-RHW (S.D. Miss. July 15, 2020), *appeal filed*, No. 20-60679 (5th Cir. July 24, 2020)**

(39) **(May 15, 2020)** Order Denying Request to Determine Validity of Specified Tax Assessments and Second Request to Determine Validity of Tax Assessment

(40) **(June 9, 2020)** Order Denying Request to Reconsider Request to Determine Validity of Specified Tax Assessments and Second Request to Determine Validity of Tax Assessment