

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**HELEN D. WILLIAMS,**

**CASE NO. 12-01467-NPO**

**DEBTOR.**

**CHAPTER 7**

**MEMORANDUM OPINION AND ORDER  
GRANTING MOTION TO REOPEN BANKRUPTCY**

There came on for hearing on October 7, 2013 (the “Hearing”), the Motion to Reopen Bankruptcy (the “Motion”) (Dkt. 40) filed by U.S. Bank, N.A. (“U.S. Bank”) and EMC Mortgage, LLC (“EMC”), the Objection to Motion to Reopen Bankruptcy (the “Response”) (Dkt. 42) filed by the Debtor, Helen D. Williams (the “Debtor”), the Trustee’s Response to Motion to Reopen Case (the “Trustee Response”) (Dkt. 46) filed by J. Stephen Smith, the duly appointed chapter 7 trustee (the “Trustee”), and the Reply in Support of Motion to Reopen Bankruptcy (Dkt. 48) filed by U.S. Bank and EMC in the above-referenced bankruptcy case (the “Current Bankruptcy Case”). At the Hearing, Stephen Schelver represented U.S. Bank and EMC; W. Joseph Kerley and Edwin Woods represented the Debtor; and Eileen N. Shaffer represented the Trustee. Having considered the pleadings and the arguments of counsel, the Court finds that the Motion should be granted.

**Jurisdiction**

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. These are core proceedings under 28 U.S.C. § 157(b)(2)(A) and (O). Notice of the Motion was proper under the circumstances.

## Facts

Except for certain matters related to procedural history, the following facts are based upon the allegations in the Complaint. *See Highland Capital Mgmt. LP v. Chesapeake Energy Corp. (In re Seven Seas Petroleum, Inc.)*, 522 F.3d 575, 583 (5th Cir. 2008) (holding that whether a cause of action belongs to the bankruptcy estate is decided by reference to the “facial allegations” in the Complaint). These facts should not be deemed findings by the Court on the merits of any of the claims.

1. On June 11, 2013, the Debtor filed a Complaint (the “Complaint”) (Ex. A, Dkt. 40-1) in the Circuit Court of Scott County in Mississippi (the “Circuit Court”), Civil Action No. 13-CV-142, against U.S. Bank, EMC, Britt Barnes Realty Group, LLC (“Barnes Realty”), and Shavonne Clark (“Clark”). The subject matter of that litigation (the “Scott County Litigation”) is real property located at 1234 New Mt. Calvary Road in Lake, Mississippi (the “Subject Property”) where the Debtor currently resides (Compl. ¶¶ 1 & 14). The issue raised in the Motion is whether any of the causes of action asserted in that Complaint are property of the estate (the “Estate”) in the Debtor’s Current Bankruptcy Case.

2. The Debtor and her husband, Marvin Williams, acquired the Subject Property in 1973. (Compl. ¶ 13 & Ex. A at 23). In 2004, Marvin Williams signed a promissory note (the “Loan”) in the amount of \$40,000.00. (Compl. ¶ 14). To secure repayment of the Loan, Marvin Williams and the Debtor granted a deed of trust (the “DOT”) on the Subject Property.<sup>1</sup> (Compl. ¶ 14 & Ex. B at 25). Marvin Williams passed away on January 25, 2007. (Compl. ¶ 15).

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<sup>1</sup> U.S. Bank and EMC suggest that the Debtor executed the DOT to subordinate any homestead rights the Debtor may have had in the Subject Property, but these facts do not appear in the allegations of the Complaint.

3 After her husband's death, the Debtor suffered financial hardship and was unable to continue making payments on the Loan. (Compl. ¶ 16). The Debtor attributes the default to the servicer of the Loan who "refused to discuss any account matters with her." (*Id.*). When she attempted to repay the Loan, EMC, the most recent servicer, advised her "that her payments would not be accepted due to the fact that she wasn't listed on the 'account.'" (Compl. ¶ 17).

4. To save her home from foreclosure, the Debtor commenced a voluntary chapter 13 bankruptcy in Case No. 09-00050-NPO, on January 7, 2009 (the "2009 Bankruptcy Case") (Compl. ¶ 18). The Debtor did not list the Subject Property as an asset of her estate in Schedule A—Real Property (Case No. 09-00050-NPO, Dkt. 6 at 3), although the Debtor was "under the impression that her mortgage had been included." (Compl. ¶ 18).

5. The Debtor attempted to negotiate a reaffirmation agreement<sup>2</sup> with EMC regarding the Loan.<sup>3</sup> (Compl. ¶ 19). EMC, however, refused to cooperate or respond to her efforts to reaffirm the debt. (Compl. ¶ 20).

6. U.S. Bank and EMC's parent company, JPMorgan Chase Bank, N.A. ("Chase"), are subject to Consent Orders issued on April 13, 2011, by the Office of the Comptroller of the Currency ("OCC"). (Compl. ¶¶ 37 & 39). In those Consent Orders, the OCC identified "unsafe or unsound practices in residential mortgage servicing and . . . handling of foreclosure proceedings" by U.S. Bank and Chase. (*Id.*).

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<sup>2</sup> A reaffirmation agreement is a contract between a debtor and creditor that involves a dischargeable debt. 11 U.S.C. § 524(c).

<sup>3</sup> These allegations appear in the Complaint in the context of the 2009 Bankruptcy Case, although it is more likely that the reaffirmation was sought in the Current Bankruptcy Case.

7. The Debtor failed to make plan payments as required, and at the request of the chapter 13 trustee, her 2009 Bankruptcy Case was dismissed on November 10, 2011 (Case No. 09-00050-NPO, Dkt. 47).

8. On April 19, 2012, the DOT was assigned to U.S. Bank, who replaced the original trustee with Nationwide Trustee Services, Inc. (“Nationwide”) as the substitute trustee (the “Substitute Trustee”) (Compl. Ex. E at 46). Clark, who is named as a defendant in the Scott County Litigation, is an officer of Nationwide. (Compl. ¶ 6).

9. At some point, the Debtor asked EMC for a modification of the Loan. (Compl. ¶ 21). Presumably, the Debtor sought the modification of the Loan pursuant to the federal Home Affordable Modification Program (“HAMP”), although the Complaint does not expressly refer to HAMP.<sup>4</sup> The Debtor provided EMC with all the information it requested to consider her application for a Loan modification. (Compl. ¶ 23). EMC advised the Debtor that no foreclosure proceedings would occur during the application process. (Compl. ¶ 65). When the Debtor later contacted EMC to check on the status of her application, EMC denied ever having received one. (Compl. ¶ 22). The allegations in the Complaint do not disclose precisely when any of these events occurred.

10. On May 1, 2012, the Debtor initiated the Current Bankruptcy Case by filing a voluntary petition for relief (the “Petition”) (Dkt. 1) under chapter 7 of the U.S. Bankruptcy Code.<sup>5</sup>

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<sup>4</sup> HAMP provides financial incentives to participating loan servicers to lower monthly mortgage payments. 12 U.S.C. § 5201.

<sup>5</sup> Hereinafter, all code sections refer to the U.S. Bankruptcy Code found at Title 11 of the United States Code.

11. In her Current Bankruptcy Case, the Debtor listed the Subject Property<sup>6</sup> in Schedule A–Real Property (Dkt. 3 at 3) and identified EMC in Schedule D–Creditors Holding Secured Claims (*Id.* at 8). Nowhere in her bankruptcy schedules or Statement of Financial Affairs did the Debtor disclose any potential or contingent claims for damages or other relief against U.S. Bank, EMC, Barnes Realty, or Clark, who are all named as defendants in the Scott County Litigation.

12. On September 17, 2012, the Debtor received a no-asset discharge under 11 U.S.C. § 727(a) (Dk. 36). After finding that the Estate had been fully administered, the Court entered the Final Decree/Order Closing Case (Dkt. 38) in her Current Bankruptcy Case on October 1, 2012.

13. Several months after the commencement of her Current Bankruptcy Case, U.S. Bank, through EMC, sent the Debtor a Substitute Trustee’s Notice of Sale (the “Notice”) (Compl. Ex. D at 44) prepared by Clark in her capacity as an officer of Nationwide. The Notice stated that there had been a default in the payments on the debt secured by the DOT and that on February 20, 2013, between the hours of 11:00 a.m. and 4:00 p.m., the Substitute Trustee, at public outcry, would offer the Subject Property for sale. (Compl. ¶ 27 & Ex. D at 44). The Debtor, her two sons, and a neighbor appeared at the Scott County Courthouse in Forest, Mississippi (the “Scott County Courthouse”) on the day of the scheduled foreclosure sale and remained there at the South door from 11:00 a.m. until 4:00 p.m. (Compl. ¶¶ 28-30). No “public outcry” for the sale of the Subject Property occurred that day between those hours. (Compl. ¶ 31).

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<sup>6</sup> Although the street address for the “House and 5 acres” is listed in Schedule A–Real Property as 1232 New Mt. Calvary Road, rather than 1234 New Mt. Calvary Road, the parties do not dispute that this is the Subject Property.

14. Although “no one appeared to cry the sale” on the date of the scheduled foreclosure sale, the Substitute Trustee’s Deed (Compl. Ex. E at 45) was recorded on February 21, 2013, in the Chancery Clerk’s Office of Scott County, Mississippi, alleging that the Subject Property was sold to U.S. Bank, the highest bidder, at a public auction at the South door of the Scott County Courthouse on February 20, 2013. (Compl. ¶ 34 & Ex. E at 45).

15. The Debtor did not vacate the Subject Property after the purported foreclosure sale. Barnes Realty, a local real estate agent hired by EMC, contacted the Debtor, informed her that the Subject Property had been sold, and threatened to have her forcibly removed, but the Debtor refused to leave “because the Substitute Trustee’s Deed was filed fraudulently.” (Compl. ¶ 35). Eviction proceedings were instituted against the Debtor. (*Id.*).

16. The Debtor filed the Complaint in the Circuit Court on June 11, 2013. In support of her request for actual and punitive damages, the Debtor asserts, in general, that she was wrongfully denied a modification of the Loan and that the Subject Property was wrongfully foreclosed upon. Specifically, she alleges “Breach of Contract Law Claims” (Compl. ¶¶ 45-63); “Causes of Action for Intentional and/or Negligent Torts” (Compl. ¶¶ 64-102); and “Causes of Action for Injuries to Property” (Compl. ¶¶ 103-11). In the category of contract claims, the Debtor alleges claims for breach of the DOT (Compl. ¶¶ 45-55) and breach of the implied covenant of good faith and fair dealing (Compl. ¶¶ 56-63). In the category of tort claims, the Debtor alleges fraud, fraudulent misrepresentation and/or omissions, and fraudulent inducement (Compl. ¶¶ 64-75); negligence/gross negligence (Compl. ¶¶ 76-82); negligent infliction of emotional distress (Compl. ¶¶ 83-90); and wrongful foreclosure (Compl. ¶¶ 91-102). In the category of property claims, she alleges fraudulent conveyance (Compl. ¶¶ 103-06) and unjust enrichment. (Compl. ¶¶ 107-11).

17. U.S. Bank and EMC removed the Scott County Litigation on July 11, 2013, to the U.S. District Court for the Southern District of Mississippi, Jackson Division (the “District Court”) in No. 3:13-cv-00439-DPJ-FKB (the “Federal Litigation”) based on diversity of citizenship, bankruptcy, and federal question jurisdiction. Pending before the District Court as of the date of this Opinion are U.S. Bank and EMC’s Motion to Refer (Civil Action No. 3:13-cv-00439-DPJ-FKB, Dkt. 6), the Debtor’s Motion to Remand (Civil Action No. 3:13-cv-00439-DPJ-FKB, Dkt. 8), and the Motion to Dismiss Filed on Behalf of Brett Barnes Realty Group, LLC (Dkt. 34).

18. On August 21, 2013, U.S. Bank and EMC filed the Motion *sub judice* seeking to reopen the Current Bankruptcy Case to allow the District Court to transfer the Federal Litigation to this Court as an adversary proceeding. They filed the Motion although the District Court has not yet ruled whether to retain the Federal Litigation, remand it to the Circuit Court, or refer it to this Court.

19. On September 12, 2013, the Debtor filed the Response objecting to the reopening of the Current Bankruptcy Case. The Trustee in the Trustee Response also opposes the Motion on the ground the claims in the Complaint appear to have arisen after the commencement of the Current Bankruptcy Case and, for that reason, are not property of the Estate. At the Hearing, however, the Trustee stated that if any of the claims were deemed to constitute property of the Estate, the Trustee was willing to pursue them.

## Discussion

The narrow issue before the Court is whether any claim asserted in the Federal Litigation is property of the Estate to warrant the reopening of the Debtor's Current Bankruptcy Case and allow the Trustee to pursue that claim.<sup>7</sup>

### A. Property of the Estate under § 541(a)(1)

Property rights personal to a debtor become property of the bankruptcy estate by virtue of § 541(a)(1). Section 541(a)(1) states that a bankruptcy estate consists of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). This definition has been construed broadly and includes “rights of action” such as claims based upon state or federal law. *See* H.R. REP. NO. 95-595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323-24; *Wischan v. Adler (In re Wischan)*, 77 F.3d 875, 877 (5th Cir. 1996) (holding that a personal injury claim filed before the debtor commenced bankruptcy case is property of estate); *La. World Exposition, Inc. v. Fed. Ins. Co. (In re La. World Exposition)*, 832 F.2d 1391 (5th Cir. 1987). If a claim belongs to the estate, then only the bankruptcy trustee has standing to assert it. *Schertz-Cibolo-Universal City v. Wright (In re Educators Grp. Health Trust)*, 25 F.3d 1281, 1284 (5th Cir. 1994).

There is an important temporal limitation in § 541(a). Only property that exists at the commencement of the case becomes property of the estate. *Burgess v. Sikes (In re Burgess)*, 438 F.3d 493, 496 (5th Cir. 2006). A case is commenced when the voluntary petition for relief is filed. 11 U.S.C. § 301. As the Fifth Circuit explained, “a debtor's interest in property may be contingent-or enjoyment of the interest may be postponed-until after bankruptcy, but the debtor

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<sup>7</sup> This determination is the sole issue before the Court. No attempt is made to determine whether these claims are legally or factually viable causes of action under federal or Mississippi law.



must have had a pre-petition interest nonetheless.” *Burgess*, 438 F.3d at 499.

## **B. Ownership of the Claims**

The Debtor maintains that the claims asserted in the Complaint are not part of the Estate because they did not exist until the foreclosure sale on February 20, 2013. U.S. Bank and EMC, on the other hand, contend that many of the operative acts alleged in the Complaint took place well before the foreclosure sale and, more importantly, before the commencement of the Current Bankruptcy Case and, therefore, some of the claims belong to the Estate.

The issue regarding the Debtor’s claims is one of timing because “[w]hether a particular . . . cause of action belongs to the estate depends on whether . . . the debtor could have raised the claim as of the commencement of the case.” *Educators Grp. Health Trust*, 25 F.3d at 1284 (citations omitted). That determination is guided by Mississippi law.

The Fifth Circuit Court of Appeals in *Wheeler v. Magdovitz (In re Wheeler)*, 137 F.3d 299, 300 (5th Cir. 1998), discussed the various approaches in determining whether a “claim,” as defined in the Bankruptcy Code,<sup>8</sup> includes a claim that accrues post-petition when the conduct that forms the basis for liability occurred pre-petition. *Id.* At one extreme is the “accrual” approach, in which courts have held that there is no claim under the Bankruptcy Code until a cause of action has fully accrued under state law or non-bankruptcy law. *Id.* (citing *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332, 337 (3d Cir. 1984), *overruled by Jeld-Wen, Inc. v. Brunt (In re Grossman’s Inc.)*, 607 F.3d 114, 121 (3d Cir. 2010)). At the other extreme is the “conduct” approach, in which courts have rejected the “accrual” approach on the ground it interprets the term “claim” too narrowly and have held that a claim arises at the

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<sup>8</sup> Section 101(5) defines a “claim,” in relevant part, as a “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” 11 U.S.C. § 101(5).

time of the conduct that is the basis for liability, even if the cause of action has not yet fully accrued. *Id.* (citing *Grady v. A.H. Robins Co.*, 839 F.2d 198, 202-03 (4th Cir. 1988)). In the “middle ground” approach, courts have held that a claim arises when it has fully accrued (the “accrual” approach) unless there is some pre-petition relationship between the conduct and the debtor in which event the claim arises at the time of the conduct that forms the basis for liability (the “conduct” approach). *Id.* at 300-01 (citing *Piper Aircraft Corp.*, 162 B.R. 619 (Bankr. S.D. Fla. 1994)). The Fifth Circuit noted in *Wheeler* that it had previously adopted the “middle ground” approach in *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268 (5th Cir. 1994). *Wheeler*, 137 F.3d at 300-01. The Fifth Circuit then proceeded to apply the “middle ground” approach to the facts in *Wheeler*.

The debtor in *Wheeler* sued his bankruptcy attorney for legal malpractice after the debtor was convicted for falsifying and concealing assets belonging to his bankruptcy estate. *Wheeler*, 137 F.3d at 300. The debtor’s claim was based upon the negligent handling of his bankruptcy case, including the filing of the petition for relief that indicated that the bankruptcy estate contained no assets. The debtor maintained that his claim did not arise pre-petition because he was not injured by his attorney’s malpractice until he was indicted for bankruptcy fraud, which occurred almost five years after the commencement of his bankruptcy case. The Fifth Circuit found there was evidence of a pre-petition relationship between the debtor and his bankruptcy attorney sufficient to meet the *Lemelle* requirement and held that the debtor’s legal malpractice claim belonged to the bankruptcy estate.

Turning to the Motion, all of the claims asserted by the Debtor are related to some extent to the Subject Property, but the Court rejects the Debtor’s wholesale characterization of her Complaint as a wrongful foreclosure suit. Determining who owns the claims is not as

straightforward as the Debtor's position suggests because some of the conduct underlying the claims in the Complaint straddles the Petition date and because it is possible for the Debtor and the Estate to own different claims arising out of the same broad conduct. Moreover, the Court rejects the argument of counsel for the Debtor at the Hearing that he did not normally handle "lender liability" actions and did not intend to start doing so now. It is the "facial allegations" of the Complaint that guide the Court in its analysis and not counsel's private intentions or his wholesale characterization of the Federal Litigation as a wrongful foreclosure suit. *See Edwards v. City of Houston*, 78 F.3d 983, 985 (5th Cir. 1996) (en banc) ("[W]e have oft stated that 'the relief sought, that to be granted, should be determined by substance, not a label.'").

In the Complaint, the Debtor divides her multiple causes of action into contract, tort, and property claims without regard to when the underlying conduct occurred. To determine whether and to what extent the claims existed as of the commencement of the Current Bankruptcy Case, the Court re-organizes these claims into two groups based upon when the underlying conduct occurred. These groups are: (1) claims arising from the post-petition foreclosure sale and (2) claims arising from the pre-petition HAMP application process. As to the HAMP-related claims, the Court's analysis is made more difficult by the Debtor's failure to provide a specific time frame for the alleged improper conduct.

The Court pauses here to note the absence from the discussion below of any claims based on the alleged refusal of U.S. Bank and EMC to cooperate with the Debtor in her attempt to reaffirm the debt secured by the DOT. Although U.S. Bank and EMC point to these allegations in support of their contention that the Federal Litigation includes claims existing prior to the Current Bankruptcy Case, the Complaint does not list this conduct as a factual basis for any of the claims in the Complaint. For this same reason, the Court also excludes from the discussion

below any cause of action based upon alleged violations of the Consent Orders. The Court's analysis of the Complaint in this regard is supported by the explanation given by counsel for the Debtor at the Hearing that the Complaint mentions the Consent Orders only to bolster the Debtor's allegation of wrongdoing and not in direct support of any specific claim.

**1. Claims Arising from the Post-Petition Foreclosure Sale**

The Court agrees with the Debtor that the claims based upon the manner in which the post-petition foreclosure sale was conducted are not property of the Estate. These claims arose and accrued simultaneously with the foreclosure sale and include the allegations: that U.S. Bank failed to provide notification to the Debtor of the acceleration of the maturity date of the Loan as required in the DOT prior to the foreclosure sale (Compl. ¶¶ 46-49); U.S. Bank, EMC, and Clark failed to conduct the foreclosure sale by public outcry (Compl. ¶ 62), that U.S. Bank, EMC, and Clark caused the Debtor to suffer emotional distress because of the manner in which they conducted the foreclosure sale (Compl. ¶ 84); that U.S. Bank, EMC, and Clark conducted the foreclosure sale in a negligent manner (Compl. ¶ 79); and that the foreclosure was invalid because U.S. Bank violated Mississippi foreclosure laws, MISS. CODE ANN. § 11-5-99 (Compl. ¶ 96), MISS. CODE ANN. § 89-1-55 (Compl. ¶ 97), and MISS. CODE ANN. § 13-3-163 (Compl. ¶ 98). These specific claims are in substance wrongful foreclosure causes of action.

Likewise, the Court agrees with the Debtor that the causes of action based upon actions resulting from, or taken after, the foreclosure sale clearly are not property of the Estate because they too did not arise or accrue until after the foreclosure sale. These causes of action include the allegations that U.S. Bank, EMC, and Clark were unjustly enriched by the foreclosure sale (Compl. ¶ 108); that U.S. Bank, EMC, Barnes Realty, and Clark falsely represented that the Subject Property had been sold through a foreclosure sale (Compl. ¶ 70); that Barnes Realty

caused the Debtor emotional distress by threatening to evict her from her home (Compl. ¶ 84); and that U.S. Bank, EMC, and Clark acquired title to the Subject Property through fraudulent means and any subsequent conveyance of the Subject Property constitutes a fraudulent conveyance (Compl. ¶¶ 104-05).

## **2. Claims Arising from Pre-Petition HAMP Application**

The remaining claims are related to the HAMP application process and are based on conduct that straddles the date of the commencement of the Current Bankruptcy Case. Two of these claims accrued post-petition. Therefore, a question arises as to whether there was a sufficient pre-petition relationship between the alleged improper conduct and the Debtor at the commencement of the Current Bankruptcy Case to render these claims property of the Estate.

These claims include allegations that U.S. Bank misrepresented that the pendency of the HAMP application would halt the foreclosure sale of the Subject Property (Compl. ¶ 65) and that U.S. Bank conducted the foreclosure sale after agreeing to process the Debtor's HAMP application (Compl. ¶¶ 60-61). The two remaining claims relate to the Debtor's purported efforts to have the Loan payments reduced. They include the allegations that U.S. Bank, EMC, and Clark negligently failed to issue the Loan modification (Compl. ¶ 79) and that U.S. Bank's negligent mishandling of the HAMP application caused the Debtor to suffer emotional distress (Compl. ¶ 84).

The Complaint is silent as to when the Debtor engaged in negotiations with EMC to modify the Loan and when EMC told her that the HAMP application would postpone the foreclosure sale. Assuming that the conduct alleged in the Complaint appears in chronological order, these negotiations may have taken place sometime between January 7, 2009, when the Debtor commenced her 2009 Bankruptcy Case, and December 21, 2012, when she received

notice of the foreclosure sale. (Compl. ¶ 27). It is also just as possible, however, that the HAMP application process was underway as early as 2007 when the Loan first went into default. Given either time frame, the negotiations took place in whole or in part before May 1, 2012, when the Debtor commenced the Current Bankruptcy Case, although some or all of the claims may have accrued post-petition.

The Court finds that the claims arising from U.S. Bank's alleged misrepresentations that the HAMP application process would delay the foreclosure sale are not property of the Estate. The Debtor did not sustain any injury because of the alleged wrongful acts until the date of the foreclosure sale when it was too late for the Debtor to take any other action to postpone the sale, for example, by obtaining alternative financing or liquidating other property. *See, e.g., Miller v. BAC Home Loans Serv., L.P.*, 726 F.3d 717, 724 (5th Cir. 2013) (holding that claim based upon loan servicer's promise to consider loan modification application before conducting foreclosure auction stated a ground for relief under Texas law for misrepresenting nature of services provided). These claims, therefore, did not accrue under Mississippi law until the post-petition foreclosure sale. *See Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 706 (Miss. 1990) (holding that cause of action accrues only when an injury occurs); *Smith v. Temco, Inc.*, 252 So. 2d 212, 216 (Miss. 1971) (holding that a "tort is not complete until the injury occurs"). The timing of a claim's accrual is not necessarily dispositive of when a "claim" arises for purposes of § 541 under the "middle ground" approach. Here, however, the Court finds that the pre-petition relationship between the alleged wrongdoing of U.S. Bank and EMC in failing to postpone the foreclosure sale and the Debtor is too tenuous to meet the *Lemelle* requirement.

On the other hand, the Court finds that the remaining two HAMP claims arising from U.S. Bank's alleged negligent handling of the HAMP application and the alleged negligent

failure of U.S. Bank, EMC, and Clark to issue the Loan modification are property of the Estate. These claims likely accrued pre-petition. Even if they accrued post-petition, however, the Court finds that the pre-petition relationship between the alleged mishandling of the Loan modification process and the Debtor's alleged emotional injury is sufficient to meet the *Lemelle* requirement. Indeed, these claims neatly fit within the recent spate of consumer finance litigation against loan servicers for failing to comply with HAMP guidelines. See *HAMP: An Overview of the Program and Recent Litigation Trends*, 65 FIN. L.Q. REP. 194, 195 (2011); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012).

### **Conclusion**

Based on the facial allegations of the Complaint, the Court concludes that the Debtor's HAMP claims arising out of the alleged improper handling of her Loan modification application by U.S. Bank and EMC are property of the Estate. This conclusion warrants the reopening of the Debtor's Current Bankruptcy Case so that the District Court may take whatever action in the Federal Litigation that it deems appropriate under these circumstances.

IT IS, THEREFORE, ORDERED that the Motion hereby is granted.

SO ORDERED.