SO ORDERED,

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: September 30, 2015

**The Order of the Court is set forth below. The docket reflects the date entered.**

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

**IN RE: RICHARD N. KENNEDY** **CASE NO. 13-51219**

**DEBTOR** **CHAPTER 7**

**ORDER GRANTING MOTION TO APPROVE COMPROMISE OR SETTLEMENT**

The matter before the Court is the Trustee's Motion to Approve Compromise or Settlement under Rule 9019 with Louisiana Farm Bureau Casualty Insurance Company (the "Motion"), (Dkt. No. 185)[1], filed by Derek Henderson—the Chapter 7 Trustee (the "Trustee"); the Creditors' Objection to Motion for Settlement and Reques for Trustee to Abandon Case and Motion to Expedite Trial ("the Objection"), (Dkt. No. 187), filed by Creditors Carla Harper, Brandon Woodward, and Haley Woodward (collectively, the "Creditors"); and the Response to the Objection, (Dkt. No. 197), filed by Louisiana Farm Bureau Casualty Insurance Company ("Farm Bureau"). A hearing was held on the matter on April 21, 2015 (the "Hearing"). After the Hearing, the Court invited the parties to submit briefs on two issues: 1) the effect of the Trustee's abandonment of his adversary against Farm Bureau and the Creditors' standing to pursue the Trustee's claims should the Court deny his Motion, and 2) the Court's jurisdiction to enter final

[1] Unless stated otherwise, citations to the record are as follows: (1) citations to docket entries in the adversary proceeding, Adv. Proc. No. 14-05022-KMS, are cited as "(Adv. Dkt. No. ___)"; and (2) citations to docket entries in the main bankruptcy case, Case No. 13-51219-KMS, are cited as "(Dkt. No. ___)".

judgment on those claims. The Creditors filed their brief on these issues on May 5, 2015, in which they included a Motion for Leave of Court to Allow Creditors to Pursue the Adversary Complaint on Behalf of the Trustee (the "Creditors' Motion"), (Dkt. No. 203); Farm Bureau filed its response brief on May 18, 2015, (Dkt. No. 204); and the Trustee also filed a response brief on May 19, 2015. (Dkt. No. 207).

After considering the motions filed and exhibits attached thereto; counsels' arguments at the Hearing; the post-hearing briefs submitted by the parties; and the record, the Court finds that the Motion should be granted and states the following:

## I. JURISDICTION

The Court has jurisdiction of the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334(a). This matter is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2). This order constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rules of Bankruptcy Procedure 9014 and 7052.

## II. FINDINGS OF FACT

### A. Background

The facts underlying the filing of the involuntary petition are recited in detail in the Court's Memorandum Opinion and Order granting the petition for relief. *In re Kennedy*, 504 B.R. 815 (Bankr. S.D. Miss. 2014). The facts relevant to this ruling are as follows. On January 1, 2010, Richard N. Kennedy ("Kennedy") was involved in a car accident, which caused the death of Caynen Woodward—Carla Harper and Brandon Woodward's one-year-old child. *Id.* at 818. Shortly after the accident, the Creditors offered to settle their claims for $50,000.00—an amount within Kennedy's insurance policy limits with Farm Bureau—via demand letter to Farm Bureau. (Dkt. No. 187-1, Exh. A at 1–4). A second demand letter was sent on May 11, 2010. (*Id.* at 11–

19). The claim was not settled within the 14-day time frame given by the Creditors in their second demand letter, and the Creditors sued Kennedy for personal injury and wrongful death on May 26, 2010. (Dkt. No. 129, Exh. 1). The trial resulted in a judgment against Kennedy in the amount of $1.5 million. (*Id.* at Exh. 3). After the trial, Farm Bureau deposited $50,011.45 into the registry of the Circuit Court of Marion County, Mississippi. (Dkt. No. 129–2, Exh. 20 at 6–12). The judgment against Kennedy was partially satisfied in that amount. (*Id.* at 1–3). On October 31, 2014, the Chancery Court of Marion County ordered the disbursal of the funds in the registry in the following manner: $12,502.86 in the form of a check "payable to Brandon Woodward and his attorney, Paul Snow, P.A."; $5,001.15 in the form of a check "payable to Carla Harper . . . and her attorney, Paul Snow, P.A."; and $32,507.44 in the form of a "check payable to the Estate of Caynen Woodward, a Minor deceased, For and Behalf of all wrongful death beneficiaries and Paul Snow, P.A.". (Dkt. No. 201, Exh. 20).

Following the entry of final judgment against Kennedy, his attorney prepared an assignment that would have transferred Kennedy's claim—if any—for bad faith against Farm Bureau to the Creditors. (Dkt. No. 129-5, Exh. 37). Kennedy never signed the assignment, and the Creditors moved for a Writ of Execution on Kennedy's alleged bad faith claim against Farm Bureau on April 19, 2013. (Dkt. No. 129-3, Exh. 26 at 19–20). The writ was issued, and a sheriff's sale was conducted on May 6, 2013, where the Creditors bid $10.00 for the cause of action. (*Id.* at 23–27). The Creditors were outbid by Blake Smith, counsel for Farm Bureau, who was the purchaser at the auction with a $50.00 bid. (*Id.* at 26–27).[2]

The Creditors filed a motion to set aside the sheriff's sale; and the Circuit Court of Marion County, Mississippi entered an order, presented by the Creditors, finding that the writ

[2] Smith subsequently assigned the cause of action to Farm Bureau. (Dkt. No. 185 at 9, ¶ 41; Adv. Dkt. No. 1, Exh. I).

could not be executed for failure of process. (Dkt. No. 129-4 at Exh. 27). Blake Smith's ensuing motion to vacate that order and quash any subsequently-issued writs was granted, and the Creditors' motion to set aside the sheriff's sale was denied. (Dkt. No. 129-5 at Exhs. 31, 32). The Creditors did not appeal either order. The Creditors then filed the involuntary petition, and the order for relief under Chapter 7 was entered on February 12, 2014. (Dkt. No. 135).

**B. The Adversary Complaint and Settlement Agreement**

The Trustee filed an adversary complaint against Farm Bureau on April 21, 2014. (Adv. Dkt. No. 1). The complaint includes counts for fraudulent transfer under §§ 548 and 550, inadequate consideration, lack of due process, and attorney's fees. (*Id.*). On February 4, 2015, the Trustee filed his Motion. (Dkt. No. 185). The Creditors filed an objection to the Motion on February 24, 2015. (Dkt. No. 187). In their Objection, the Creditors argue that "the bad faith claims [against Farm Bureau] under Louisiana law are worth at least $3,000,000 under the facts of this particular case." (*Id.* at 3). They also argue that the sheriff's sale should be avoided for insufficient consideration and the subsequent assignment of the bad faith action to Farm Bureau should be set aside. (*Id.* at 4–10).

At the hearing, the Trustee testified extensively regarding his decision to seek approval of the settlement with Farm Bureau. The settlement is in the amount of $45,000.00, which is in addition to the $50,011.45 Farm Bureau has already paid. (Dkt. No. 185 at 19, ¶ 53). The settlement agreement includes mutual releases, whereby Farm Bureau agrees to release any and all causes of action it may possess against Kennedy and his bankruptcy estate and the Trustee agrees to release any and all causes of action either the Trustee or Kennedy's estate may possess against Farm Bureau. (Dkt. No. 185, Exhs. A, B).

## III. CONCLUSIONS OF LAW

### A. The Creditors' Motion

At the Hearing, the Court invited the parties to file supplemental briefs regarding both the Court's jurisdiction to enter final judgment in the adversary and the Creditors' standing to pursue the adversary in the event the Trustee abandons it. At the end of their brief, the Creditors included a Motion For Leave of Court to Allow Creditors to Pursue Adversary Complaint on Behalf of the Trustee. (Dkt. No. 203 at 8). As Farm Bureau points out in its response brief, the Creditors' inclusion of their motion in their post-trial brief rather than filing it separately violates the Local Uniform Civil Rules of the United States District Courts for the Southern District of Mississippi. L.U. Civ. R. 7(b)(2) ("The memorandum brief must be filed as a separate docket item from the motion or response . . . Counsel must file a memorandum brief as a separate docket item from the motion or response to which it relates . . . .").

No such analogous provision is contained in the Uniform Local Rules of the United States Bankruptcy Courts for the Northern and Southern Districts of Mississippi. But, Federal Rule of Bankruptcy Procedure ("Rule") 9013 provides that "[a] request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Fed. R. Bankr. P. 9013. "[A] . . . [m]emorandum is not a pleading from which the Court grants relief." *Advanced Recovery Sys. v. Clemons (In re Clemons)*, No. 1100127EE, 2013 WL 828282, at *7 (Bankr. S.D. Miss. March 6, 2013) (quoting *In re Gilmore, Jr.*, 198 B.R. 686, 692 n. 4 (Bankr. E.D. Tex. 1996), *amended in part on reh'g*, 1996 WL 1056889 (Bankr. E.D. Tex. 1996), *aff'd*, *United States v. Gilmore*, 226 B.R. 567 (E.D. Tex. 1998)). And "because a memorandum or brief does not constitute a pleading, a request for relief

contained therein cannot constitute a written motion." *Id.* (quoting *In re Allegheny Health, Educ. & Research Found.*, 233 B.R. 671, 683 (Bankr.W.D. Pa. 1999)). Thus, because a brief does not constitute a pleading from which the court grants relief, the Creditors' motion is not properly before the Court and is deficient. *See Id.* (finding a motion to amend contained in a footnote in the plaintiff's post-trial brief was not properly before the court). But, even if the Creditors' motion were properly before the Court, the Creditors should not be granted derivative standing to pursue the adversary because the Court finds that the Trustee's Motion should be granted.[3]

**B. The Trustee's Motion**

On February 4, 2015, the Trustee filed the Motion, seeking the Court's approval of a compromise and settlement with Farm Bureau pursuant to Federal Rule of Bankruptcy Procedure ("Rule") 9019. (Dkt. No. 185). In their response to the Motion, the Creditors requested that the Trustee abandon the adversary against Farm Bureau and allow the Creditors to continue to pursue the claims against Farm Bureau. (Dkt. No. 187 at 25). But, because the Creditors do not have a possessory interest in Kennedy's adversary claims against Farm Bureau, any claims the

[3] In addition, the Creditors do not appear to meet the requirements for derivative standing. They cite *Louisiana World Expo. v. Fed. Ins. Co.*, 858 F.2d 233 (5th Cir. 1998) for support, which discussed derivative standing within the context of Chapter 11 reorganization. That court found that derivative standing existed where: 1) the claim at issue is colorable; 2) the debtor-in-possession's refusal to pursue the claim is unjustifiable; and 3) the creditor's committee first received leave from the bankruptcy court to assert the claim. *Id.* at 247. But, there has been some question within the Fifth Circuit as to whether derivative standing even applies at all in a Chapter 7 case. *See Reed v. Cooper (In re Cooper)*, 405 B.R. 801, 812–13 (Bankr. N.D. Tex. 2009) (discussing derivative standing within context of Chapter 7 and concluding that it is not "good policy to usurp the trustee's role in Chapter 7"); *In re Wilson*, 527 B.R. 253, 257 (Bankr. N.D. Tex. 2015) (finding that creditor did not have derivative standing to bring an avoidance action against debtor). This is so because in a Chapter 7 case, there is a trustee, who "has a unique role as an independent fiduciary, with a completely different perspective and interest in a bankruptcy estate than either a debtor or an individual creditor." *Cooper*, 405 B.R. at 812. Further, the trustee serves as a gatekeeper, tasked with exercising reasonable business judgment when deciding which actions should be brought and which actions are not worth the expense. *Id.* "In theory at least (and hopefully in reality), the trustee is a fair, balanced, and experienced (not to mention bonded, *see* 11 U.S.C. § 322) official who can be depended upon to exercise good litigation judgment." *Id.* And, importantly, "[a]n experienced bankruptcy trustee . . . may have a better instinct for what is worth chasing and what is worth foregoing." *Id.* But, even assuming derivative standing is available in a case under Chapter 7, the Trustee's Motion and extensive testimony at the Hearing indicate that he has not unjustifiably failed to pursue the claim against Farm Bureau.

Trustee abandons would return to Kennedy, not the Creditors.[4]

Rule 9019(a) empowers bankruptcy courts to approve a compromise or settlement to resolve a debtor's claim. Fed. R. Bankr. P. 9019(a). The decision to either "accept or to reject a compromise or settlement is within the sound discretion of the Court." *In re Idearc Inc.*, 423 B.R. 138, 182 (Bankr. N.D. Tex. 2009) (citing 9 Collier on Bankruptcy ¶ 9019.02 (15th ed. Rev. 1993)). This approval "should only be given if the settlement is 'fair and equitable and in the best interest of the estate.'" *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop., Inc. (In re Cajun Elec. Power Coop., Inc.),* 119 F.3d 349, 356 (5th Cir. 1997) (quoting *Rivercity v. Herpel (In re Jackson Brewing Co),* 624 F.2d 599, 602 (5th Cir. 1980)). "The settlement need not result in the best possible outcome for the debtor, but must not 'fall beneath the lowest point in the range of reasonableness.'" *Id.* (quoting *In re Drexel Burnham Lambert Group, Inc.,*134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991)). To decide whether a settlement is fair and reasonable, the bankruptcy judge "must make a well-informed decision, 'compar[ing] the terms of the compromise with the likely rewards of litigation.'" *Id.* (quoting *Jackson Brewing Co.,* 624 F.2d at 602). Specifically, the Fifth Circuit has set forth the following factors that a bankruptcy judge must evaluate: "(1) The probability of success in the litigation, with due consideration for the uncertainty in fact and law, (2) The complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and (3) All other factors bearing on the wisdom of the compromise." *Id.* In his Motion, the Trustee argues that the proposed settlement with Farm Bureau is fair and reasonable. The Court considers each factor in turn.

[4] Section 554 controls abandonment, but does not specifically direct the disposition of abandoned property. But, the legislative history of § 554 indicates that "abandonment may be to any party with a possessory interest in the property abandoned." (H.R. Rep. No. 595, 95th Cong., 1st Sess. 377; S. Rep. No. 989, 95th Cong., 2d Sess. 92 (1978)).

### i. The Probability of Success in the Litigation

The first factor the Court considers is the probability of success if the litigation were to proceed, taking into consideration the uncertainty in both fact and law. With regard to this factor, the Court need not conduct a mini trial "to determine the probable outcome of any claims waived in the settlement." *Cajun Electric*, 119 F.3d at 356. Instead, "'[t]he judge need only apprise himself of the relevant facts and law so that he can make an informed and intelligent decision . . . .'" *Id.* (quoting *La Salle Nat'l Bank v. Holland (In re Am. Reserve Corp.)*, 841 F.2d 159, 163 (7th Cir. 1987)). In order to recover for the estate, the Trustee would have to both avoid the sheriff's sale and successfully litigate the bad faith claim against Farm Bureau.

#### 1. The Sheriff's Sale

In order to pursue the bad faith claim against Farm Bureau, the Trustee would first have to undo the sheriff's sale and subsequent transfer of the cause of action to Farm Bureau. The Trustee seeks to accomplish this in his adversary complaint, where he alleges that the sheriff's sale should be avoided under § 548 and the subsequent assignment to Farm Bureau should be avoided under § 550. (Adv. Dkt. No. 1 at 12, ¶ 60). But there is at least some question under Fifth Circuit precedent as to whether the sheriff's sale can even be construed as a fraudulent transfer for the purposes of § 548. (Dkt. No. 185 at 10, ¶ 44.2) (citing *T.F. Sloan Co. v. Harper (In re T.F. Slone Co.)*, 72 F.3d 466, 468–69 (5th Cir. 1995)). The Trustee also asserts in his adversary complaint that the consideration given for the cause of action—$50.00—was inadequate. (Adv. Dkt. No. 1. at 13, ¶ 66). The Creditors agree, arguing that "[t]he bid amount for the bad faith claim of $50.00 is a grossly unconscionable and inadequate amount." (Dkt. No. 187 at 5). They insist that the bad faith claim is worth between $1.5 million and $3 million because the judgment against Kennedy was in the amount of $1.5 million. (Dkt. No. 187 at 5).

But the Creditors only bid $10.00 for the cause of action at the sheriff's sale. (Dkt. 129-3, Exh. 26 at 26). And, as the Trustee notes, Farm Bureau has presented Mississippi case law indicating that "a chose in action's value—for purposes of levy and execution—is determined at a sheriff's execution sale." (Dkt. No. 185 at 10, ¶ 44.3; 12, ¶ 44.7) (quoting *Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004, 1010 (Miss. 2006)).

Further, the Creditors assert that the sheriff's sale should be set aside because Kennedy was not properly served with process. (Dkt. No. 187 at 5). But, Kennedy stated in an affidavit that he "received a copy of the Notice of Execution Sale, via certified mail . . . prior to the sale on May 6, 2013," and that he "[has] no objection to the Execution Sale that occurred on May 6, 2013." (Dkt. No. 129-5, Exh. 34 at 1–2, ¶¶ 2, 6). Moreover, the Circuit Court of Marion County, Mississippi granted Blake Smith's motion to set aside its previous order, which set aside the sheriff's sale for insufficient process,[5] and quash any subsequent writ of execution. (*Id.* at Exh. 32). And, though it did not specifically address the merits of the Creditors' arguments to set aside the sheriff's sale, the Circuit Court of Lamar County, Mississippi entered an order denying their request to set aside the sheriff's sale. (*Id.* at Exh. 31). The Creditors did not appeal this order. Accordingly, the likelihood of the Trustee prevailing in his adversary against Farm Bureau appears to be questionable. And, even assuming the Trustee could undo the sheriff's sale, he would then have to prevail in subsequent litigation against Farm Bureau regarding the bad faith claim in order to recover for the estate.

**2. The Bad Faith Claim**

After the accident, the Creditors sent an initial demand letter to Farm Bureau on March 18, 2010. (Dkt. No. 187 at 19). Farm Bureau requested further information from the Creditors,

[5] The previous order was submitted by the attorney for the Creditors, and stated that the writ of execution was returned "not found," and that Kennedy failed to appear at the hearing regarding the motion to set the sheriff's sale aside. (Dkt. No. 129-3, Exh. 26 at 37–40).

which the Creditors argue was merely a bad faith attempt to delay payment. (*Id.*). The Creditors also sent a final demand letter, accompanied by a death certificate verifying Caynen Woodward's death as a result of the accident, to Farm Bureau on May 11, 2010, and the Creditors withdrew that offer on May 25, 2010. (*Id.* at 21). The Creditors then filed suit against Kennedy on May 26, 2010. (*Id.* at 20). They now argue that Farm Bureau failed, in bad faith, to pay the claim within sixty days of receipt of enough evidence and facts to justify payment of the policy limits, in violation of Louisiana law. (*Id.* at 21). They also argue that Farm Bureau's delay in accepting the settlement offer amounts to a denial of the offer, (*Id.* at 19), and that any attempt by Farm Bureau to settle after the offer was revoked on May 25, 2010 is irrelevant and cannot undo its bad faith. (*Id.* at 21). The Creditors do not cite any authority in support of these positions.

Farm Bureau asserts that it never refused to settle the Creditors' claims against Kennedy. (Dkt. No. 185 at 18, ¶ 52).[6] Further, the death certificate verifying Caynen Woodward's death as a result of the accident was apparently not attached to the original demand letter, (Dkt. No. 187-1, Exh. A), and the final settlement offer was withdrawn 14 days after its issuance. (Dkt. No. 187 at 21). Thus, there appear to be significant legal and factual questions remaining regarding whether Farm Bureau acted in bad faith when it failed to settle within the 14-day window given by the Creditors in their final demand letter.

### 3. The First Factor Weighs in Favor of Approving the Settlement

The Court finds that the first factor weighs in favor of approving the settlement. First, the

[6] Indeed, according to the investigative report authored by Shane Niswonger ("Niswonger")—the claims representative for Farm Bureau handling the case—Niswonger offered the policy limits as settlement and was awaiting a response from the Creditors on or before February 10, 2010, when the report was authored. (Dkt. No. 201, Exh. 5 at 4). And, in a letter to counsel for the Creditors, dated June 9, 2010, counsel representing Farm Bureau in the settlement negotiations stated that Farm Bureau believed it had reached a settlement with the Creditors for the policy limits prior to receiving the first demand letter, but that court approval of the settlement was required before Farm Bureau could issue checks for the settlement amounts. (*Id.* at Exh. 15). Counsel for Farm Bureau sent a follow up letter on August 10, 2010, reiterating Farm Bureau's settlement offer for the liability policy limits, and again stating that court approval was required to finalize the settlement. (*Id.* at Exh. 18).

Trustee would have to succeed in setting aside the sheriff's sale in order to pursue the bad faith cause of action against Farm Bureau. Based on the record before the Court, including the Trustee's detailed testimony at the Hearing, the likelihood of success in this litigation seems uncertain at best. Next, even if the Trustee is successful in setting aside the sheriff's sale, he would then have to prevail on the bad faith claim against Farm Bureau. Again, based on the record before the Court, the likelihood of success against Farm Bureau is not "particularly promising." *See Cajun Electric*, 119 F. 3d at 356. In contrast, the settlement offer would result in immediate recovery for the bankruptcy estate in the amount of $45,000.00.

**ii. The Complexity and Likely Duration of the Litigation**

As the Trustee asserts in his motion, his adversary against Farm Bureau seeks to avoid the sheriff's sale. (Dkt. No. 185 at 9, ¶ 43). Avoiding the sheriff's sale is a prerequisite to the pursuit of the bad faith claim against Farm Bureau. Thus, if the Trustee were to succeed in the adversary, he would only have won the ability to pursue the bad faith claim. The Trustee would then have to investigate the bad faith claim; engage in litigation against Farm Bureau again; and succeed in that litigation before recovering any monetary judgment for the benefit of the estate. The result of having to successfully sue Farm Bureau twice in order to recover a monetary benefit for the estate is inevitably complex and protracted litigation. The proposed settlement would avoid that protracted and expensive litigation and result in an immediate recovery for the estate. Accordingly, the Court finds that the second factor favors approval of the settlement.

**iii. Other Factors Bearing on the Wisdom of the Compromise**

The Fifth Circuit has imposed two additional factors for consideration of the third, catch-all provision concerning all other factors bearing on the wisdom of the compromise. Those two factors include "the best interests of the creditors, 'with proper deference to their reasonable

views,'" and "'the extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.'" *Cajun Electric*, 119 F.3d at 356 *(*quoting *Connecticut Gen. Life Ins. Corp. v. United Co. Fin. Corp. (In re Foster Mortg. Corp.),* 68 F.3d 914, 917–18 (5th Cir. 1995)). No evidence of fraud or collusion has been presented in this case, and the Creditors have not argued that the proposed settlement is the result of fraud or collusion. Further, although the Creditors believe that the bad faith claim against Farm Bureau is worth between $1.5 million and $3 million dollars, it seems unlikely that the Trustee would be able to succeed in both layers of litigation necessary to achieve such a recovery for the estate. Additionally, as evidenced by his Motion and his extensive testimony at the Hearing, the Trustee fully investigated both the claims contained in his adversary against Farm Bureau and the bad faith claim against Farm Bureau before deciding that the settlement is the most beneficial option for the estate. There is no indication that the Trustee has acted in any capacity other than an independent fiduciary, concerned only with the best interests of the bankruptcy estate. Accordingly, the Court finds that the third and final factor favors approval of the settlement and the Trustee's Motion should be granted.

Having found that the Trustee's Motion should be granted, it is unnecessary for the Court to decide whether it has jurisdiction to enter final judgment on the Trustee's adversary claims against Farm Bureau.

**IT IS THEREFORE ORDERED AND ADJUDGED** that the Trustee's Motion is **GRANTED**.

**## END OF ORDER ##**